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James D. Hopkins

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Book Review

Interpreting Law and Literature: A Hermeneutic Reader

Edited By Levinson & Mailloux

Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies

By S. Fish

Reviewed by James D. Hopkins†

The affinity between law and literature has been marked over the years. Both law and literature depend on the use of language and linguistics techniques; both are close to the human condition. Lawyers and judges are constantly concerned with the need to reach the meaning of the Constitution and statutes, not to speak of the intent of a testator or contracting parties. Words, in short, are the common coin of lawyer and literary artist alike.

The editors of *Interpreting Law and Literature*[1] and the author of *Doing What Comes Naturally*[2] are representatives of

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† Columbia College, 1931; Columbia Law School, 1933; Justice, Appellate Division 2d Dept., Supreme Court of New York, 1962-81.

1. INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Levinson and Mailloux ed. 1988) [hereinafter INTERPRETING LAW AND LITERATURE]. Sanford Levinson is the Charles T. McCormick Professor of Law at the University of Texas; Steven Mailloux is Professor of English at Syracuse University.

2. S. FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989) [hereinafter DOING WHAT COMES NATURALLY]. Stanley Fish is Arts and Sciences Professor of English, and Professor of Law at Duke University.

this alliance. *Interpreting Law and Literature* brings together articles and essays written by lawyers and literary scholars; *Doing What Comes Naturally* is a compendium of essays by Stanley Fish published in law reviews and literary journals.

Though the material presented in both books is far ranging, the focal point is narrow: How shall we read and understand past writings? More specifically, are there tests available to the reader whereby the intent of the writer can be precisely ascertained? Or does the language of the writing control? The lawyer faces these questions frequently; the literary critic engages in seemingly endless, and sometimes acrimonious debate over the fine nuances of meaning. The ultimate question broached in both books is whether interpretation in the two disciplines proceeds similarly. If that is so, can the learning amassed in one be applied advantageously by the other?

The books deal with hermeneutics, a term which The Compact Edition of the Oxford English Dictionary traces to the eighteenth century.[3] The dictionary defines the term as the art and science of interpretation, apparently derived from Hermes, the Greek god of science, commerce, eloquence and many of the arts of life, who was in his tutelary character the god of speech, writing and traffic.[4] It is somewhat daunting to discover that another derivative from Hermes — hermetic — is described in the dictionary as the practice of occult sciences, surely a contradiction in meaning and a rather sinister reflection on the office of hermeneutics.

Hermeneutics "goes back to ancient attempts to construct general rules for understanding religious texts such as the Bible."[5] As we know, these attempts led to sharp differences, culminating in persecution and war.[6] According to Hirsch, "hermeneutical theorizing was confined almost exclusively to two domains where correct interpretation was a matter of life and death (or Heaven and Hell) — the study of scripture and the

3. THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1295 (1971).

4. *Id.*

5. INTERPRETING LAW AND LITERATURE, *supra* note 1, at ix. *See also* HARPER DICTIONARY OF MODERN THOUGHT 280-81 (1977).

6. For example, interpretative differences led to the excommunication of Martin Luther by the Catholic Church and fueled religious conflicts. *See, e.g.*, L. CRISTIANI, THE REVOLT AGAINST THE CHURCH 72 (1962).

study of law."[7] At first, the resemblance of law to religious conviction in Hirsch's reference to mortal concern seems strained, until one recalls the bloodshed and violence arising after the *Dred Scott* decision.[8]

Lately, a fervor approaching that accompanying scriptural disputes has brought about the expression of rhetoric in the discussion of constitutional interpretation. The proposal of nearly literal interpretation as opposed to the concept of expansive interpretation is more than a philosophical difference; its resolution affects the direction of our law and culture.

The controversy over scriptural interpretation centered on whether the text itself should be narrowly construed, or whether the text should be read broadly, sometimes as metaphor or sometimes in conjunction with the current setting. The textualists (or originalists) rest on the sense of the language; the contextualists rest on inference suggested by structure and relationship of the words of the text and on the cultural changes in place at the time of the interpretation.[9]

Literary critics have created theories of interpretation based on this fundamental schism, but with greater analytic development. One of the dominant theories, linked to Jacques Derrida,[10] is known as "deconstruction." Deconstruction, according to Derrida, means undoing, not destroying in the process of analyzing the layers of a structure.[11] Deconstruction, thus, questions not only the text, but what the text leaves out, or in the terms of the theory, what has been repressed.[12]

Such an abstruse doctrine appears not only vague in application, but also alien to the interpretation of legal text. Never-

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7. E.D. HIRSCH, JR., THE AIMS OF INTERPRETATION 19-20 (1972). The author is the William R. Kenan Professor of English at the University of Virginia.

8. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). *See also* J.S. DYE, HISTORY OF THE PLOTS AND CRIMES OF THE GREAT CONSPIRACY TO OVERTHROW LIBERTY IN AMERICA (1866) (detailing the events in the bloody battlefields of the American Civil War from 1861 to 1865).

9. This distinction between textualists and contextualists, along with other modified versions of both approaches, is drawn by Brest, *The Mission and Quest for the Original Understanding*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 70-71, 80-84. Paul Brest is Dean of the Stanford Law School.

10. INTERPRETING LAW AND LITERATURE, *supra* note 1, at x.

11. *Id.*

12. INTERPRETING LAW AND LITERATURE, *supra* note 1, at xi.

theless, deconstruction is considered by Clare Dalton[13] to be relevant to contractual relationships. She notes that stressing the words of a contract over the subjective intent of the actors overlooks the problem of knowledge, which is consequently a repressed element.[14] Jessica Lane uses deconstructionist tenets in her critique of Ronald Dworkin's model of legal interpretation.[15]

Whether deconstructionism or any other theory of literary interpretation may be aptly applied to the law is subject to gentle skepticism; it is a question contingent on present practice of constitutional and statutory interpretation, together with the appraisal of the particular circumstances calling for the application of the constitutional or statutory provision. In certain cases, what the writing leaves out may be critical to the analysis. This is not deconstructionist dogma.

The intent of the authors is repeatedly held to be the source of the interpretation of the Constitution and statutes.[16] Legislative history is routinely examined in reaching intent.[17] But there are some who would grant little significance to legislative debate, which they believe to be inconclusive and not binding on the silent legislators; their key to intent is the language which was finally adopted.[18] One thinks of the journal kept by James Madison during the drafting of the Constitution[19] and the inval-

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13. Dalton, *An Essay in the Deconstruction of Contract Doctrine*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 285. Dalton is Assistant Professor of Law at Harvard Law School.

14. *Id.* at 290 n.20.

15. Lane, *The Poetics of Legal Interpretation*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 269. Lane is a doctoral candidate in English at Johns Hopkins University.

16. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937) (interpreting the fifth amendment bar to double jeopardy); Patsy v. Board of Regents, 457 U.S. 496 (1982) (discussing the legislative history of 42 U.S.C. § 1983 (1982)).

17. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 489-90 (1954) (discussing status of public education at the time of enactment of the fourteenth amendment); Maine v. Thiboutet, 448 U.S. 1 (1980) (discussing legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C § 1988 (1982)); Owen v. City of Independence, 445 U.S. 622, 635-37 (1980) (scope of a municipality's immunity from liability under 42 U.S.C. § 1983 is essentially one of statutory construction).

18. *But see* R. BERGER, GOVERNMENT BY JUDICIARY (1977) (discussing the historical context surrounding the enactment of the fourteenth amendment).

19. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Ohio University Press ed. 1984) (first published in v. 2-3 of The Papers of James Madison, Washington, 1840).

uable aid which his notes bear to the meaning of the language. That view becomes somewhat dimmed when one reads that Madison thought that "the debates and incidental decisions of the Convention can have no authoritative character."[20]

The split reflected by these outlooks has progressed to serious proportions in recent years, especially in the consideration of the Constitution. The senatorial hearing held on the appointment of Judge Bork is the most striking illustration. Bork was questioned closely concerning his beliefs, shown both by his judicial opinions, and by his philosophy as displayed in his law review articles.[21]

How should we interpret our Constitution? As might be expected, Justice William J. Brennan, Jr. and former Attorney General Edwin Meese III have different standards. Justice Brennan looks at the constitutional language "with full consciousness that it [is] . . . the community's interpretation that is sought."[22] Thus, he would engraft on the language the historical and cultural background formed between the framing of the Constitution until the day of decision in a particular case. Meese, on the other hand, argues that the interpretation depends on the meaning which the authors had in mind in choosing the language,[23] a view, which though rooted in the text, is not as absolutely literalist as that held by commentator Max Radin, who contended that even intention should not enter into interpretation, but only the naked text.[24]

The problems are better defined through example. The Constitution provides that no person shall be eligible for the office of President who shall not have attained the age of thirty-

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20. Powell, *James Madison's Theory of Constitutional Interpretation*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 97-98. H. Jefferson Powell is Associate Professor of Law at the University of Iowa.

21. *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the U.S.: Hearings Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 1011 (1987).

22. Brennan, *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 13, 15. William J. Brennan, Jr. is an Associate Justice of the Supreme Court of the United States.

23. Meese, *Address Before the D.C. Chapter of the Federalist Society Lawyers Division*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 25, 28. Edwin Meese III is the former Attorney General of the United States.

24. M. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-70 (1930).

five years.[25] There is little to interpret in this language; the words are blunt. The same section also provides that no person, except a natural born citizen or a citizen at the time of the adoption of the Constitution, is eligible to be President.[26] This language excludes a naturalized citizen, but it is debatable whether it excludes a person born of citizens on foreign soil.

Fish refers to the problem of a general statute, such as one defining larceny as the taking of "the property of another without his consent . . . ."[27] A rule of that general character raises questions whether the act complained of is a "taking," or whether embezzlement and fraud could be considered larceny.[28] Thus, the general rule necessitates the making of subordinate rules to further the process of interpretation. It is noteworthy that civil law attempted to meet the problem of interpreting a general law by declaring that the judge should decide the case, unprovided for by the statute, by a rule which he would lay down if he were a legislator.[29] The duty thus cast on the judge, though difficult to discharge, seems no more onerous than the making of a common law rule.

In *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*,[30] Professor Tushnet points out that *Griswold v. Connecticut*,[31] the case finding a constitutional interest of privacy, relied on precedents which were ambiguous in justifying that reliance.[32] Tushnet further points out that the reliance can be justified by a reasonable reading of the precedents cited as exemplars of the concept of privacy beyond the

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25. U.S. CONST. art. II, § 1.

26. *Id.*

27. S. FISH, *Fish v. Fiss*, in DOING WHAT COMES NATURALLY, *supra* note 2, at 120-21.

28. *Id.* at 121.

29. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TUL. L. REV. 351, 375 (1943).

30. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles* in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 193. Mark V. Tushnet is Professor of Law at Georgetown University Law Center.

31. 381 U.S. 479 (1965).

32. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 208-09 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925), which held unconstitutional a requirement that children attend public rather than private schools and Meyer v. Nebraska, 262 U.S. 390 (1923), which held that a state could not prohibit the teaching of foreign languages to young children).

outlines of the factual patterns in each case. It is, of course, to be observed that his explanation embraces items of potential dispute over or about which reasonable minds might differ.

It appears plain, therefore, that interpretation of writings in the law is a delicate process, to which the judge must summon up and analyze a congerie of elements such as intention, setting, present day concerns and practical consequences, in order to strike a final balance. That balancing act was acutely, if metaphorically, described by Learned Hand: "[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appears, and which all collectively create."[33]

Can this process be lightened by resort to the methods of literary critics? It is somewhat revealing that the word "critic" comes from the Greek "kritikos" and "kritos," meaning judge. Both the literary critic and the judge are engaged in the interpretation of language to explain and to persuade. There are other parallels between them, but there are distinctions as well. The great distinction is that the judge performs institutional functions — determining disputes and issuing rules for future conduct. The critic has no public function and, thereby, acts under no rule save his own. Even so, the interpretation of language is an occupation common to both.

E.D. Hirsch, a professor of English at the University of Virginia, argues that the problem of interpretation should be put in focus by the question asked by Lewis Carroll through Humpty-Dumpty: Who shall be master — the writer or the reader?[34] This question assumes that the reader is at liberty to add, detract and modify the intent of the writer. Certain novels, rich in symbolic material, are fertile grounds for the critic's imagination — Herman Melville's *Moby Dick*, James Joyce's *Ulysses*, Thomas Mann's *Doctor Faustus*, to list a few. The critic, in extending the scope or metaphors of the novel or poem, does no injury, except incidentally affording the opportunity for fierce

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33. Helvering v. Gregory, 69 F.2d 809, 810-11 (2d Cir. 1934); *see also* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

34. Hirsch, *Counterfactuals in Interpreting*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 55, 56.

and often rancorous controversy among his fellow critics, and sometimes between the author and himself.

Hirsch distinguishes between meaning and significance. Meaning, he says, is what the writer had in mind; significance is what the reader makes of that meaning, giving consideration to the sense of the writer at the time of his creation.[35] He discerns these steps in the process of interpretation: (1) to understand the original meaning; (2) to accommodate it to present circumstances; and (3) to distinguish between an accommodation true to the spirit of the original and one that is not.[36] He recognizes, however, a license in the creator; for example, a poet may repudiate or alter a poem, just as the legislature may repeal or amend a law.[37] Fish is skeptical of the critic who follows self-imposed tests because it is not possible for the critic to insulate himself from the effect of deeply held norms shared by the critic and the society of which he is a part.[38]

Charles Fried, recently Solicitor General, takes as a text for interpretation Shakespeare's Sonnet LXV. To Fried, the transparent meaning of the poem is the impermanence of the most substantial things — of rocks and steel gates — but the true meaning to him is that black ink, the medium of language, survives the passing of time.[39] Yet, Philip Martin, an English scholar, reviewing the same poem, finds that it ends not in certainty, but is "deliberately and properly tentative," for it contemplates that only a miracle can succeed in preserving beauty.[40]

These differences in critical insight immediately throw into question the governance of interpretation by the imposition of rules. Fish points out that the true rule generates the correct result, independently of the critic, and that the true rule is ex-

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35. *Id.* at 57.

36. *Id.* at 61.

37. *Id.* at 67-68. Hirsch cites as an analogy the change wrought to the holding of Plessy v. Ferguson, 163 U.S. 537 (1896) by Brown v. Board of Educ., 347 U.S. 483 (1954).

38. S. FISH, *Critical Self-Consciousness, Or Can We Know What We're Doing*, in DOING WHAT COMES NATURALLY, *supra* note 2, at 436, 440-41.

39. Fried, *Sonnet LXV and the Black Ink of the Framers' Intentions*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 45, 48-49. Charles Fried was the Solicitor General of the United States.

40. Martin, *On Sonnet LXV*, in INTERPRETING LAW AND LITERATURE, *supra* note 1, at 53. Philip Martin is Senior Lecturer in English at Monash University, Melbourne.

emplified by mathematics, not susceptible to varying answers.[41] Thus, social theory and the literary standards observed by critics, under the true rule, can never be formalized definitively to interpret and construe literary text in the same way, no matter the time or the circumstances.

A cluster of axioms, called canons, has grown around the process of interpretation in the law. The canons are considered as aids to arrive at the true construction of the writing. But, as Karl Llewellyn[42] demonstrated, the canons are often at cross-purposes, and the judge may easily find a canon to justify his interpretation.[43] One canon proclaims that a penal statute should be construed liberally to carry out its purpose, while another canon asserts that a penal statute should be construed narrowly in order to protect life and liberty. In essence, the canons cancel one another, and their use is reduced to a justification for a result, rather than a rule requiring a result.

In *Braschi v. Stahl Assoc. Co.*,[44] the Court of Appeals of New York was divided four-to-two over whether the word "family" should be construed to include a deceased tenant's roommate with whom he had lived for over ten years.[45] Both the majority and minority cited dictionary definitions of "family."[46] Both sides invoked the intent of the authors and the purpose of the regulation.[47] Yet, opposing conclusions were reached by the judges.[48]

Ronald Dworkin contends that there is almost always one

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41. S. FISH, *Consequences*, in DOING WHAT COMES NATURALLY, *supra* note 2, at 315, 317.

42. Karl Llewellyn is the noted author of numerous books and law review articles, and chief reporter of the Uniform Commercial Code.

43. Llewellyn, *Remarks on the Theory of Appellate Decision and Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). A broad canvass of the canons is contained in N.Y. STATUTES LAW ch. 6 (McKinney 1971 and Supp. 1990); *see also* SUTHERLAND, STATUTORY CONSTRUCTION chs. 55, 61 (4th ed. 1986).

44. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

45. *Id.* The regulation in question provided that the landlord on the death of the tenant may not dispossess either the surviving spouse of the tenant or a member of the deceased tenant's family living with the tenant. *Id.* at 206, 543 N.E.2d at 50, 544 N.Y.S.2d at 785.

46. *Id.* at 211, 219, 543 N.E.2d at 54, 59, 544 N.Y.S.2d at 789, 794.

47. *Id.* at 211, 218, 543 N.E.2d at 54, 58, 544 N.Y.S.2d at 789, 793.

48. *Id.* at 214, 223, 543 N.E.2d at 55, 61, 544 N.Y.S.2d at 790, 796.

right answer to any legal question.[49] However, he assumes the presence of one omniscient judge which eliminates the annoyance of competing opinions. Ideally, there may be one true interpretation; pragmatically, it is inevitable that differing interpretations will emerge due to ambiguous wording that must be applied to new factual backgrounds.

In the end, interpretation of legal writings is an art, not a science.[50] The result stems from a melange of many elements: the words themselves; the setting of the case; the consequences of the surrounding legal framework on the system; and, of course, the judge's own cultural influences and beliefs.[51] Both *Interpreting Law and Literature* and *Doing What Comes Naturally* offer rich material to develop a philosophical and comprehensive explanation of what occurs in the interpretative process, which may be more satisfying than the amorphous answers currently seen.

While there are many similarities between law and literature, there are many differences as well. It is doubtful that the theories of literary criticism can be imported wholesale into the world of legal construction. Judges and lawyers do not enjoy the absolute freedom of speculation; they are bound by ties of precedent, of legislative action and the need for consistency, for better or worse. It is at once the impediment and the glory of the common law that judges are forced to adhere to the regimen of the system which maintains rules which cannot be violated without peril.

All decision-making is to a degree intuitive; the decision-maker must always be aware of the intuitive sense and put it in its proper place, always in the perspective of the surrounding legal relations. For the luxury of philosophical argumentation, I commend to you the varying visions portrayed in these two books. Though much of the disputations rest on arcane and sometimes knife-like reasoning, as lawyers we should not avoid

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49. Dworkin, *No Right Answer?*, in LAW, MORALITY AND SOCIETY 58 (1977).

50. *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

51. *See, e.g.*, Burnet v. Guggenheim, 288 U.S. 280 (1933), in which Justice Cardozo asked, in considering variant statutory meanings, "which choice is it the more likely that Congress would have made?" *Id.* at 285. Justice Cardozo said that it was a choice between uncertainties, and that "[w]e must be content to choose the lesser." *Id.* at 288.

the delight of observing finely spun pleading. Even more to the point, we should be aware of the developments in abutting fields of learning. The experience of the past is that the body of the law is confronted by the cultural controversy. Most probably, there is a lag in the challenge. But be ready, my friends, be ready.