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Medea and the Un-Man: Literary Guidance in the Determination of Heinousness under Maynard v. Cartwright

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Essay


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*JASON:* ... Thou wife in every age
Abhorred, blood-red mother, who didst kill
My sons, and make me as the dead . . . .

*MEDEA:* I love the pain, so thou shalt laugh no more.

—Euripides¹

*FRATE ALBERIGO:* Then he answered: “I am Frate Alberigo; I am he of the evil garden’s fruit, who here get date for fig.”

*DANTE:* “Oh,” I said, “are you too now dead?”

*FRATE ALBERIGO:* And he answered: “How my body is getting along in the world above, I have no notion. This Ptolomea is so privileged that often the soul falls down here before Atropos releases it. . . . I now tell you that as soon as a soul commits betrayal, as I did, its body is taken from it by a demon, who then controls it until all its time on earth is gone. The soul falls into this cistern here.

—Dante²

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Ransom had the sense of watching an imitation of living motions which had been very well studied and was technically correct: but somehow it lacked the master touch. And he was chilled with an inarticulate, night-nursery horror of the thing he had to deal with—the managed corpse, the bogey, the Un-man.

—C.S. Lewis

I.

In Love's Knowledge, Martha Nussbaum argues forcefully that "certain truths about human life can only be fittingly and accurately stated in the language and forms characteristic of the narrative artist." For her, and probably for most of us who take literature seriously, the linear rhetoric of the logician cannot adequately describe nor convey the knowledge necessary to address the question of how one should live. Although Nussbaum does not set forth as a foundationalist prescription any particular "truths" she has found, she eloquently re-establishes an ethics of reading. And, to the extent that the law involves making ethical judgments, she has made an important point about jurisprudence as well by implying that some knowledge essential to seeking justice has been most perfectly articulated by artists.

In other words, some of the most relevant raw materials for solving legal problems may be found in novels, poems, and drama. So far, most "law and literature" efforts have not sought to bring art to bear on specific legal questions. Most academics have been content to apply their legal expertise to interpret literary texts or to rehash postmodern debates over foundationalism and moral relativism in the legal context. If we take literature seriously, however, we may find that a poem is as relevant a guide to the interpretation of a statute as a congressional committee report. (If you've read many committee reports, you will not find this surprising.)

In particular, this Essay brings Dante, C.S. Lewis, and Euripides to bear on a discrete problem examined by the U.S. Supreme Court in

3. C.S. Lewis, PERELANDRA 126 (1947).
Maynard v. Cartwright.\textsuperscript{7} Reading Dante’s Inferno,\textsuperscript{8} Lewis’s Perelandra,\textsuperscript{9} and Euripides’s Medea\textsuperscript{10} provides guidance in responding to the Court’s mandate that the state channel discretion in capital sentencing.\textsuperscript{11} Specifically, these works imply an ethical framework for determining what constitutes an “especially heinous, atrocious, or cruel” murder. Other literary texts are certainly relevant to Maynard.\textsuperscript{13} This Essay, however, is not an attempt to survey comprehensively and distill the insights provided by all relevant material, but rather an attempt to demonstrate and defend a method of applying literary texts to concrete legal problems. Even if any specific conclusions about Maynard do not ultimately prove to be convincing, especially to those who categorically oppose capital punishment,\textsuperscript{14} I hope my methodology is independently defensible.

Although the discussion of literature and Maynard forms the core of this Essay, a preliminary comparison of Nussbaum’s approach to literature with that of other prominent commentators helps to place my claims into context. Nussbaum’s approach to literature differs from that of James Boyd White or Stanley Fish, for example. Because I rely primarily on Nussbaum for justifying the integration of law and literature, a brief contrast of their approaches should illuminate the position taken in this Essay.

II.

Although Love’s Knowledge does not dwell directly on the relationship between law and literature, Nussbaum refocuses the recent debate, as exemplified here by White, Fish, and Lief Carter. White writes that “law is best regarded not as a kind of social science but as one of the humanities. . . . [T]he life of the law is thus a life of art, the art of making

\begin{thebibliography}{9}
\item 7. 486 U.S. 356 (1988). In Maynard, the U.S. Supreme Court held that the “especially heinous, atrocious, or cruel” aggravating factor is unconstitutionally vague as applied in Oklahoma’s capital sentencing scheme. \textit{Id.} at 363-64.
\item 8. DANTE, \textit{supra} note 2.
\item 9. LEWIS, \textit{supra} note 3.
\item 10. EURIPIDES, \textit{supra} note 1.
\item 11. \textit{See, e.g.,} ALBERT CAMUS, \textit{THE STRANGER} (Stuart Gilbert trans., Vintage Books 1954) (1942); IRVING STONE, CLARENCE DARROW: \textit{FOR THE DEFENSE} 414-17 (1941) (describing Clarence Darrow’s closing argument in defense of Leopold and Loeb); RICHARD WRIGHT, \textit{NATIVE SON} (1940). The works of the Marquis de Sade and Thomas de Quincy, among many others, also spring to mind.
\item 13. \textit{See, e.g.,} ALBERT CAMUS, \textit{THE STRANGER} (Stuart Gilbert trans., Vintage Books 1954) (1942); IRVING STONE, CLARENCE DARROW: \textit{FOR THE DEFENSE} 414-17 (1941) (describing Clarence Darrow’s closing argument in defense of Leopold and Loeb); RICHARD WRIGHT, \textit{NATIVE SON} (1940). The works of the Marquis de Sade and Thomas de Quincy, among many others, also spring to mind.
\item 14. This Essay presumes the death penalty is constitutional and will continue to be employed for the foreseeable future. All my conclusions are bounded by this given, which, perhaps unfortunately, appears accurately to describe the current state of legal affairs. What literature has to say about capital punishment itself is another essay.
\end{thebibliography}
meaning in language with others.”

Law and art are both processes through which we constitute ourselves in community with others—languages through which we create meaning in our lives. The language of law, of course, often entails the violence of the state. In spite of the differences in the direct political impact of legal and literary discourse, however, the rhetoric and substance of both are equally important to creating and maintaining community. The institutional separation of law and the humanities is, therefore, artificial and potentially impoverishing to both disciplines. For White, breaking down distinctions between the two should be the main goal of a law and literature movement.

White focuses on both law and literature as processes. They should be studied together in order to understand and recognize the legitimacy of the multitude of voices in our community. The importance of his work lies in his examination of the functions of legal and literary discourse and his endorsement of the virtues of tolerance, pluralism, and constitutive rhetoric. He does not, however, make clear the justification for privileging these values.

By contrast, although Stanley Fish applauds White's process-oriented, integrationist approach to both literature and law, he finds fault with “White’s hopes for the law [that] are not rhetorical, but transcendental.” Like White, he recognizes doctrinal inconsistency and linguistic indeterminacy, but nonetheless appreciates the pragmatic success of the law and the constraints of professionalism. Fish does not, however, as he accuses White of doing, “look[] forward to a time when all parties will lay down their forensic arms and join together in the effort to build a new and more rational community.” An appreciation of the artistic nature of the legal endeavor will not increase the number of “just” laws or “just” judicial decisions, or nurture a more “just” community. As an objective matter, Fish would deny that the word “justice” itself has any fixed, noncontextual meaning. White would also deny a fixed content for justice in the sense that a bicameral legislature might be called “most just”; however, he clearly privileges tolerance and pluralism to such an extent that a somewhat objective notion of justice might be implied. This hint of objectivism leads Fish to admonish White to cease having progressive hopes for the interesting relationship he has described.

16. Id. at 122-25.
18. Id. Fish’s interpretation of White’s views may be overstated. White has recently written, “I don’t know where Stanley Fish got [this] idea . . . . I have never said such a thing, nor do I think it.” Letter from James B. White, Professor, The University of Michigan, to Paul Heald, Associate Professor, The University of Georgia School of Law (July 7, 1993) (on file with the author).
In a slightly different vein, Lief Carter suggests that recognizing law as an art form implicates another possible standard by which to measure justice.\textsuperscript{19} Although he does not offer an absolute objective standard, he notes that judicial opinions productively bear aesthetic scrutiny.\textsuperscript{20} The legal aesthetic examines the "fit" between the "raw experiences" of the community and "common pattern[s] in the way we think."\textsuperscript{21} Some judicial decisions fit better than others, for the same reasons that some artistic performances please the audience more than others: "The good performance creates in that audience a belief that it shares a communal experience. . . . 'Doing justice' is a subset of this phenomenon."\textsuperscript{22} Even though our politics may be offended by a particular decision—Justice Harlan himself clearly disapproved of the protester he vindicated in Cohen\textsuperscript{23}—or our moral sense may be at odds with the message of a particular work of art—some of my atheist friends love Fauré's Mass—our aesthetic sense may nonetheless be able to appreciate voices in conflict with our own.

Carter echoes White in his call for a peaceful turf on which to argue and to recognize our unique positions.\textsuperscript{24} Our differences make consensus unlikely, but a move toward an aesthetics of decisionmaking and away from fixation on pure ideological or technological correctness (ends discourse) will improve the quality of legal discourse. Like White, however, Carter fails to explain adequately his privileging of plural voices and peaceful discourse as the core of his aesthetics. He would reject the suggestion that the Nürnberg rallies in any sense "did justice," and yet they were undoubtedly a profoundly "share[d] . . . communal experience."\textsuperscript{25} Aesthetic considerations, as opposed to ethical ones, do not obviously demand the inclusion of plural (nonracist) voices.

White, Fish, and Carter are representative of many who integrate law and literature.\textsuperscript{26} They focus on process and function—how law works,
how literature works. Although White and Carter might be interpreted as hinting at external substantive norms (plurality, tolerance, and peaceful discourse) that could be used to judge when law or literature is "working" well, all three avoid traditional ethical language. They are not expressly engaged in an Aristotelian search for "justice" or "the good." They are wary of any projects tainted with objectivist notions. Such projects claiming to have the "truth" or to know what "justice" demands have too frequently justified political and moral atrocities. The current goal of legal philosophy seems to be to establish a jurisprudence that denies validity to atrocity and nihilism, while avoiding ethical discourse.27

In Love's Knowledge, Nussbaum demonstrates an ethics of reading, the possibility of ethical discourse that makes no grand, oppressive (or monopolistic) claim to the truth. She asserts that literature is worth studying for reasons other than to scrutinize the literary process or the art of rhetoric.28 Every work of art contains clues as to how we should live. We read not primarily to find out something about the process of writing, but to decide how to act and think, to encounter "certain truths" available nowhere else.29 We read to become wiser. Her position, of course, is as old as Aristotle (on whom she frequently relies30), but it seems fresh in the face of postmodern skepticism.

Inspired by Nussbaum's project, this Essay suggests that ethical considerations provide the primary justification for giving literature a more prominent role in legal decisionmaking. To illustrate, Part III explores how reading Dante, Lewis, and Euripides can heighten the level of ethical discourse in the consideration of what constitutes an especially heinous and cruel murder for the purposes of Maynard v. Cartwright. Part IV examines the limits of applying literature to law, referencing Pascal in an effort to emphasize the modesty of the claims that can be made for the enterprise.

III.
A.

In 1982, William Cartwright entered the home of his ex-employer, Hugh Riddle, to commit murder. As he made his way down the hall toward the living room where Riddle watched television, he encountered Riddle's wife, Charma, whom he shot twice in the legs. After killing his

28. See NUSSBAUM, supra note 4, at 5 (asserting as one purpose of studying literature the examination of "the contribution made by certain works of literature to the exploration of some important questions about human beings and human life").
29. Id.
30. See, e.g., id. at 47.
ex-boss in the living room, he went back down the hall and found Mrs. Riddle trying to call the police. He stabbed her twice, slit her throat, and left her to die.\textsuperscript{31} She survived, and on the basis of her testimony,\textsuperscript{32} Cartwright was convicted of aggravated murder and sentenced to die in the Oklahoma electric chair.\textsuperscript{33}

Oklahoma, like most states with the death penalty, requires the sentencing authority to weigh a specific list of statutory aggravating circumstances against mitigating evidence that the convicted murderer offers.\textsuperscript{34} In Cartwright's case, the jury found two aggravating circumstances, one of which was that the murder was "especially heinous, atrocious, or cruel."\textsuperscript{35} On appeal, Cartwright challenged Oklahoma's heinousness factor as unconstitutionally overbroad.\textsuperscript{36} He argued that the statutory language, which was read to the jurors, did not adequately confine the jurors' discretion.\textsuperscript{37} How is a jury to guess what the legislature means by an "especially heinous murder" as opposed to a "just-plain-vanilla heinous murder"? The language invited, according to Cartwright, the sort of arbitrary, capricious, and standardless sentencing scheme struck down in \textit{Godfrey v. Georgia}.\textsuperscript{38} \textit{Godfrey} held essentially that when a life is at stake, the sentencer cannot be given an open opportunity to condemn for whatever reason it pleases.\textsuperscript{39}

In vacating Cartwright's sentence, the Supreme Court affirmed \textit{Godfrey}'s requirement that the state must channel jury discretion with more than vague statutory language.\textsuperscript{40} It refused, however, to strike down the statute on its face. Instead, it suggested that the heinousness factor could be constitutionally applied in light of a limiting judicial construction or statutory amendment that would flesh out what was meant by "especially heinous, atrocious, or cruel."\textsuperscript{41} The sentencer, either judge or jury, must be told more precisely what sort of murders fit the bill.

\textsuperscript{33} Maynard, 486 U.S. at 358-59.
\textsuperscript{34} OKLA. STAT. tit. 21, § 701.11 (1991).
\textsuperscript{35} Id. § 701.12(4). Many jurisdictions include "heinousness" or something like it as an aggravating circumstance. See, e.g., FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1995) ("especially heinous, atrocious, or cruel"); ARIZ. REV. STAT. ANN. § 13-702(c)(5) (1994) ("especially heinous, cruel, or depraved"); GA. CODE ANN. § 17-10-30(7) (Michie 1990) ("outrageously or wantonly vile, horrible, or inhuman").
\textsuperscript{36} Maynard, 486 U.S. at 359.
\textsuperscript{37} Id. at 361-62.
\textsuperscript{38} 446 U.S. 420 (1980).
\textsuperscript{39} Id. at 428-29.
\textsuperscript{40} Maynard, 486 U.S. at 362-64.
\textsuperscript{41} Id. at 364, 364-65.
The heart of the opinion mandates that states do a better job of sorting out the kinds of murderers who deserve to be executed from those who do not. The Court refused to perform the task itself—it was unwilling to hold, for example, that the jury could find heimousness as an aggravating factor only if torture or serious physical abuse were present. Instead, the Court invited the states to tell stories to their sentencers about what kind of people should die. The content of these stories would be basically up to judges or legislatures, but the sentencer's discretion must be guided by the story told.

The Court had earlier, in a number of decisions beginning with *Lockett v. Ohio*, authorized defendants to tell their own stories: stories about their childhoods, their religious conversions, their experiences in prison, their addictions—anything that might remotely be considered mitigating in the eyes of the sentencer. The state typically must plead and prove the existence of at least one enumerated statutory aggravating factor, but the defendant may offer character evidence that falls outside the mitigating factors specifically listed in the capital sentencing statute. The defendant usually seeks to make himself a more sympathetic individual in the eyes of the sentencer. In requiring the admission of such evidence, the Court has already invited the sentencer to listen to one sort of death-time story.

The state's tale is usually different. Under *Cartwright*, it must categorize defendants rather than individualize them. It asks the question whether the defendant is the type of person who should be executed. When states address this ethical question, literature can become relevant. Fiction contains a huge repository of stories about who should live and who should die, what is good and what is evil, what is heinous and what is merely pathetic. Because we constitute ourselves through art and law, both artists and lawmakers spend considerable time pondering the fates of those who transgress societal norms. To give content to the term "heinous," a judge might just as plausibly look to fiction as to a dictionary or to history, legislative or otherwise.

In fact, given the narrowness of our actual experiences, perhaps resort to fiction should be mandated. In considering the relevance of fiction to living, Nussbaum ponders:

But why not life itself? Why can't we investigate whatever we want to investigate by living and reflecting on [life]? Why, if it is the

42. *Id.* at 365.
43. *Id.* at 364–65.
45. *Id.* at 604–05 (plurality opinion).
46. *E.g.*, FLA. STAT. ANN. § 921.141(2)-(3) (West 1985).
47. *Lockett*, 438 U.S. at 604-07 (plurality opinion).
Aristotelian ethical conception we wish to scrutinize, can't we do that without literary texts, without texts at all . . . .

One obvious answer was suggested already by Aristotle: we have never lived enough. Our experience is, without fiction, too confined and too parochial.48

In her commentary on Kant's theory of political judgment, Hannah Arendt describes a similar process:

The "enlargement of the mind" plays a crucial role in the Critique of Judgment. It is accomplished by "comparing our judgment with the possible rather than the actual judgment of others, and by putting ourselves in the place of any other man." The faculty which makes this possible is called imagination. . . . [By] force of imagination it makes the others present and thus moves potentially in a space which is public, open to all sides; in other words, it adopts the position of Kant's world citizen. To think with the enlarged mentality—that means you train your imagination to go visiting.49

In the hope of enlarging our understanding through a mix of fiction and historical examples, I would like to tell the following Maynard stories for the state.

B.

When Dante nears the end of his journey through Hell and finally reaches the lake of ice that surrounds the trunk of Satan himself, Dante encounters a special group of murderers whose acts were so evil that they merit punishment in the lowest circle of the great pit. They are the killers of kin and guests—frozen in eternal torment. In pausing to speak with Friar Alberigo, whose servants murdered his dinner guests upon his signal to serve dessert (hence the reference to figs at the beginning of his speech50), Dante expresses surprise that the Friar is already dead. In fact, the Friar's body is not really dead at all, although his soul resides in Hell. His body, now possessed by a demon, is alive and well and committing who knows what sort of horrors on the populace of Italy.51 His irredeemably corrupt soul has perished, leaving behind a husk of unspeakable evil.

We encounter the husk itself in C.S. Lewis's Perelandra, not the shell of Friar Alberigo, but the body vacated by the fictional physicist, Dr.

48. NUSBAUM, supra note 4, at 47.
49. 2 HANNAH ARENDT, THE LIFE OF THE MIND 257 (Mary McCarthy ed., 1978) (quoting IMMANUEL KANT, CRITIQUE OF JUDGMENT (1790)).
50. See DANTE, supra note 2, canto 33, at 285 ("I am he of the evil garden's fruit, who here get date for fig."); see also supra text accompanying note 2.
51. See DANTE, supra note 2, canto 33, at 285 ("How my body is getting along in the world above, I have no notion."); see also supra text accompanying note 2.
Weston. Bloated by his fabulous scientific success, Weston has committed the ultimate sin of making himself into God. He admits he is fully capable of genocide to advance what he describes as the spirit of the universe. Just before his soul vacates his body, Weston raves to Lewis’s hero, Dr. Ransom:

There is no possible distinction in concrete thought between me and the universe. In so far as I am the conductor of the central forward pressure of the universe, I am it. Do you see, you timid, scruplemongering fool? I am the Universe. I, Weston, am your God and your Devil. I call that Force into me completely.

At the moment of invocation, Weston’s personality is gone in a violent contorting shudder, but his body remains, the Un-man, an empty yet terrifying creature of purposeful violence against which Ransom wages a passionate struggle for the rest of the novel.

Unfortunately for us, the Un-man is not only an imaginary creature, a character from fiction. We find him purposefully searching the streets and countryside for vulnerable women to rape, torture, and murder. He visits the corner convenience store and calmly shoots the teenage clerk in the back of the head when he turns to empty the till. He has led nations and political movements. When he is caught, he often describes his acts in the third person. Psychologists who interview him frequently note the “inappropriate affect” exhibited by the Un-man when discussing the crime—the trademark monotone, the emotionless recitation of acts of deliberate annihilation.

Joe Aloï, a private investigator who helped the infamous serial killer Theodore Robert Bundy in one of his murder defenses, described the “altered state” Bundy would seem to enter when he discussed one of his serial killings. According to Aloï, Bundy would emit a strong odor, freezing those around him in fear. In the eyes of many, when Bundy was executed in 1989, the State of Florida switched off a managed corpse—the person inside had disappeared long before.

Dante and Lewis may help us describe one sort of murderer the state could identify as meriting capital punishment. They provide an illustration of what “heinousness” could mean for the purposes of Maynard, an insight that focuses on a rare type who embraces and nurtures the darkest side of human nature—one who develops a taste for killing. Before developing

52. Lewis, supra note 3, at 97.
53. Id. at 96-97.
54. Id. at 97.
56. MacPherson, supra note 55, at 190.
further the attributes of the Un-man and discussing the practical dangers and theoretical problems of using Dante and Lewis, let me tell another story—the myth of Medea, wife of Jason and murderess of their children. Whatever her faults, Medea is not an Un-person—in fact, few murderers are. This does not necessarily mean she deserves mercy. Maynard does not say who should live and who should die, but the telling of the Medea myth, in conjunction with the myth of the Un-man, clarifies and refines the state's options in defining heinousness.

After Jason and Medea flee from Iônica, where Jason has failed to regain his deposed father's throne after completing his quest for the Golden Fleece, they come to Corinth where King Creon offers Jason the hand of his daughter. Jason, who owes his life and virtually all his accomplishments to the help of Medea, but whose wealth is depleted and who is tired after years of wandering, accepts Creon's offer. He claims to Medea that he does not love his attractive young betrothed, but that he is strategically doing what is best for Medea and their children. In her anger over his betrayal, she kills Creon's daughter and her own children.

Medea's anguish goes far beyond mere jealousy. She has given up everything in her obsessive devotion to Jason. When he arrived in her barbarian home of Colchis on his quest, she fell in love with him and enabled him to defeat her family. Without her help, he could not have taken the Golden Fleece and recovered the soul of his kinsman Phrixus, as demanded by Pelias, his father's usurper. Because she needed to kill her own brother to prevent him from ambushing Jason, she fled Colchis with Jason and the Argonauts. She proved an invaluable addition to his crew as his ship wandered its way home to Iônica. Unfortunately, once Jason arrived back home to his civilized Greek city-state, Medea's violent determination to advance Jason's interests backfired and resulted in their exile to Corinth after her killing of King Pelias.

Despite the obsessive nature of Medea's love, she remains, at least in part, a sympathetic character, especially in the face of Jason's eagerness to abandon her. Jason provides one of fiction's first examples of male mid-life crisis. The quest of his youth has been completed. What can he look forward to, other than bedding an aging wife, watching his sons grow, and continuing the struggle to survive? How can he resist a beautiful young princess and a chance to see his children on the throne of Corinth? One can hardly fault Jason for being tempted. Medea's attendant confronts her nurse's surprise at Jason's behavior by declaring: "[W]hat man on earth is different?" But Jason is tempted by more than a young body. He is

57. EURIPIDES, supra note 1.
58. Id. at 7.
tempted by the illusion that he can both have his new life and discharge the enormous debt he owes Medea.

Jason will not admit that he is a traitor. As Medea exclaims, "'Tis but of all man's inward sicknesses / The vilest, that he knoweth not of shame . . . ." He clings stubbornly to the illusion that Medea and their children will be better off after the marriage. He never admits that he is attracted to Creon's daughter. He tries to turn his treachery into a favor:

Yet, even so, I will not hold my hand
From succouring mine own people. Here am I
To help thee, woman, pondering heedfully
Thy new state. For I would not have thee flung
Provisionless away—aye, and the young
Children as well; nor lacking aught that will
Of mine can bring thee. Many a lesser ill
Hangs on the heels of exile. . . . Aye, and though
Thou hate me, dream not that my heart can know
Or fashion aught of angry will to thee.60

Like many modern American men, Jason believes that if he pays his child support and remains civil to his abandoned family, he may blithely start a new life. No responsibility need be taken for the severing of old ties.

Jason's failure to acknowledge the legitimacy of Medea's pain provokes her ultimate act of violence—the stabbing deaths of their two children. Having tried all manner of words, murder becomes the way to make Jason feel her pain. To the surprise of no one who has seen this story played out on a less epic scale, Jason's blindness remains even in the face of the horrific result of his faithlessness. He takes no responsibility for the tragedy. Looking back, Jason (but not the audience) finds Medea accursed and wicked from the beginning: She has not killed because of his abandonment, but because she was evil from the day they met. His response to the murder is not insight into Medea's tortured soul. He does not see her as the victim she wants to be. Rather, he rejects her entire being as poisonous. Medea has not only murdered her children but also finished the process by which Jason blinded himself both to reality and to his own responsibility for Medea's crimes.

In fact, Medea's love for Jason was probably never very healthy. Healthy love does not lead a woman to kill her brother, at least one king, the daughter of another, and her own two children. But the issue here is not whether Medea is culpable—she is. The question is whether the play sheds any light on how a state should describe a heinous murder. Should the murder of Medea's children be described as "especially heinous" for

59. Id. at 27.
60. Id. at 26-27.
the purposes of *Maynard v. Cartwright*? This point is especially relevant in that Medea is not any more a purely mythic character than the Unman.61

According to Jungian critics, Medea is so common, so much a part of every person, that she can easily stand for the archetype of the wronged feminine in both women and men.62 For Jung, the feminine represents the part of a personality that seeks connection with others, that casts its lot with mate, friends, and family, that seeks meaning in relationship rather than material accomplishment.63 When a relationship is severed, and particularly when the wrong goes unacknowledged, Medea raises her head. "If only my spouse knew what pain he was causing me, I'm sure he would stop." Obviously, most Jason-like wrongings of the feminine do not result in murder, but sometimes they do. Spouses, ex-spouses, and ex-lovers sometimes pay a lethal last visit to their families.64 Fired workers (those who have a greater emotional investment in their jobs than I do) return to work one last time to kill their employers or co-workers.65

The problem with executing Medea is that we know her too well. Although the obsessiveness of her love pushes her much further out of control than any reader of this Essay is likely to get, we empathize with her. Do we dare execute an archetype of our own pain? Might we not diminish ourselves in the process? The Court's decision in *Maynard* does not provide us with an answer to that question; however, it does imply that a state should at least ask it. Irrespective of the answer chosen by the state, reading Euripides helps us describe and identify a type of murderer that differs significantly from the Un-man.

Having discussed Medea in relatively familiar terms, improving our description of the Un-man seems more difficult. Neither Dante nor Lewis lets us into the Un-man's mind—if they think he even has one.66 Perhaps a fuller description of the interior life of the Un-man would prick our

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62. Cf. JOHN A. SANFORD & GEORGE LOUGH, WHAT MEN ARE LIKE 140, 136-41 (1988) (surveying the archetypal powers of major Greek goddesses in order to emphasize "the scope and importance . . . of the feminine archetype in a man's psychology"). My presentation of the facts of the Medea myth is heavily influenced by Sanford.
63. Id. at 149, 131-50 (noting that the feminine side of a man—the anima—"gives a man heart, enabling him to be courageous in the face of life's burdens and afflictions" (emphasis in original)).
64. See, e.g., Bill Harmon, Retired Cop Charged in Slaying: Police Say the Former Officer Stabbed His Estranged Wife Four or Five Times, TAMPA TRIB., Jan. 17, 1995, at 1.
66. For an interesting attempt, see ANNE RICE, THE TALE OF THE BODY THIEF 11-23 (1992) (describing the thoughts and impulses of a killer—the Un-man—as sensed by the book's narrator, a vampire).
sympathies as much as the Medea story. Our view of the Un-man is clouded by his own unwillingness or inability to describe his motivation.\textsuperscript{67} Ted Bundy, the prototypical Un-man for the purposes of this Essay, sheds a little light. He responded to the following question about his need to "possess" his victims:

\textbf{[INTERVIEWER]}: Would the feeling of physical possession be met, or satisfied \ldots if the victim was unconscious or dead?

\textbf{BUNDY}: \ldots I think we see a point reached—slowly, perhaps—where the control, the possession aspect, came to include, uh, uh, within its demands, the necessity \ldots for the purposes of gratification \ldots the killing of the victim. \ldots Perhaps it came to be seen that the ultimate possession was, in fact, the taking of the life. And then the purely \ldots physical possession of the remains.\textsuperscript{68}

Bundy savored the God-like power of exerting ultimate control over another human being. Perhaps the Un-man is the murderer who enjoys killing for its own sake. Although our understanding of the Un-man is still incomplete, Dante and Lewis are clearly attempting to describe a different kind of murderer than Euripides is.

Before discussing whether the state, having separated Medea and the Un-man, should treat them differently, we should note potential difficulties with using literature to answer the question. For example, the state should not abstract from Dante and Lewis and tell its sentencers that especially evil and inhuman murderers merit the death penalty. To do so would authorize the same sort of ambiguous and standardless charge that does not guide discretion and that has frequently led to an overabundance of ethnic minorities on death row (those of different races are too easily perceived to be inhuman\textsuperscript{69}). Aristotelian ethics would suggest that the safeguard and usefulness of the stories lies in their particularity.\textsuperscript{70} The specific imagery of Dante and Lewis, the "night-nursery horror \ldots of the managed corpse"\textsuperscript{71} in all its vividness, identifies a very special type of killer. The point cannot be made too emphatically that what is most true in literature is most potent in the particular expression of the work itself. Even talking about Dante and Lewis as we have is one step removed from the power of

\begin{itemize}
\item \textsuperscript{67} Unlike Medea, who explains to Jason, "I love the pain, so thou shalt laugh no more." EURIPIDES, \textit{supra} note 1, at 75.
\item \textsuperscript{68} Hugh Aynesworth & Stephen O. Michaud, \textit{A Killer's Words}, VANITY FAIR, May 1989, at 146, 147 (transcript of interview) (emphasis in original).
\item \textsuperscript{69} See Nussbaum, \textit{supra} note 5, at 114, 113-14 (stating that "a discretionary approach on the part of judges will frequently be harsher to defendants—especially minority defendants—than will an approach based on strict rules").
\item \textsuperscript{70} See Nussbaum, \textit{supra} note 56, at 338 (arguing of Medea that "it is only in [this particular story] that the limits of Aristotelianism can be clearly seen").
\item \textsuperscript{71} LEWIS, \textit{supra} note 3, at 126.
\end{itemize}
the original works. Law and literature works best when we stay with particular literary works, talk about narrow legal questions, and avoid the real dangers of making literature merely part of the competitive rhetoric of law.

For this reason, literature and myth may be most appropriately integrated by an appellate judge reviewing a trial court's finding of heinousness. An appellate judge, removed from the impassioned argumentation of the courtroom, may be better able to apply dispassionately the lessons taught by literature. And through the institution of the written opinion, the logos of decision, conversation about confining the sentencer's discretion can be carried on by judges within the case law. This institutionalized narrative may incorporate the stories of Medea and the Un-man less dangerously than the relatively unconstrained speechmaking of lawyers before juries.

Of course, these stories may be integrated into the legal process before other audiences. The story of Medea and the Un-man might be told to a judge before she drafts her instructions to a jury, to a district attorney considering whether to seek the death penalty, to a legislature considering an amendment to its capital sentencing scheme, to a class of law students struggling with their own ethical sensibilities, or to literature students threatened with marginalization by a culture that finds little pragmatic use for literary criticism. We should not presume that the only useful legal audience for art is the jury.

But what art? What stories? Another danger lies in the misconception that a particular canon of works would provide the "correct" solution to legal problems. Dante, Lewis, and Euripides do not provide the last word in the heinousness debate. Other works are probably equally or more relevant. The assertion made in this Essay is that reading increases wisdom—not that the truth is confined to a particular list of books, poems, or plays. Dante, Lewis, and Euripides challenge us, increase our options, raise our consciousness, and trouble us. They make us wiser. But they are not the only authors capable of enriching our understanding.

The life of the law, however, may not always need enrichment. Perhaps the integration of law and literature will only muddy the water and make decisionmaking more complex. Dante, Lewis, and Euripides do not

72. See Weisberg, supra note 26, at 5 ("We can rearticulate . . . words to state their meaning, but we know that not only their beauty is thereby impoverished; the meaning itself is lessened through each restatement." (emphasis in original)).

73. See Heinzelman, supra note 5, at 9 (describing a Texas district attorney's decision to charge the killer of a child with capital murder).

provide crystal-clear answers. Literature may have a disruptive and destabilizing influence. Bringing increased complexity to the law, however, is not necessarily problematic. Rendering the answer to a particular question less black and white is beneficial if we have been oversimplifying. For instance, before reading Medea, one could much more easily define multiple child murder as per se heinous. Destabilization of existing decision-making models may be a good thing. We proceed ethically even if the wisdom sought in literature makes decisionmaking more, rather than less, agonizing. More information should be desirable, although any information, derived from literature or otherwise, potentially can be abused.

Finally, we need to be wary of the information we purport to glean from a work. Medea was written long ago in a very different cultural context. The danger of taking a work out of context is manifest. We must try to distinguish what Euripides is saying about Greek culture in particular from what he is saying about human nature in general. This is often a difficult, if not impossible, task. And yet, it is the routine work of the law. By keeping historical and cultural contexts in mind, competent judges and academics learn much from decades or even centuries-old precedent. The Thorns Case\(^75\) still teaches students the fundamentals of tort law. The point here is not that all legal commentators perfectly distill the truth from culturally distant texts, but rather that our current system flourishes in spite of contextual limitations in the case law and faces no greater problem in considering literature. In other words, the argument against the legitimacy of using texts as distant as those of Euripides proves too much.

C.

A question has been left hanging concerning the precise use the state should make of the stories told by Dante, Lewis, and Euripides. With the aforementioned caveats in mind, let us examine whether Medea should be treated differently than the Un-man in light of post-Maynard developments in the law. The response to Maynard by state courts has been mixed. The cases evidence two sorts of approaches. For example, the Arizona Supreme Court has defined "especially heinous, cruel or depraved" to identify a "perpetrator [who] inflicts mental anguish or physical abuse before the victim's death" or who "relishes the murder, evidencing debasement or perversion" or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the crime.\(^76\) This narrowing language was approved by the U.S. Supreme Court in Walton v.}

\(^75\) Y.B. 6 Edw. 4, fol. 7, pl. 18 (1466), reprinted in Richard A. Epstein, Cases and Materials on Torts 62 (5th ed. 1990). Students in Epstein's first-year torts class report that he has sometimes spent more than a week on this ancient two-page case.

Arizona. Although far from a model of clarity, this language suggests an emphasis on the mental state of the murderer that complements the foregoing discussion of Lewis. The Un-man characteristically relishes the murder or exhibits the type of "indifference toward the suffering of the victim" that the Walton court focuses on.

Florida, on the other hand, focuses somewhat more on the category of crime, holding rather consistently, for example, that the sentencer can infer heinousness as a matter of law from the strangling of a conscious—but not semiconscious—victim. The Court approved of this crime-specific approach in Sochor v. Florida. A reconsideration of Dante, Lewis, and Euripides helps frame the question whether line drawing should be based on the type of crime or the mental state of the defendant.

In his organization of Hell in Inferno, Dante tends to categorize sinners by type of sin. Panderers are together in one level; adulterers have their own place; gluttons, usurers, and others all suffer torment commensurate to their sort of sin. Medea, perhaps, is down with Friar Alberigo, frozen in the ice for killing her own kin. We do not know whether Dante would have considered her an Un-person—he gives no indication whether all killers of guests and kin descend to Hell before their bodies perish. At first glance, his cosmology might support Florida's categorization of murderers by type of crime—for example, stranglers of conscious victims should be treated the same as far as the determination of heinousness is concerned.

Lewis, on the other hand, seems initially to be more concerned with the mental states of individuals he depicts. He describes the original and greatest sin (and in a sense the only sin) as purely one of mental state—making oneself God. The serpent told Adam that eating from the tree of knowledge would make him like God. Being like God makes anything possible, and those who exercise the most God-like power may lose their humanity altogether. Although Lewis's imagery is primarily biblical, Ted Bundy echoed these themes in interviews when he described his mental

78. Walton, 769 P.2d at 1033.
79. See Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991), rev'd on other grounds, 112 S. Ct. 2114 (1992); see also Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993) (holding that a quick shot to the heart was not heinous because the victim had no forewarning).
81. Dante does not explicitly place Medea in Hell in the Inferno, although she is referenced in the Canto that consigns Jason to the level where seducers are punished. DANTE, supra note 2, canto 18, at 147.
82. We will see later, however, that this use of Inferno is unconvincing and provides an example of how literature can be misused—a misuse that, nonetheless, can be persuasively rebutted. See infra text accompanying notes 94-95.
state as he killed and mutilated young women.\textsuperscript{83} Just as Lewis's Professor Weston eventually identified himself with the universal life force, Bundy sought to possess life itself through killing. A focus on how Bundy killed, sometimes hitting the victim on the back of the head with a tire iron before she knew what was happening, as opposed to his mental state while he killed, fails to name fully the evil that ended in the Florida electric chair in 1989.

A reading of Dante and Lewis illustrates the significance of the choice between a bright-line rule treating identically all those who commit certain types of crimes—multiple victims, strangulation of the conscious, and others—and an ad hoc inquiry focused on the mental state of the murderer. In which direction should we channel sentencing discretion? Using Medea as an example, should the sentencer find the act of infanticide per se heinous (if we are going to have per se rules, certainly multiple child murder is likely to be one of them), or should the sentencer be directed to look first into her soul? Although literature has proven useful in framing this question (and that alone justifies its use), it may prove equally useful in suggesting an answer.

Let us pose the question in light of two real cases. The State of Florida executed two men in the spring of 1989 for killing young girls: Theodore Robert Bundy and Aubrey Dennis Adams. While clerking for a judge of the United States Court of Appeals for the Eleventh Circuit, my own ethical sense was altered by the misfortune of working on their final habeas corpus appeals.\textsuperscript{84} The State of Florida's heinousness findings in the two cases demonstrate the ethical problems presented by focusing primarily on circumstantial evidence.

The trial court made the following findings of fact relevant to heinousness in the prosecution of Ted Bundy for the murder of Kimberly Leach:

\[T\]he victim was a twelve year old female junior high school student attending the Lake City Junior High School. The Defendant kidnapped her from the said Junior High School sometime between 9 and 10 a.m. on February 9, 1978, and her deteriorated body was found in a hog pen approximately 45 miles from the scene of abduction on April 7, 1978. The victim died of homicidal violence to the neck region of the body. At the time the body was found it was unclothed except for a pullover shirt around the neck. There were semen stains in the crotch of her panties found near the body. Blood was found on the bluejeans also found near her body, and there were

\textsuperscript{83}. See supra notes 68-71 and accompanying text.

\textsuperscript{84}. None of the discussion herein violates judicial confidentiality. My views are my own and not those of the judge for whom I worked. Moreover, the issues raised in the final appeals did not directly address the heinousness issue.
tears and rips in some of her clothes. The Court finds this kid-
napping was indeed heinous, atrocious and cruel in that it was ex-
tremely wicked, shockingly evil, vile and with utter indifference to
human life.\textsuperscript{85}

In \textit{Bundy v. State},\textsuperscript{86} the Florida Supreme Court \textit{reversed} the trial judge’s
finding of heinousness.

Another trial court made the following findings of fact relevant to
heinousness in the prosecution of Dennis Adams for the murder of Trisa
Thornley:

\textquote{The capital felony was especially heinous, atrocious or cruel . . . .
The autopsy . . . showed a bruise on one arm, inflicted prior to
death, . . . swelling in the hands induced by tight binding with tape
prior to death . . . . [T]he autopsy showed that the body was a nude
body of an eight year old girl whose hands were tightly taped behind
her back prior to death, which showed that Trisa Gail Thornley had
time to anticipate her murder and that the autopsy and photographs
showed seven coils of rope with circumference of nine and three-
fourths inches around the neck . . . , and that the child’s body was
placed in a plastic garbage bag and thrown in a wooded area some
three miles from her home.}\textsuperscript{87}

In \textit{State v. Adams},\textsuperscript{88} the Supreme Court of Florida \textit{affirmed} the trial
court’s finding of heinousness.

Apart from the additional physical evidence of sexual abuse present in
the \textit{Bundy} case, the similarity between the circumstances relied on by the
judges in the two cases is striking. Wholly apart from the question of
whether the ultimate sentences themselves were merited, one could strongly
argue that given the state’s focus on similar circumstances, the considera-
tion of the heinousness factor in both cases should have been the same. If
anything, stronger evidence of sexual abuse would seem to make Bundy’s
crime more heinous, although his victim was four years older. The result
in these cases casts doubt on the strongest argument that can be made in
favor of focusing on circumstance rather than mental state—that predictabil-
ity is enhanced.

An ad hoc inquiry into mental state, rather than circumstance, is not
necessarily more predictable, but predictability is only one goal of sen-
tencing. Another critical goal is the labeling of the behavior meriting

\textsuperscript{85} State v. Bundy, No. 79-149-CF, slip op. at 3-4 (Fla. Cir. Ct. 1980), \textit{quoted in Bundy v. State},

\textsuperscript{86} 471 So. 2d 9 (Fla. 1985), \textit{cert. denied}, 479 U.S. 894 (1986).

\textsuperscript{87} State v. Adams, No. 78-474 CF, slip op. at 4 (Fla. Cir. Ct. 1979), \textit{quoted in State v. Adams},
412 So. 2d 850, 856 (Fla.), \textit{cert. denied}, 459 U.S. 882 (1982).

\textsuperscript{88} 412 So. 2d 850 (Fla.), \textit{cert. denied}, 459 U.S. 882 (1982).
retribution by the state. An execution is a communicative act whereby the state names, correctly or incorrectly, what is most evil in people. A reading of Lewis would suggest that what makes a crime especially heinous is the mental state of the murderer, not the circumstances surrounding the act of killing.89

For example, Ted Bundy killed purposefully—to possess as fully as possible the body and life force of his victim. He is the classic Un-man: devoid of empathy, completely self-centered, and above all social norms. His enjoyment of killing for its own sake is what renders his crime heinous. On the other hand, Dennis Adams was a hardworking prison guard with no criminal record or history of violence.90 He was spurred to a homicidal catatonia by his wife’s chronic infidelity—she spent the night before the murder sleeping with one of Adams’s co-workers across the street from their house.91 He confessed to the crime.92 Although his behavior was inexcusable and his execution may be defensible, he was a much different type of killer than Bundy. He looks more like a version of Medea than like the prototypical Un-man. Whether or not the State of Florida should treat Medea and the Un-man differently, its current focus on circumstance rather than mental state appears to lead to arbitrary results.

The state, however, buoyed by Inferno, could argue that a rigid focus on circumstance might reduce arbitrariness, asserting that our notions of punishment are equally well informed by the type of crime. For example, each circle in Dante’s Hell is reserved for specific types of crimes. Wouldn’t clear rules for heinousness based on the circumstances of the murder be consistent with Dante’s cosmology? Florida’s equating of choking a conscious victim to death with special heinousness seems to take such an approach. A set of bright-line rules might be desirable. Maybe the correct response to the comparison of Bundy and Adams should be to intensify the focus on circumstance: murdering children is per se heinous, or concealing remains is per se heinous. This suggestion, if consistently applied (a big if), might lead to greater predictability, but it does injustice to Dante. Not all murderers go to Hell. Dante’s purgatory contains murderers who confessed their sin and asked for forgiveness.93 Mental state is hardly irrelevant to Dante. Mental state sends one to Hell—circumstance merely helps determine the type of punishment. In fact, severity of

89. The facts surrounding the crime will, of course, often provide strong clues as to mental state—the fact a victim was tortured reveals a lot about the mental state of the defendant.
90. Adams, 412 So. 2d at 854.
91. Id. at 857.
92. See id. at 851 (stating that the defendant’s involvement in the crime was shown through circumstantial evidence and the defendant’s oral and written statements to police officers).
punishment is closely related to mental state. Francesca and Paolo, suicidal lovers who fell victim to their own erotic passions, are less far down in Hell than those who killed in betrayal.\textsuperscript{94}

\textit{Inferno} then cannot really be read as supporting the notion that special heinousness as an aggravating factor should be determined merely from looking at the circumstances surrounding the crime.\textsuperscript{95} In the final analysis, Dante and Lewis both make mental state critical. If mental state is the key, then a focus on circumstances does a poor job of separating the Un-man from Medea.

Of course, the question remains whether Medea should be treated identically to the Un-man. I believe the answer should be no. When the fax machine chattered the death of Ted Bundy, I felt ambivalent. The execution of Dennis Adams continues to trouble me. The trial court found three aggravating factors in his case and three mitigating factors.\textsuperscript{96} Had the Florida Supreme Court invalidated the finding of heinousness in his case, as it did in Bundy’s, the balance would have tipped in his favor. The vast majority of people cannot imagine committing a crime such as Adams’s, yet most have felt the rage and disorientation of rejection by a loved one.

In a recent essay, Nussbaum explores the lessons of Seneca’s \textit{Medea} and concludes:

The message to the Aristotelian is, then, that there is no combining deep personal love with moral purity. If you set yourself up to be a person who cherishes all the virtues, whose every act is done justly and appropriately, towards the right person in the right way at the right time, you had better omit erotic love, as the Stoics do. If you admit it, you will almost surely be led outside the boundaries of the virtues; for this one constituent part likes to threaten and question all the others. And then the very perfectionism of the Aristotelian, who so wants all of life to fit harmoniously together, will produce rage upon rage—angry violence towards one’s own violence, a sword aimed at one’s own aggression.\textsuperscript{97}

If Medea’s violence is a natural, although unacceptable, outgrowth of erotic love, then it is hard to label the violence heinous. Acknowledging the

\textsuperscript{94} Francesca and Paolo were found in the second circle of Hell, \textit{see DANTE, supra} note 2, canto 5, at 37, whereas those who killed in betrayal were found in the ninth circle of Hell, \textit{see id.} canto 32, at 271-77. For a discussion by Nussbaum of the differences between Medea’s erotic nature and Francesca’s “erotic flame that is ‘quickly kindled in the gentle heart,’” \textit{see Nussbaum, supra} note 61, at 335, 335-36.

\textsuperscript{95} The attempt, however, is useful to illustrate a misuse of literature and also to demonstrate the possibility of convincingly diffusing the attempt.

\textsuperscript{96} \textit{Adams}, 412 So. 2d at 854.

\textsuperscript{97} Nussbaum, \textit{supra} note 61, at 336.
destructive capacity of love should not lead us to condemn it because "if we leave love out, as the play also teaches us, we leave out a force of unsurpassed wonder and power." As a community, we will sometimes pay the price for choosing to accept the gift of eros. Because we choose love, we find Medea’s crimes tragic, but not heinous. The Un-man, on the other hand, is not the outgrowth of any part of our nature we choose as a community to embrace. His nihilistic spirit may lurk within us, but we have no excuse to feed and nurture it.

Only a focus on mental state and the interior life of the particular defendant can fully reveal the distinctions that lie at the heart of Maynard v. Cartwright. Although the inquiry at issue is conducted within the brutal confines of capital sentencing procedure, the purpose of the inquiry is inherently merciful. In examining the contrast between epieikeia (roughly translated as "mercy") and dikê (roughly translated as "retribution"), Nussbaum concludes that notions of retribution are most appropriately focused on a category of crime unconcerned with the individual criminal, while equity and mercy are exercised when the "notions of intention, choice, reflection, deliberation, and character that are part of a nonreductive intentionalist psychology" are applied to the particular individual at issue.

Her understanding of mercy leads Nussbaum’s “ideal judge [to be] unashamedly mentalistic” and to treat “the inner world of the defendant as a deep and complex place.” This inner world is considered “[l]ike a novel” and is “based on a highly particularized perception of the character’s [defendant’s] situation.” Most importantly, she concludes that “the motives for mercy are engendered in the structure of literary perception itself.” In other words, mercy can be exercised only when we seek to understand the individual’s mental state. She properly rejects Holmes’s “conflation of the retributive idea with the idea of looking to the wrongdoer’s state of mind, implying that an interest in the ‘insides’ invariably brings retributivism with it.” Perhaps equity and mercy are the strongest reasons to reject Florida’s crime-specific approach to heinousness.

To conclude, I think that the strongest thesis—strongest in the sense of most specific—that can be supported by a reading of Euripides, Dante,
and Lewis is that Medea's crimes are not heinous for the purposes of Maynard, but that the Un-man's are. An intermediate thesis suggests more generally that a focus on mental state rather than circumstance would reduce arbitrariness in determining heinousness and improve and refine the labeling function of punishment. A yet broader suggestion might be made that Euripides, Dante, and Lewis improve the quality of the heinousness debate, raising the ethical level of the discussion irrespective of what standard the state eventually decides to implement. On the most general level, the consideration of particular works of literature helps to identify the ethical parameters of specific legal issues.

IV.

Having completed a discrete and somewhat practical exercise, this Essay will conclude by examining what theoretical claims should be made for this sort of incorporation of literature into law. One crass claim might be that literature merely provides a ready source of metaphor and, for the crafty lawyer, an effective rhetorical weapon. According to Nussbaum, however, talking about the works of artists like Euripides, Dante, and Lewis is an ethical exercise, part of the constant re-examination of how to live. If James Boyd White is correct, this rigor would extend beyond our own discrete selves to the world and, more concretely, to the question of how we should constitute ourselves in community with others. Not only the works discussed herein, but also the whole corpus of literature, and indeed all art, is potentially relevant to making ethical choices, including legal decisions. They are particularly fertile sources of wisdom to be integrated into legal rules, not mere tools of persuasion.

The claim that literature is highly relevant to law, however, must be separated from the claim that exposure to literature will ultimately render the law just or even enable us to articulate a clear definition of justice. Nussbaum's explanation of the ethics of reading does not include a set of behavioral prescriptions for us, nor a tidy list of truths she has found. By the same token, although an ethical conception of law demands the incorporation of literature, such an incorporation will not enable us to construct a

106. In holding that the term “pitiless” was not unconstitutionally ambiguous, the Supreme Court remarked that

some within the broad class of first-degree murders do exhibit feeling. Some, for example, kill with anger, jealousy, revenge, or a variety of other emotions. . . . Idaho has identified the subclass of defendants who kill without feeling or sympathy as more deserving of death. By doing so, it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed.


107. See NUSSBAUM, supra note 4, at 40-43 (challenging the view that emotions, as represented in novels, are unreliable as a basis for practical wisdom).

108. See supra text accompanying notes 15-16.
comprehensive list of just legal rules. Justice is out there, but we cannot often be very sure of its particulars. To paraphrase Professor Carter, at best we dance around the truth.\textsuperscript{109}

The ethical conception suggested here might be best illustrated with one final literary example. The simultaneous embracing of objective truth and rejecting of grand claims about its content is the core of Blaise Pascal's conception of God. Pascal's notion of a "hidden God" emerges from his extending "paradox to God himself," and making Him "both certain and uncertain, present and absent" and thus opening a new chapter in the history of philosophical thought.\textsuperscript{110} According to Pascal, God exists—and so, therefore, truth in an objective sense—but is mostly hidden. Human rationality, although evidence of the divine spark, is incapable of fully realizing justice or truth. We can meditate, read, pray, and make intelligent guesses as to the nature of the cosmos, but we are far too fragmented and broken to put the puzzle together. According to Pascal, "[w]e possess truth and goodness only in part, and mingled with falsehood and evil."\textsuperscript{111}

Pascal suggests that justice exists—that natural law contains right and wrong answers to legal questions. The hidden nature of God, however, prevents us from perceiving justice clearly. A combination of intuition, reason, and experience reveals some things with relative certainty—for example, that murder is bad—but mostly we grope for the truth. Like Plato's cave dwellers, we can only make guesses from the shadows we see playing on the walls of our cave. Literature provides many shadows for us to scrutinize and discuss. We may misapply our learning, but we are at least proceeding in good faith.

Nussbaum's ethical claims are similarly modest: We pursue wisdom when we read literature. What we ultimately find is another matter. We can, however, remain faithful to the ethics of the pursuit. The existential nature of the pursuit is not a denial of an ultimate reality, but a recognition of human frailty.

This frailty must be recognized when we look to literature for help in making legal decisions, especially when the legal pronouncement may be death. In some well-known contexts—for example, the Spanish Inquisition—what is called "truthseeking" becomes synonymous with dehumanization. Only the constant recognition of the frailty of human judgment can forestall the dangerous confluence of intellectual arrogance and claims of truth. Labeling a murderer an Un-man can be an unjust and manipulative

\textsuperscript{109} For Carter, the dance is the truth. \textit{See}, \textit{e.g.}, CARTER, \textit{supra} note 19, at 9 ("'Truth,' defined as it is by personal experience, varies according to each of our separate and unique experiences.").


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act of dehumanization, but it may also be the ethical identification and classification of the ultimate indulgence of the darkest side of human nature. Under current constitutional law, execution is clearly permissible. Whether we like it or not, states will exercise that power. If we remember our frailty, literature may help humanize the process. After all, an inquisition has a hard time surviving *The Brothers Karamazov*.

Literature may help us approximate a just legal rule, but human nature stands in the way of the establishment of justice. That nature, however, is not entirely base. We are at least capable of embarking on the Aristotelian inquiry, and, therefore, literature can be a valuable part of the ethical groping we call legal decisionmaking. Talking about Euripides, Dante, and Lewis does not guarantee just decisions, but such talk is an essential part of a more ethical decisionmaking process.

V.

The predominant view of law and literature as exemplified by James Boyd White, Stanley Fish, and Lief Carter can only partially be reconciled with the position taken in this Essay. For White, both law and literature are processes through which we constitute ourselves and generate community values. Fish and Carter share this view to the extent that value and meaning arise organically from the community, and not from on high. Law, therefore, is not truthseeking, but truthmaking. The Nussbaum-Pascalian contribution (if I can call it that) is to create a framework that enables us to make ethical choices without setting ourselves up as gods, arrogantly ready to impose our perceptions of truth upon all dissenters. We incorporate literature into law in the hope of better defining the shadows that play on the wall of our cave. Because we cannot avoid living in community, we extend to the law itself our personal ethical inquiry into the good. Talking about Euripides, Dante, and Lewis in response to *Maynard v. Cartwright* provides one possible illustration of how this extension can profitably be accomplished.