Let's Ask Again: Is Law Like Literature?

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Many recent debates about interpretation of the law, familiar to students of legal theory, are determined by a rather simple question—the one I take as my title here—which has, surprisingly, received little *explicit* attention. These debates are vexed and complex, and have been exacerbated by the personalities of some participants and the professional jealousy aroused by real or imagined transgressions of disciplinary boundaries. More seriously, the recent entry—or, as some would have it, the infiltration—of contemporary literary and interpretive theory into the realm of law has vastly complicated the issues. Those issues include: the proper role of intention in legal documents, especially the Constitution; the relevance or redeemability of claims to truth and objectivity in legal interpretation; the law's epistemological and moral status; and, ultimately, the relevance of legal theory itself to the practice of law.

These questions were not absent from the minds of lawyers and legal scholars before the current groundswell of theoretical interest. The study of legal hermeneutics, including much abstract and subtle theorizing about textual indeterminacy, has a long and honorable history—one longer, arguably, than that enjoyed by the study of literary interpretation.[1] The "infiltration" problem is that the controversies, innovations, and philosophical questioning of one realm of study—contemporary literary theory—have been translated, and have even proliferated, when similar concerns were raised in the realm of law. The so-called "law and literature" movement

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1. Together with Biblical and philological scholarship, legal study provided the controversial texts that prompted the first study of general interpretive theory by German scholars in the early nineteenth century. *See* Kurt Mueller-Vollmer, *Introduction* to THE HERMENEUTICS READER 1 (Kurt Meuller-Vollmer ed., 1990). James Farr demonstrates that the German style of theorizing about texts was alive early on this continent. James Farr, *The Americanization of Hermeneutics: Francis Leiber's LEGAL AND POLITICAL HERMENEUTICS*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 83-102 (Gregory Leyh ed., 1992). Leiber, a Prussian immigrant to the United States, published the first edition of his work in 1837.

and its attendant debates are the legacy of this proliferation. Most of the current debates, however, can be organized around divergences and confusion concerning the analogy between law and literature. Ultimately, we still need to decide how similar are the concerns of legal and literary theory. Do they speak to the same subjects? In what ways is law really like literature?

That is the central question, and though it is indeed a rather simple one, we cannot pretend that it has a simple answer. Nor can we expect, for related reasons, a *definitive* answer. All available answers to the analogy question, including the one offered in this article, are complicated by various dimensions of indeterminacy, disagreement, and simple cognitive failure. That is, it may prove no easier to answer—in a dispute-ending way—whether law is like literature than it is to say what art is, or what constitutes the good life, or whether a person is trustworthy. Indeed, one of the virtues of asking the analogy question explicitly is that it shows us the problem with our desire for a simple and definitive answer to the question. Having thus hinted at a paradox, let me confirm the hint and offer a blunt answer to the analogy question: law is utterly like literature; it is utterly unlike literature; and, in the end, the question of analogy hardly matters.

The question hardly matters, yet it remains significant. Why? Because, it drives a concern shared by many—ranging from those (like Ronald Dworkin) who think law very much like literature to those (like Richard Posner) who think it very much unlike—to find a plausible general theory of legal interpretation. The motive to find such a theory derives from the even more general desire to distill *clear meaning* from legal texts. Such meaning can take many forms, and there is a bewildering variety of opinions on its status; but, in general, people concerned with the question wish there to be something like the "valid" or "correct" or "true" or even "objective" meaning of legal texts. Just what that something is, and how valid or correct or true it needs to be, are questions that take us into the heart of recent law-and-literature controversies. What we will find in exploring these controversies is that a general theory of interpretation is indeed available, a theory that is both interesting and useful in understanding the status of the law. Whether such a theory additionally secures "true" meaning, or is useful in guiding the practices of legal interpretation, are distinct questions, and I will take them up only in the final section of this paper.

To get to that point, I will proceed as follows. The first section assesses several controversies that have become familiar in recent debates over legal interpretation, in particular, the set of allegedly all-or-nothing choices that seem to define the theoretical discussions of law. These debates clarify the stakes in the analogy question. Next I examine, in sharper focus, various versions of the analogy argument: the claims that there are (or are not)

significant similarities between law and literature. My argument here will be that the question has, for the most part, remained inexplicit. In the rare instances where it has been asked explicitly, the answer has been clouded by what the inquirer imagines "the other side" to be saying. In the third section, I attempt both to sketch the outlines of a superior general theory of interpretation and to suggest its limitations. These limitations lead us back to the fundamental questions, broached in the fourth section, that are ever in the background of this discussion: Can truth ever be secured in interpretation? Does interpretive theory represent the only way to secure it?

I. THE FORKS OF LEGAL INTERPRETATION

Students of interpretive theory in law are familiar with the experience of being asked to make a series of choices as they consider the meaning of a legal text. Each of the choices comes with a label, and writers in the field invite readers, in effect, to pledge their allegiance: positivist or non-positivist; interpretivist or noninterpretivist; intentionalist or formalist; originalist or contextualist; determinist or indeterminist; objectivist or perspectivist; foundationalist or pragmatist. To add to the confusion, and to the reader's sense of being put-upon, these choices frequently overlap and seep into one another. Is being a positivist the same as being an intrepretivist? Can a pragmatist be an originalist? Disputes over entailment are also endemic: When is an originalist also an intentionalist? Always? Never? Sometimes? Supporters of the various parties, who very much want the reader to choose, may elevate the stakes to make the choices starker. If we are not objectivists or foundationalists, they might say, chaos will be loosed upon the law. Nietzschean nihilism (or skepticism, or indeterminacy, or quietism) will reign.[2] Society will crumble. If, on the other hand, we are not, say, contextualists, we risk supporting the tyranny of reason, the chilly determinacy of the dominant world view, the devastation of empire and capital, or simply fascism. The tropes for writing about legal interpretation can often be reduced to two: the fork and the specter. The fork demands that one choose this path or the

2. It is fascinating to note how often Nietzsche gets the blame for loosing nihilism upon the world and ushering in the era of textual indeterminacy. *See, e.g.*, Sanford Levinson, *Law as Literature, in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 155-73 (Sanford Levinson & Steven Mailloux eds., 1988). An effective reply is made in the same volume by Richard Weisberg, who demonstrates the well-balanced character of Nietzsche's views on interpretation. Richard Weisberg, *On the Use and Abuse of Nietzsche for Modern Constitutional Theory, in id.* at 181-92. Richard Posner, in *Law and Literature: A Misunderstood Relationship*, makes a similar point—after an egregiously oversimplified reading of Nietzsche in Chapter 3—when he notes that Nietzsche's views on textual coherence *endorse* the conservative New Critical position in literary criticism. RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP 219 (1988). But there is a convincing case that for Nietzsche, nihilism means *not* that there is no meaning in the world, but rather that all the meaning we have is *of human origin*. I owe this point to Randall Havas.

other; the specter suggests the vision of disastrous consequence, fear of which is supposed to ensure that one will make the right choice.

The stakes are rarely as serious as the specters would suggest, and it is tempting to agree with Stanley Fish that the choices, and the labels, are of mainly rhetorical and political import.[3] But we should resist taking Fish's next step, namely, that the theoretical consideration of these questions has no bearing on the practices of legal interpretation. How we pledge ourselves—what we understand ourselves to be doing when we engage in textual interpretation—will affect both the kinds of interpretations we produce and the status we take those interpretations to have. Indeed, Fish's kind of reductionism, which sees most of these fraught debates as nonexistent, has the unfortunate effect of leaving everything as it is and reducing theoretical reflection to no more than a pleasant parlor game. That he would not regard this effect as unfortunate, indeed that he would not regard it as an effect, is consistent with Fish's urge—one he holds in common with many other sophisticated thinkers, usually influenced by Wittgenstein—to cure us of certain desires for theory. These include the desires to draw distinctions and to force choices in an effort to say how things really are in the world. It is undeniable that this set of desires, which can go by the shorthand name of "philosophy," has exerted a hold on us; it is also true that Fish's practice-based account of legal interpretation is attractive in many respects.[4] Yet, ultimately, his efforts at intellectual therapy—the attempt to get us, as Wittgenstein put it, to stop scratching where it does not itch—simply lead to one more fork in the legal theory road: theorist or therapist.

Before assessing *that* fork, and suggesting how we can detour around it, I will briefly examine the most influential of the other forks. Though there are many complexities in the debate surrounding these choices, I hope to provide enough detail to clarify the stakes in the central question of analogy between law and literature. I also hope to avoid exposure to another argumentative trope common in debates over interpretive theory, the one played out in reply to someone who attempts to "overcome" certain canonical distinctions: the charge here is that by refusing to take the fork seriously, one wants to have his cake and eat it too. The fork is thus reinstated as a choice between "thinking clearly"—that is, thinking dichotomously—or not. Yet the charge fails to hit the mark; although there are indeed choices to be made in interpretive theory, they rarely involve the all-or-nothing propositions suggested by the forks.

3. Stanley Fish, *Play of Surfaces: Theory and the Law*, *in* LEGAL HERMENEUTICS, *supra* note 1, at 297-316.

4. The extended defense of the practice-based account, including our practice-relative notions of truth and correctness, is explored at greater length in STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980), and DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989).

The two most influential forks posed for the practice of interpretation—as opposed to forks concerning the status of interpretations, or the status of the law itself—arise out of different scholarly contexts. The interpretivism/noninterpretivism debate is a legacy of legal debate, while the intentionalism/formalism debate is a direct inheritance from literary criticism, especially the American criticism that was influential during the middle part of this century, the so-called New Criticism. Cynical observers, reflecting on the origin of these debates, have found it amusing that lawyers found themselves able to advance a theory of interpretation that denies the value of interpretation as most of us understand it—and to call that theory, perversely, interpretivism.

In general terms, interpretivism is the view that adjudication is a matter of reading a legal text (a statute, a founding document like the U.S. Constitution, or even a body of precedents) and rendering a decision that tries to express simply "what the law says." According to this view, judges "should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[5] In the judgment of Mark Tushnet, interpretivism is one of "[t]he two leading constitutional theories" in contemporary legal circles.[6] And, indeed, it has a straightforward appeal: What else could adjudication be but restating what the law says? The real problem of interpretivism is that "statements" or "clear implications" in legal texts are in practice limited to a very small number of noncontroversial (read "nonpolitical") clauses of legal writing. Thus, in practice, as Owen Fiss remarks, interpretivism is really a kind of legal determinism: it draws a (usually undefended) distinction between the controversial and the uncontroversial, and purports to speak only of the latter, and to do so "in plain terms." Fiss is correct in saying that this distinction is itself a controversial interpretive property, and that since interpretivism of this sort is necessarily committed to a pre-reflective view of what the law is, it is inherently deterministic.[7]

Some commentators, attacking the determinism of interpretivist stances, have gone so far as to argue that even apparently uncontroversial clauses—such as the Constitution's Article II injunction that the president be at least 35 years of age—are themselves open to interpretation. That the president should "have the maturity and station in life of an average 35-

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5. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980).

6. The other is the "neutral principles" view, which Tushnet suggests is equally misleading. *See* Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,* 96 HARV. L. REV. 781 (1983), *reprinted in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 193. Tushnet's critique of these "programmatic" or "rule-driven" theories constitutes a negative argument in favor of a hermeneutic alternative. *See id.* at 199-203.

7. Owen Fiss, *Objectivity and Interpretation,* 34 STAN. L. REV. 739 (1982), *reprinted in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 232. For a more detailed discussion of the objectivity issue, see KENT GREENAWALT, LAW AND OBJECTIVITY (1992).

year-old" is, for example, one possible interpretation suggested by this clause. Posner is the most vocal of interpretivist-style critics of this interpretation. The interpretation is implausible, he says, because Article II is meant to be merely an arbitrary cutoff. But this "merely" is charged: Posner will not be bothered to ask both what the clause says and what it means—that is, he will not interpret it as well as read it.[8] We can agree that the limit is simply an arbitrary and fixed cutoff (we are not asking for exemptions for some exceptionally mature 30-year-olds) *and* argue that its meaning is discerned only in some account of maturity and resources. Strict interpretivism, however, shuts down *ex ante* this effort to secure meaning, leaving us, in this case, with a clause whose very arbitrariness, unless unpacked in interpretation, can appear simply authoritarian and prejudicial.

Interpretivism can also be considered a species of legal positivism, for it claims to treat the law as if it were an object of quasi-scientific study, something that will cough up its relevant truths when subject to the proper methods of impartial judicial investigation.[9] Two familiar slogans from legal theory clarify the specter that is thought to motivate the choice of interpretivism. Interpretivists want a law that is found, not made, and they want a government of laws, not one of men. Noninterpretivists, for their part, question the validity of interpretivist judicial decisionmaking, arguing that interpretivists may misconstrue the law in their efforts to treat it as what Richard Rorty has called "a lump"—that is, as a preexisting, unconditioned something that lies, without any prior determination by human concerns, waiting to be examined.[10] In addition, by refusing to grapple with parts of legal texts that are controversial, interpretivists in effect obviate the role of adjudication. We do not have judges just to provide interpretations of the apparently plain—even recognizing that plainness can be deceiving. Interpretivism is therefore an inaccurate picture both of the

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8. *See* Mark Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985). Posner criticizes these two "critical legal studies" thinkers for their attempt to bring the "skepticism" of literary interpretation, especially deconstruction, to statutory interpretation. *See* POSNER, *supra* note 2, at 219-20, 242.

9. It is not, for that reason, a legal *realist* position, since it remains committed to interpreting the text of the law as what Fiss misleadingly calls "objective." Realist objections to this enterprise come in old and new forms: the political realism of the early twentieth century and what Fiss calls the "nihilist" realism of the late twentieth century, both of which claim that judicial adjudication is about power, not objective legitimacy. *See* Fiss, *supra* note 7, at 230. But, as I attempt to show in the final section of this paper, the issue poses another false choice. We can both recognize the role of politics in adjudication and preserve all the claims to legitimacy necessary to uphold the legal practices associated with it.

10. RICHARD RORTY, *Texts and Lumps*, *in* OBJECTIVITY, RELATIVISM, AND TRUTH 78-92 (1991). The other essays in that volume continue the defense of Rorty's views on "anti-representationalism"—an account "which does not view knowledge as a matter of getting reality right, but rather as a matter of acquiring habits of action for coping with reality"—begun in *Philosophy and the Mirror of Nature* (1979).

law and of judicial decisionmaking. Taken as a *normative* picture, it will skew judicial reading of the Constitution or other statutes and render the law irrelevant in the face of changing social conditions.

The choice between interpretivism and noninterpretivism is really no choice at all. Lawyers will sometimes speak as if there were a genuine decision to be made about whether judicial decisionmaking can be interpretive, but in fact judges—like readers—are interpreting all the time, whether they like it or not. From this point of view, interpretivism is really just a rather strict and old-fashioned school of interpretation, one that is further impaired by insufficient self-awareness. The notions of uncontroversial clauses and "plain speaking" are red herrings that, at best, obscure the contextual features of a practice that make some elements of a text less problematic than others; at worst, these notions conceal a political agenda that is conservative in nature.[11] Moreover, as developments in the philosophy of science make more and more investigative practices appear less positivistic, the appeal to standards of scientific "lump" examination makes less and less sense.[12] On these matters, Fiss claims in his paper "Objectivity and Interpretation" that interpretivism is no longer a serious choice for students of legal interpretation; nonetheless, he organizes his opening remarks around the issue of whether adjudication is indeed interpretation, suggesting that the question (if not the choice) is still a live one.[13]

The interpretivism/noninterpretivism fork has a strong bearing on the analogy question because it may suggest, as Fiss puts it, the possibility of an "essential unity between law and the humanities."[14] The clue here is a broadening of the notion of *text*, which, Fiss says correctly, is now applied to almost every aspect of life. Hermeneutics has long insisted on the essential similarity between texts in the usual sense, which is to say books and other written documents, and what are called text-analogues.

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11. The issue is similar to the one conjured up when people claim that the "politicization" of the law (or some other social practice, e.g., the academy) is illicit. Being honest about the political stakes of a practice is not tantamount to reducing it to plays of power—the usual specter in view here. On the contrary, refusing to acknowledge political elements of a practice capitulates to whatever politics are then dominant, and that in itself is a political act. "If someone agrees with us on the aims and uses of culture, we think him objective," the critic Robert Hughes notes; "if not, we accuse him of politicizing the debate." ROBERT HUGHES, CULTURE OF COMPLAINT: THE FRAYING OF AMERICA 60 (1993).

12. This point has become a commonplace with the expanding influence of Kuhnian philosophy of science, which emphasizes the practice-based elements of scientific investigation and lays to rest many of the axiological excesses of the Enlightenment view. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). Despite important divergences, Kuhn's work has affinities, interesting for the present point, with the work of W.V.O. Quine and Donald Davidson. See especially Davidson's influential essay *On the Very Idea of a Conceptual Scheme, in* POST-ANALYTIC PHILOSOPHY 129-44 (John Rajchman and Cornel West eds., 1985).

13. Fiss, *supra* note 7.

14. *Id.* at 230. Fiss's point seems to be that this unity, if real, would allow the application of humanistic techniques in the realm of law, and would clarify the study of law as itself a kind of humanistic discipline.

Text-analogues may be spoken words, rituals, practices, non-verbal artworks, even a definable set of political or moral values. Indeed, the thrust of *philosophical* hermeneutics, especially as practiced by Martin Heidegger and Hans-Georg Gadamer, is that all aspects of human life—what we may simply call "the meaningful"—are relevantly addressed as texts by a general interpretive theory. Overcoming the non-choice between interpretivism and noninterpretivism, which has confused the issue with its narrow commitments concerning the uncontroversial, opens us to the possibility that all adjudication is indeed interpretation.[15] The relevant texts will be the statutes, defining documents, and precedents of the legal practice to which we belong. The relevant question to ask of ourselves as interpreters will not be whether or not we are interpreting, but rather what commitments we bring to the task of interpretation, and how defensible they are.

Fiss is right in saying that adjudication is always interpretation. Whether this general statement actually confirms an essential unity between law and the humanities is, however, a separate question. Fiss moves too easily from one to the other, and he does so because, like many legal theorists, he has not paused to examine the analogy issue in detail. Because law and literature both involve generally accessible written texts, it is perhaps too easy to assume an analogy on the level of interpretive principle. The proliferation of texts and text-analogues makes the question an easy one to elide, but we cannot allow it to remain so.

The intentionalism/formalism fork explains why. Put crudely, this fork poses a choice between those who are willing to take authorial intention into account and those who claim to be unwilling. In legal theory, it is closely related to the interpretivism/noninterpretivism fork because many, if not most, so-called interpretivists are strong proponents of intentionalism: they argue that the clarity of clear Constitutional statements (or clearly implicit messages) can be recovered only by examining the historical record and accounts of the Constitution's writing to discern, or anyway to imagine, the Framers' intent.[16] The nonintentionalist side of the choice, associated

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15. For a contrary view, from a perspective sympathetic to the Critical Legal Studies movement, see Robin West, *Adjudication Is Not Interpretation: Some Reservations about the Law-as-Literature Movement*, 54 TENN. L. REV. 203 (1987).

16. Tushnet argues that the link between intention and interpretation can only be maintained by a commitment to "flawed historiographical methods," especially in viewing authorial intention as divorced from "social and conceptual context." *See* Tushnet, *Following the Rules Laid Down*, *in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 198. We might be interested in distinguishing here between intentionalism *tout court* and originalism, the doctrine that interpretation is validated by reconstruction of (in this case) the Framers' original intentions. Some literary intentionalists, like Hirsch, are not originalists; in their view, this reconstruction is impossible and attempts at it lead to antiquarian fallacies. For a good discussion of the various options in legal interpretation, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980), *reprinted in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 69. Terence Ball offers some novel anti-intentionalist arguments, showing that conceptual change makes genuine reconstruction impossible.

with certain well-worn positions in literary criticism (Wimsatt, Beardsley, Brooks et al.), is formalist in the sense that it suggests the only relevant criteria of interpretation are those that inhere in the work itself: the work considered, in the language of these authors, as a kind of artifact, a "verbal icon" or indeed a "well wrought urn."[17] Authorial intention is irrelevant to formalist critics because it cannot reveal anything about the success or failure of the work in terms of its formal perfection, its achievement of aesthetic goals concerning, say, coherence and uniformity of effect. Indeed, the notion of "recoverable intention" is thought by some to be a chimera—inaccessible, even imaginary, and only claimed when one has achieved a satisfactory interpretation on other grounds.[18] Literary critics committed to some form of intentionalism (like E.D. Hirsch, Jr.) argue, by contrast, that no text can be fully understood without assessing what the author intended it to mean.[19] For these critics the text is a kind of message, something that we could in principle ask the author to repeat or expand upon in line with what he meant to say. Reading the text, as a result, involves placing it in the context of those (usually counterfactually presumed or historically reconstructed) authorial intentions.[20] At this point, formalists often reply that if authorial intentions have any bearing at all, they will be realized in the text itself and will not have to be sought in biographical, historical, or otherwise extraneous information.

The remarkable persistence of the intentionalism/formalism debate has overshadowed numerous commonalities between the two positions, positions which, I will argue, collapse into each other. As before, the

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Terence Bell, *Constitutional Interpretation and Conceptual Change*, *in* LEGAL HERMENEUTICS, *supra* note 1, at 129-46.

17. Two essays by W.K. Wimsatt and Monroe C. Beardsley are considered ground zero of formalist literary criticism. They are "The Intentional Fallacy" (1946) and "The Affective Fallacy" (1949), both included in W.K. WIMSATT, THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY (1954). The essays argue that authorial intentions and states of mind, as well as affective responses excited in the reader, are irrelevant to the objective judgment of aesthetic objects. Less uncompromising, but committed to the same goal, is Cleanth Brooks's close formalist reading of a collection of well-known poems in CLEANTH BROOKS, THE WELL WROUGHT URN: STUDIES IN THE STRUCTURE OF POETRY (1947).

18. I thank Matthew Parfitt for sharpening this point. Formalists, of course, are not the only critics who reject intention as a criterion of assessment in interpretation. This is one reason the fork does not represent a genuine choice.

19. *See, e.g.*, E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION (1967); E.D. HIRSCH, JR., THE AIMS OF INTERPRETATION (1976). These works constitute the most sustained recent defense of an "intentionalist" position in literary interpretation.

20. Hirsch makes a convincing case for the role of counterfactuals in usefully recovering intentions. *See* E.D. Hirsch, Jr., *Counterfactuals in Interpretation*, *in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 55-68. He suggests that "[i]nterpreters sometimes need to imagine what a text *would* mean if it were authored in the present." Without this awareness, the text is reduced to its present meaning in what he labels an "irresponsible reading." But taking this counterfactual awareness too seriously can lead to what Paul Brest calls "the misconceived quest for the original understanding," or the fallacies of antiquarianism or strict originalism. Brest, *supra* note 16, at 69. The problems of accurate historical reconstruction of intention have been much remarked; Hirsch's counterfactual account is free of most of them, and indeed closer to the model of interpretation I defend in Section III of the present paper.

debate represents not so much a genuine choice as another fork in the rhetorical road. And once again, this fact has important consequences for the question of whether law is like literature.

A clue to the commonalities is provided by the unsatisfactory nature of extreme versions of the fork. There have recently been critics who felt no compunction in declaring the author—conceived as a locus of intention—dead, his or her texts no more (but, of course, no less) than nodes of textuality in a great linked chain of writing and reading.[21] On the other side, certain interpreters of some texts—legal texts perhaps among them—claim that formal or aesthetic criteria are entirely irrelevant to the meaningfulness of a message.[22] The first position appears to destroy the really interesting fact about texts, namely, that in them someone is trying to say something to someone else. The second position appears to ignore that no text can be meaningful unless it follows *some* formal criteria, shared between author and reader, that combine to render the text readable.

The specters conjured up by the respective parties also differ, but they are united on another common theme: the other side's interpretations are subject to error and distortion, and hence loss of validity. Formalists think that opening the door to the evidence of intention will lead to impressionism, subjectivism, and even relativism. At the same time intentionalists, many of whom find their bogeymen in more contemporary literary criticism, think that taking close account of intention is the only way to halt a different form of impressionism and relativism, the kind threatened in "reader-response" criticism or (a favorite bugbear of the late 1980s) deconstruction.[23]

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21. The "death of the author" claim, now much abused, is associated most closely with the French critic and philosopher Roland Barthes. *See, e.g.*, ROLAND BARTHES, WRITING DEGREE ZERO (1967); ROLAND BARTHES, ELEMENTS OF SEMIOLOGY (1968); ROLAND BARTHES, NEW CRITICAL ESSAYS (1980); ROLAND BARTHES, THE SEMIOTIC CHALLENGE (1988). Barthes's central argument is that a text must be interpreted only in terms of its textual functions, that is, wholly apart from truth values and from any concern with the irrelevant figure of the author. Echoes of this position are audible in deconstruction's emphasis on indeterminacy in textual meaning and intertextuality (i.e., the claim that "there is nothing outside the text"). For a helpful discussion of deconstruction's relevance to legal interpretation, see Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy, and the Temptation of the New Formalism, in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 152-210 (David Gray Carlson et al. eds., 1992).

22. Posner is one such interpreter. *See* POSNER, *supra* note 2, ch. 5 *passim*.

23. The most influential of the new, more sophisticated theories in literary criticism were developed by Paul de Man in his *Blindness and Insight* (1983), *Allegories of Reading* (1979), *The Resistance to Theory* (1986), and numerous accompanying articles. Deconstruction was itself "begun" by the French philosopher Jacques Derrida, and perhaps its most representative texts are Derrida's collections *Of Grammatology* (Gayatri C. Spivak trans., 1976) and *Margins of Philosophy* (Alan Bass trans., 1982). Some legal and political aspects of this interpretive program are examined in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE, *supra* note 21. For present purposes, the most illuminating essays in that collection are those of Michel Rosenfeld, Fred Dallmayr, and Alan Wolfe.

As with most of the specters, the danger posed by this "relativism" is overstated, a subject we will return to in the final section of this paper.[24] For now, notice a third commonality that bears directly on our central question. Both formalists and intentionalists in literary criticism can find good reason to reject the law/literature analogy: formalists because the formal properties of law are not, allegedly, of the kind that bear on its interpretation; and intentionalists because the law poses far-reaching problems concerning the accurate reconstruction of the intentions held by numerous people in the complex process of negotiation and argument that creates legal documents. From this second point of view, the debates concerning the intentions held by the Framers of the Constitution are central. Even if we prize intention in literary evaluation, can we ever say what those varied and disagreeing people intended, especially considering the usual problems of distance in time and culture and the profound difficulties in divining what vision of the future they held?

Since no single person could hold both these views, a more common rejection of the law/literature analogy uses the intentionalist/formalist fork as a fulcrum. This is the course defended by Posner, who declares himself a formalist in matters literary and an intentionalist in matters legal—incidentally adopting in each arena the more "conservative" of available choices. I will explore his position in more detail in a moment. We should notice first, though, that recent moves in the intentionalist/formalist debate have actually sought to collapse the distinction—and from both sides. Fish no longer holds (if he ever did) a straightforward reader-response view, and he has argued that we have no choice about taking intentions into account when we read texts, for texts would make no sense considered from any point of view other than one that regards them as meaningful attempts to say something—in this sense we are all, like it or not, intentionalists.[25] And the strict-intentionalist Hirsch, clarifying his position, has recently said that we have no choice but to assess interpretations in terms of our own responses, and *not* against an always deeply problematic attempt to reconstruct what the author intended.[26]

24. The main reason for this is that the worst consequences of the positions called "relativist" can only be generated by a prior (and unnecessary) commitment to what Barbara Herrnstein Smith calls "objectivist axiology": the strong view of objective truth sometimes associated with naive or common-sense realism. Her version of the relativism specter is a mocking progression of dangers. *See* BARBARA H. SMITH, CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY (1988). Smith's account begins with charges of self-contradiction and fallacy, moves through "fatuous forbearance" and "Panglossism and status-quoism," and ends with "the breakdown of law and morality" and, therefore, "the Gulag, the Nazi death camps." *Id.* at 152-3. Her book's main point, shrewdly argued, is that noting the presence of contingency or variability in judgment—including interpretive judgment—does not lead to this gallery of horrors. It leads to better judgments.

25. Fish, *Play of Surfaces*, *in* LEGAL HERMENEUTICS, *supra* note 1, at 299.

26. Hirsch, *supra* note 20, at 56-7.

These thinkers might see themselves as forcing the choice rather than collapsing it, but such a view is inaccurate. Fish and Hirsch doubtless disagree on many issues, but in these recent clarifications of their views they both appear to agree that interpretation is something we do with texts, and that intentions of the author are relevant in some sense to this enterprise. Once we admit intentions, of course, the question is no longer "formalist or intentionalist?" but instead "which intentions, and why?" The notion of *relevant intention* thus acquires increasing importance, though perhaps with no attendant increase in clarity. (Why relevant? To whose ends? By what reckoning?) Nevertheless, this convergence suggests a more convincing general account of interpretation than any of those mooted by the confirmed intentionalists or formalists, an account that attempts to define and incorporate notions of context, including the context of intention. The precise boundaries of these contexts may prove difficult or even impossible to place, of course, and such a theory may provide no more than some rules of thumb. But it would bypass the limitations of the posed forks.

This theory will be sketched in Section III. A more immediate concern is what such a theory can say about the analogy argument. Can we have a theory that specifies relevant intentions for law and different ones for literature? Or will the similarities that remain in such a theory be so trivial—the shared words "text" and "interpretation," for example, but little more—that the many differences will obviate it? To appreciate the depth of these issues, and with the theoretical ground now cleared of false choices, we must examine in more detail some influential versions of the analogy argument as it arises in legal theory.

II. ANALOGIES AND DISANALOGIES

In his influential paper "How Law Is Like Literature," Ronald Dworkin makes one of the broadest possible appeals to the pro-analogy argument in the recent literature, an appeal that continues in his more systematic studies of judicial interpretation in *Law's Empire*.[27] The law, he says, is like a chain novel: successive interpreters of the law are like the composers of a novel whose discrete chapters are written, through time, by different authors.[28] This image captures a sense shared by many legal theorists that the interpretation of law (which, unlike literary criticism, produces binding results that can alter the relevant canon) is a shared authorial enterprise and not a relationship of critics to (original) author. The novel is put in motion

27. RONALD DWORKIN, *How Law is Like Literature*, *in* A MATTER OF PRINCIPLE 146 (1985). This paper is a re-working of Dworkin's *Law as Interpretation*, 9 CRITICAL INQUIRY 179 (1982). *See also* RONALD DWORKIN, *On Interpretation and Objectivity*, *in* A MATTER OF PRINCIPLE 167; RONALD DWORKIN, LAW'S EMPIRE (1986).

28. DWORKIN, *How Law is Like Literature*, *supra* note 27, at 158-62.

by a first author, and the first chapter may determine many aspects of the resulting novel by introducing characters or themes, but the first author has little control over what exactly happens thereafter. Subsequent authors feel themselves bound to honor the intentions of the previous author—but only up to a point, the point at which they decide how the novel can best go forward as a whole. New chapters have to be written in a manner that both preserves continuity with what already exists and advances the story in a positive way.[29]

On the basis of this analogy, Dworkin identifies two constraints that operate on the efforts of subsequent authors in the chain novel and, by extension, on the efforts of legal interpreters. First, there is a notion of "fit," a constraint that preserves the coherence and consistency of the whole text. Fit works, in other words, as an anticipation of completeness—a sense, shared by all contributors, that the end product will be a complete whole and not an incoherent patchwork of unconnected stories. But since fit is not enough to guarantee that the text will be the best it can be, Dworkin adds a second constraint called "best light" or, sometimes, "the aesthetic hypothesis": the requirement that a given text be interpreted (and added to) so that it is *the best example possible* of the "form or genre to which it is taken to belong."[30]

The aesthetic hypothesis and the importance of genre are clearly essential in literary criticism. We do not ordinarily assess a novel by Proust in terms of its ability to sustain nail-biting suspense to the last page, nor ask of a Shakespearean sonnet that it contain a rousing patriotic message. To do so would be to make an elementary genre mistake that would lead our interpretations astray. I say "ordinarily" because in literary criticism—unlike in law—we may indeed sometimes assess a work this way, for the sheer interest of it, or for the possible new light it will throw on an old and much-interpreted text. (We might also do it in jest or for satirical purposes, thus using the gap between ordinary and extraordinary for other purposes.) We may want to call genre-bending interpretations mistaken, but in literary criticism the most we can typically say is that they fail to take account of the whole text or, more damning, that they are uninteresting.

Such counter-genre interpretations are, at any rate, not common. The aesthetic hypothesis usually is in operation (sometimes even in counter-genre interpretations, as that which is flouted). So in addition to asking

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29. An important ambiguity arises, however, when we try to decide who the relevant authors are. Lawyers arguing cases, judges deciding them, legal theorists writing and teaching them, and legislators making new laws seem all to be possible candidates for authorhood in this sense. Dworkin focuses attention on judges, but even here we might want to ask, for example, how judges at different levels of the court system relate their interpretations to one another and to the influential schools of interpretation. (I thank Todd Ducharme for this point.)

30. DWORKIN, *How Law is Like Literature*, *supra* note 27, at 149-54.

whether a work is complete or coherent, we also want to know whether it is a good representative of its kind. Indeed, according to Dworkin, this necessary interplay between fit and best light constitutes, in effect, a third constraint on the interpreter, namely, that the balance between them be honored—a balance governed, in Dworkin's example, by Quine's claim about a mutually adjusting "web of beliefs,"[31] or, according to Georgia Warnke, by something like reflective equilibrium.[32] When the three constraints are put into play in interpretation, they have the ability to render a reading "constrained and valid, even if it cannot be considered uniquely correct."[33]

But does the aesthetic hypothesis guide us in legal interpretation? Dworkin's claim is that it gives us something that other kinds of legal theory do not, namely, what he calls "integrity." When we ask not only whether an interpretation fits, but also whether it makes the law the best it can be, we add a necessary dimension to adjudication: we make it accord with basic moral principles that, in providing a fundamental normative structure, hold the law up. Without that structure the law has no legitimacy; and without integrity in adjudication, the law has no access to principle in its decisions. Law as integrity allows us to explain, then, why so-called "checkerboard" decisions should be ruled out, for they fail to take account of the moral status of persons and our conviction that status is important. For example, a law that allows abortions for women born in even years, but prevents it for those born in odd years, could be considered fair; it might even, more doubtfully, be politically satisfying to some affected groups. But it would lack integrity in Dworkin's sense because it would fail to join the law to some shared moral principles that underlie the project of community, namely, that rules concerning life and death should not be arbitrary the way lotteries or rote selections are.[34]

Warnke, for one, finds Dworkin's interpretive commitment initially encouraging. It suggests, she says, a new hermeneutic awareness among theorists of law. Yet Dworkin, the thinker widely held responsible for "the interpretive turn" in legal theory, lets the side down when it comes to discussing actual cases. As Warnke demonstrates, his discussions of *McLoughlin v. O'Brian* and *Brown v. Board of Education* indicate that Dworkin's hermeneutic commitment is, in practice, quite small.[35] In the first case, Mrs. McLoughlin sued Mr. O'Brian for emotional injuries arising from an automobile accident that injured her husband and four of her

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31. W.V.O. QUINE, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 20 (2d rev. ed. 1961). *See also* W.V.O. QUINE & JOSEPH ULLIAN, THE WEB OF BELIEFS (1978).
32. GEORGIA WARNKE, JUSTICE AND INTERPRETATION 70 (1993).
33. *Id.*
34. For further discussion of Dworkin's "integrity," see Denise Reaume, *Is Integrity a Virtue? Dworkin's Theory of Legal Obligation*, 39 U. TORONTO L.J. 380 (1989).
35. WARNKE, *supra* note 32, at 72-81.

children, resulting in the death of one. Mrs. McLoughlin was informed of the accident two hours after it happened, and her emotional shock began when she visited the hospital and saw the condition of her family.[36] Hercules, the super-judge of Dworkin's thought experiment (who has no time constraints and ample intelligence), decides the case by choosing from a ready-made list of interpretive options—i.e., competing thumbnail statements of what we think people have a right to recover for injuries. We choose one of these options, according to Dworkin, when we add consideration of what public morality will bear. But, one might object, selecting from this shopping list of choices is not interpretive adjudication, which is necessarily unable to force choices into such neat categories. Law as integrity might indeed demand reference to public morality, but that would involve sensitive and contextual appreciation of conflicting demands. A successful interpretation is one that resolves these conflicts in a plausible, if not final, manner. We do not, in other words, successfully interpret *Moby-Dick*—or anything else—by choosing from among a range of competing (and reductive) options.

The appeal to public morality is also not firm in Dworkin's theory. In *Brown*, the well-known segregation case argued under the Constitution's Equal Protection Clause, Hercules cannot let public morality hold sway. Why? Because the Constitution deals with matters of fundamental importance, and public morality may be divided or confused on such an issue. The decision therefore turns on an even more problematic appeal to "basic political values," values which are presumed to be more apparent to judges than to ordinary citizens. But what is the source of such values, assuming they exist? Dworkin cannot retreat to an impoverished Framers' intent position to secure them, so he must refer—rather hopefully, it seems to me—to the glue of society and the importance of law's legitimacy. But to make this move is to enter the realm of political theory.

Let me be clear: Dworkin's interpretations of these cases may be valid. There is, however, nothing hermeneutic about deciding them in these ways, and the chain-novel criteria of fit and best light seem no longer much in evidence. Warnke concludes, correctly, that Dworkin has sacrificed the most valuable aspect of an interpretive theory, namely its ability to educate both the interpreter and his or her community, not merely to recapitulate the existing community norms. Perhaps even more obviously, there is no explicit attention to an analogy argument here. The aesthetic hypothesis, when applied to law, is no longer aesthetic in any meaningful sense: the sense of "best" we appeal to in making the law the "best it can be" concerns standards of public morality or political value, and it is at least

36. The point of dispute in the case was the question of delay. The precedents, in which plaintiffs recovered damages for emotional injury, all involved shocks that happened at the scene and time of the accidents.

unclear how these standards are related to the kind of aesthetic criteria that would govern a literary judgment. Since the point of asking the analogy question is that law is not usefully thought of, even trivially, as just another genre beside the romance or the epic, the pro-analogy position has not been sufficiently defended by the thinker many consider its foremost proponent.[37]

These drawbacks may not be the most obvious ones. For critics who simply see too much making and not enough finding in Dworkin's theory, the image of the chain novel is vastly overstated, and Dworkin's interpretive constraints dangerously misleading. Consider: a chain novel has what Jessica Lane calls "a thrust toward closure," something which the law, by definition, lacks.[38] There is also some measure of agreement in literary criticism about the formal values associated with a given genre. Although this agreement is often overstated by outsiders, it is clear that the prospects of agreement on the formal values governing legal interpretation—the values of public morality—are much worse. It is not even certain that there exists genuine commensurability between text and reader in this kind of interpretation (hence the interminable disputes about Framers' intent). In short, Lane argues, Dworkin's version of the analogy argument must fail: law and literature have different needs, impulses, associated practices, and communities.

Perhaps the most important of these differences concerns the relative power of literary and legal interpretations. Because of the social practices and structures of the law, its interpretations are demonstrably binding in a way barred to a literary critic. As Fiss says: "There can be many schools of literary interpretation, but . . . in legal interpretation there is only one school and attendance is mandatory. All judges define themselves as members of this school and must do so in order to exercise the prerogatives of their office." More bluntly, "even if the rule of law fails to persuade, it can coerce."[39] And this recourse to coercion, though it says nothing in itself about the correctness of an interpretation, does ensure its binding quality. Fish, emphasizing the presence of interpretive communities, argues that there are appeals to finality and authority in literary interpretation, too—and he is right. It is also the case that defenders of the disanalogy

37. Those who defend the broad continuity of text seem to me to underestimate this point; if law were just another genre (that is, of literature in the broad sense), it would not pose its special kind of interpretive difficulties. It is precisely because law comes wedded to social power, especially the "legitimate" use of force, that stopping at an identification of generic difference is not enough. Such a position leaves all the hard questions unasked.

38. Jessica Lane, *The Poetics of Legal Interpretation*, *in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 269-84. Lane gives an effective overview of Dworkin's recent work on legal interpretation. She is especially convincing in her demonstration that the superior rationality of the Hercules model (in *Law's Empire*) is inconsistent with the chain-novel analogy developed in *How Law is Like Literature*, *supra* note 27.

39. Fiss, *supra* note 7, at 234-35.

tend to overstate both the uniformity of consensus in law and the lack of consensus in literary interpretation. Yet despite all this shading, there remains a clear difference: in law, an interpretation can be backed by state power—thus, if there is not a single right answer, there is at least a single answer.[40]

It is because those two things are distinct, however, that objections of the kind that worry Fiss are able to get a foothold in legal theory. If an interpretation could be binding but not correct, is the door not open to "political realist" theories of law that would see it as the mere expression of political power? Fiss himself drives a wedge between the binding character of certain judicial decisions and their correctness. *Plessy v. Ferguson* and *Brown v. Board of Education* are both, in his view, "objective" in that they were arrived at under the practice-sanctioned constraints—or "disciplining rules"—of legal interpretation. Nevertheless, only *Brown* is correct, and it, in effect, overturned *Plessy*. According to Fiss, *Plessy* could be incorrect for a variety of interpretive, or internal, reasons: the judges may have failed to understand the authoritative rules correctly, or they may have misapplied them. But the decision may also be incorrect, says Fiss, in terms of external reasons—that is, moral, religious, or political reasons not strictly related to law. Yet Fiss never satisfactorily clarifies the relation between these realms, or the issue of how the second kind of reason can be built into the "objective" disciplining rules of legal interpretation.

What does it mean, after all, both to follow a rule and to misapply it? Or to follow it even while misunderstanding it? Fish's main objection to the Fiss account is that this notion of disciplining rules, supposed by Fiss to secure objectivity (and thereby ward off the specter of nihilism), is itself incoherent, and that the language of objectivity is simply unhelpful.[41] Fish's notion of "doing what comes naturally," Wittgensteinian in inspiration, is simply that there exist practices of various kinds, including the one we call legal interpretation, and that these practices carry on perfectly well (at some level) in terms of our various needs and interests. An exhaustive set of rules for a practice is a logical impossibility, and any set of formal rules—which would really be guidelines or rules of thumb—can only ever be articulated by abstracting from a practice that already works and with which we are already familiar: that is, a practice about which we have a high degree of "tacit knowledge."

40. Of course, this characteristic may hold more in theory than in practice, where lower courts may depart from the "single answer" as a result of incompetence or interpretive differences. While, again in theory, such "errors" can be remedied through the appeals process, "corrections" often do not occur because of limitations on the resources of the parties, restricted access to competent counsel, and so on. (I thank Todd Ducharme for this point.)

41. Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984), *reprinted in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 251-67.

Game analogies are popular in making this kind of point, in the manner of Wittgenstein's *Philosophical Investigations*.[42] The rules of chess are not themselves the game of chess, and memorizing the rules will not make me a good player—indeed, may not make me a player at all, unless I understand as well some of the "unspoken" aims and guidelines of chess. Or consider the game of baseball: as coaches, we might give a rookie pitcher the excellent advice to "throw strikes."[43] As a rule to constrain his conduct on the mound, however, this directive will prove worse than useless. The simplest strike is a fastball through the zone, and the rookie pitcher, following our rule, serves up a succession of heaters that get rocked by quick-swinging hitters. Following the rule, he is nevertheless not playing the game, or anyway not "really" playing it. The issue here is not only that he has to know in advance what a strike is and how it fits into the game; he must also know some of the subtle and deceptive ways to get strikes—sometimes, for example, the only way to get a strike is to throw the ball outside the strike zone. He must further understand crucial exceptions and the situations that call for them: the pitch-out, the intentional walk, the retaliatory beanball. The rule does not constrain anything; it is useless as a rule—too general, uninformative, misleading.

Fish's argument, then, is valuable not as a statement in favor of political interpretation, or as a manifesto of legal nihilism (or realism), but as a reminder that *specifying* rules of interpretation is a mug's game. By calling attention to the degree of practice-specific knowledge operative in interpretation, he also manages to challenge the disanalogy Fiss was keen to maintain. The difference between law and literature is not that there are objective interpretations in one and not the other, or that there is an available notion of correctness in one and not the other. Fish even challenges the widespread notion that literary interpretation is not binding or authoritative, and does so consistently by drawing attention to institutional features of the practice that govern such interpretations: publication record, personal reputation, and explicit hierarchies of universities, journals, and presses. That there is one answer in law does not mean that it is the right answer; and that there is no right answer in literary criticism does not mean that there is no answer. In short, it is not nihilistic to claim that all meanings are practice-based. The theoretical task is to show how that meaning is generated, and which features among the many possible ones are considered, by practitioners, to be relevant.

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42. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1953).

43. Bill Lee, the eccentric Boston Red Sox and Montreal Expos pitcher, reported in his memoirs that he once had a dream in which Tom Landry, then coach of the Dallas Cowboys football team, appeared and gave him just this imperative. My baseball example is clearly also derived from Fish's basketball example, where the given rule is, "Take only good shots." Fish, *Fish v. Fiss*, *in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 254-55.

This sort of claim is anathema to Posner's strict division of law and literature and to his related worries about a creeping contagion of skepticism in law. Indeed, it appears—in Fiss and Posner, anyway—that the motivation to advance a disanalogy argument comes from the largest specter of them all, the destruction of "objective" meaning. Hence Posner's two-step theoretical commitment, to be what he calls a New Critic (or formalist) in literature and what he calls an intentionalist (which may in fact imply a kind of originalism) in law. The division is predicated on a sense that the criteria of meaning or success diverge in literature and law, and Posner is distinguished as one of the few thinkers who devotes explicit attention to the question of analogy. Literature, he says, is governed by values of aesthetic pleasure, while law is governed by values of truth. A legal text is like a message, something that in principle we can ask to have repeated. Like a command or a communication, it is not suggestive, ironic, ambiguous, multifaceted, or multilevelled—all things we might want, or even demand, of a literary text. It has a single meaning, and we can only discern that meaning by attending to the intentions of its authors. Legal interpretation is akin to asking of an indistinct or distant interlocutor, "How do you mean?" Hence Posner's reductionist position: "At the level of message most works of literature are clear," he says, inaccurately; "What makes them unclear is that we are not interested in staying at that level. But the message level is the only interesting level of a statutory or constitutional text. That is why the Peller-Tushnet interpretation of the age-35 provision in the Constitution seems obtuse rather than ingenious."[44]

This view has an attractive common-sense feel, but it is misleading. As mentioned before, the difference between straightforward and ambiguous texts lies not in features of the texts themselves, but in features of the contexts in which the texts are advanced and understood. The crucial difference between law and literature may lie precisely in this: not that their relevant central texts are metaphysically different, but that their contextual practices are constrained in different ways. It is precisely because we desire stability and finality in legal interpretation that we insist on single answers to questions of interpretation; by the same token, desiring novelty and innovation in literary criticism, we prize new and plural answers to the question of what a given text means. Feeling the stability of legal interpretation threatened, a Posnerian might balk at the very presence of interpretive theory in the realm of law. These interventions from literary theory seem to represent, after all, a challenge to the law's status as binding. That status resides, however, not in the texts of law, but in the practices of using those texts, and no general theory of interpretation has

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44. POSNER, *supra* note 2, at 242.

the power to call that entire practice into question.[45] Yet this, after all, is what worries Posner and Fiss about the rise of deconstruction in literary theory and the related—if it is related—rise of critical legal studies in law. The danger is overstated. Such "academic" disputes do not overturn practices by themselves. Deconstruction no more undermined the simple act of reading a book on the beach than CLS has undermined the myriad acts of judges and lawyers.

Still, there is a challenge here, and to be too sanguine about the ineffectiveness of theory is to collapse into Fish-like reductionism. Legal theorists worry about the challenge of skeptical theories of interpretation because it matters a good deal whether their practice is stable and in good working order. Nobody's life would be lost if the practice of literary criticism were suddenly to collapse; but a collapse of the system of legal interpretation, especially that of constitutional interpretation, could easily wreak social havoc. Defection from the republic of letters does not compare in seriousness with possible defections from the Republic if the law were shown to lack legitimacy. So it is crucial that a theory of legal interpretation take account of these practice-specific demands of law: its needs for a final adjudicator, a final answer, stability and commonality, and so on. Literary interpretation has different needs, and theory must be equally sensitive to them. It follows that if practices diverge, their products do as well. What is denied here is a third claim—a claim usually assumed, but not defended, by writers on these issues—that divergent practice and divergent product are equal to divergent texts. If true, that claim might indeed defeat the prospect of a general theory of interpretation. But it is not true.

To get a clearer sense of this, consider the following tables of elements. The first expresses some relevant features of the practices of legal and literary interpretation, while the second expresses some features of typical interpretations offered within those practices. In the practice table, the terms are divergent answers to the same implied questions; the second table is merely an attempt to articulate some relevant features of each kind of interpretation.

45. For a clear statement of the position that textual status is always conferred by contextual features of reading, see Walter B. Michaels, *Against Formalism: Chickens and Rocks*, *in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 215-27.

LAW		LITERATURE
	Practice	
hierarchy of courts		parallel and multiple authorities
binding precedent		novelty
commonality		individuation
stability		upheaval
regulation		proliferation of possibilities
coercion		persuasion
truth?		pleasure?
one (right?) answer		no (right?) answer
	Interpretation	
utterance		art
information		pleasure
governance		complexity
consistency		unity
publicity		coherence
authority		instruction
legitimacy		thematic commitment
constraint		subtlety

Notice that most of these features appear to support a disanalogy position. How could two such different practices, with such different end products, be relevantly linked? "At a sufficiently high level of abstraction," says Posner, articulating a view shared by many, "the interpretive tasks in the two fields may seem to merge. But as soon as we get down to cases the commonality of the legal and the literary inquiries disintegrates."[46] Apart from an implicit disregard of abstraction, a lawyer's forgivable preoccupation with cases, the failure of this statement is that the general theory of interpretation employed by Posner is too unsophisticated to give the commonality between law and literature its due. I suggested at the beginning that law would prove to be utterly unlike literature, and yet utterly like it. Here we see the first part of that apparently paradoxical position.

This observation is, however, only part of the story. By taking as his targets overstated pro-analogy arguments, like Sanford Levinson's crude statement about the multiplicity of Constitutions being comparable to the

46. POSNER, *supra* note 2, at 261.

multiplicity of *Hamlets*, Posner does the debate a disservice.[47] We are forced to an extreme where we must choose between saying that reading law is either just like reading literature or nothing like reading literature. Operating with an implicit but undefended standard of "aesthetic judgment"—a standard even less nuanced than Dworkin's pro-analogy version—Posner naturally rules law out of interpretive court. So committed before the fact to the disanalogy, it is impossible for him to canvass a theory of interpretation that would usefully include both legal and literary texts. I will now attempt to bolster the analogy argument with a more sympathetic version of such a theory.

III. TALKING TEXTS

A general interpretive theory allows us to assess, precisely and explicitly, the limits of the analogy between law and literature. Such a theory is best understood as a descriptive account of the presuppositions of interpretation—not rules in the prescriptive sense, impossible for reasons already mentioned, but a reconstruction of what goes on when one attempts to say what a text means.[48] In the realm of law, this hermeneutic emphasis on practice-based presuppositions has the effect of moving us beyond what Alan Wolfe has called, in a felicitous phrase, "algorithmic justice."[49] But whether the raising of a practice to theoretical clarity has any normative significance, and thus recovers a prescription after all, is another question. I will address it in the final section of this paper.

The model of interpretation I favor is Gadamerian in origin. Its most obvious and immediate benefit is an ability to overcome some of the

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47. *See* Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 378 (1981), *reprinted in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 166. Levinson's disservice to the debate is to take interesting notions—e.g., Rorty's distinction between strong and weak textualists, and the literary theoretical claims about textual indeterminacy—and to make them into a dogmatic position. So, for example, his argument that there is no uncontroversial set of public values does not entail (as he suggests) that there are no public values at all. Likewise, "no determinate textual meaning" is not equivalent to "no meaning at all." Gerald Graff's reply to Levinson makes the obvious point that *at the level of practice* the problem of meaning is no problem at all: our practical ability to do things with words is unimpaired by a failure to meet impossibly high standards of determinate meaning. Gerald Graff, *"Keep off the Grass," "Drop Dead," and Other Indeterminacies, in id.*, at 175-80. I will have more to say on this point below, but for a helpful discussion of these issues, see Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997 (1994).

48. Gadamer's *magnum opus, Truth and Method*, is the basic text of this view. HANS GEORG GADAMER, TRUTH AND METHOD (Garrett Barden and John Cumming trans., 1975). For a detailed treatment of its relevance to legal interpretation, including further citations, see David Couzens Hoy's excellent overview, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985), *reprinted in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 319-38. *See also* Gerald L. Bruns, *Law and Language: A Hermeneutics of the Legal Text, in* LEGAL HERMENEUTICS, *supra* note 1; David C. Hoy, *Intentions and the Law: Defending Hermeneutics, in id.*

49. Alan Wolfe, *Algorithmic Justice, in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE, *supra* note 21, at 361-86. But it is not enough, *pace* some critics (notably Terry Eagleton), to overturn law's status by drawing attention to an imagined desire for algorithm. Posner makes this point especially well, and uses it to bolster his objectivist position. What neither side of the choice makes clear is that, as I argue in here, we can still have validity without method.

traditional disputes associated with the forks discussed in Section I. The conversational features of Gadamer's model—the associated notions of horizon, horizon-fusion, and the third language—are the keys here. Instead of accepting the choice of emphasizing one side or the other of the interpretive process, this model attempts to bring both into play, and thus transcends the extremism of the debate between New Critics and reader-response theorists. It also offers a more sophisticated account of the interpretive weight owing to authorial intent: it suggests that the text-in-context must be considered as itself the object of interpretation—an act with its own contextual limitations.[50] Finally, it makes room for reason and truth in interpretation without endorsing a strict or absolutist conception of transcendental justification.

The process of interpretation is represented here as the contact between two spheres or horizons—mine as interpreter, and the text's (or text-analogue's) as something separated from me in time or cultural distance. Interpretation involves, then, an attempt to "fuse" these two horizons by rendering the claims or import of the text into terms we can understand. But this model of horizon-fusion is indeed only a *representation*, a fact which is often forgotten. In interpretation, we do not perform the impossible feat of leaping beyond our own horizon; instead, we find the text within it as something that needs to be understood—a sort of lump of foreign matter, or "xenocyst"—and so extend our horizon's boundaries in the act of understanding.[51] Understanding involves finding a place for this alien lump in our already existing sphere of meaning. Coming to understand an alien or distant text is not a static process. It calls for transformative effort, and so the reader-in-context does not remain unchanged by an encounter with the text-in-context. Gadamer's suggestion is that interpretation, like true translation, *creates a third language*, and this notion captures the ability of the interpretive process to alter both reader and read. The conversational nature of the process is demonstrated in interpretation's imperatives to honor what Dworkin called "fit"—the anticipation of completeness. A valid interpretation is one in which we, as sensitive interpreters, attempt to take account of as many elements of the text as possible. We do so by, among other things, playing parts off against the whole, matching elements of the reading to other elements in a way that strives for some kind of unity.

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50. Hoy, *Intentions and the Law*, *supra* note 48, at 179-82. Gadamer does not, however, believe that intention is recoverable as something completely *outside* the text. The emphasis on context—which is discerned by looking at other texts—means that we are never, in the strict sense, outside the text. But that does not mean that the significance of communication, the intention to say something through words, is lost.

51. This point is surprisingly often mislaid, even by discerning commentators. *See, e.g.*, Fish's chiding comments for Fred Dallmayr and E.D. Hirsch in *Play of Surfaces*, *in* LEGAL HERMENEUTICS, *supra* note 1, at 305.

But is this all that constitutes validity in interpretation? Gadamer emphasizes, in well-known passages of his work, the role that prejudices or "fore-judgments" play in interpretation and understanding. Indeed, the conversation between us and the text is impossible without them. According to Gadamer, we "talk to" the text in the sense of implicitly asking for support of a given reading, a reading that puts our fore-judgments into play—meaning that we implicitly offer them up for critical assessment. The text "talks back" to us in the sense of providing internal evidence that a proposed reading is, in both senses, too partial—too limited, not complete enough, and/or too overdetermined by our prejudices. But no act of interpretation can get off the ground without the presence of fore-judgments, for they provide the background of assumptions and presumptions of meaningfulness that make understanding possible. We could not even begin talking to the text, nor take any of its evidence as replies to our interpretive enquiries, unless the fore-judgments defining our horizon of concern were present. Hence Gadamer's celebrated dismantling of the Enlightenment "prejudice against prejudice," and hence, too, his adoption of Heidegger's notion of the hermeneutic circle.[52] Putting our prejudices into explicit contact with the text does not necessarily mean overdetermining the text, because this contact is itself transformative. We can only begin to understand on the basis of what we now believe; but coming to understand inevitably alters what we believe, and this in turn will affect our acts of understanding themselves. The value of the process is expressed in the Heideggerian slogan, equally applicable to Gadamer, that the important thing is not to get out of the hermeneutic circle, but to get into it *in the right way.*

A third element, or feature, of Gadamer's descriptive account of interpretation is the central role played by *Wirkungsgeschichte*, or the history of effects, accumulated through time around a text. This history, sometimes misleadingly called tradition, is crucial both in an obvious sense (previous interpretations of a given text are relevant to our own attempts at understanding), but also in the sense that *Wirkungsgeschichte* is another way of expressing the context that determines our horizons of concern when approaching the text. It includes prejudices we might think of as specific to us, but which are, in fact, legacies of a long history of communal interaction and agreement. (This characteristic is one obvious sense in which we are determined by where we happen to stand.) It also includes interpretive legacies—theoretical or disciplinary commitments,

52. Heidegger's discussion of the hermeneutic circle is at sections 31-33 of MARTIN HEIDEGGER, BEING AND TIME (John Macquarrie and Edward Robinson trans., 1962). The hermeneutic circle—where pre-understanding is confirmed and/or modified by acts of understanding, and so necessary for beginning the task of understanding—received earlier discussion in nineteenth-century classics of hermeneutic theory, notably in the work of Schleiermacher.

practice- or community-specific norms and interests—which will guide our acts of understanding and prevent them from "going off the rails." In this sense, the precise limits and contours of the reader-in-context are set by a history, or tradition, in which we find ourselves. Likewise for the text-in-context, which is determined both by a history of interpretive efforts and by the kinds of things we are able to hear the text saying. I said that the Gadamerian picture overturned the intentionalist/formalist debate because it took account of authorial intention without sacrificing the authority of the text as object. No text is separable from its context—but the precise limits of that context, the line separating relevant intention from irrelevant, cannot be placed in advance, theoretically. The limits only become obvious within the process of interpretation itself, and are there affected in large measure by the kinds of things we, as readers, are already prepared to see as meaningful.

What, then, is the right way to get into the hermeneutic circle? It may be disappointing to find that there is no precise—no methodological—answer to this question. Gadamer mentions the need to cultivate sensitivity to the text, to approach it with "the right touch," to abandon the imperatives of method and cultivate the imperatives of understanding and truth. Yet this sensitivity is something one can only judge by entering, and becoming adept at, the practice of interpretation itself. There are no rules to guide us here; or, if there are rules, they are like the rules of a game that is much more complex than, and inexplicable solely in reference to, its rules. This inability to play the game except by entering the game, together with Gadamer's emphasis on *Wirkungsgeschichte*, have led some critics to view his interpretive model as excessively conservative. In a variation of the same charge, it has also been suggested that the theory is relativistic: it allows too many interpretive flowers to bloom, providing no definite standard of judgment. Because the circle described by Gadamer allows for no "transcendent" assessment of text or prejudice, this account of interpretation may indeed appear to leave everything as it is. The debate between Gadamer and Jürgen Habermas turns on this central concern, that Gadamer's model does not provide any room for genuine critique and is therefore conservative in orientation.[53] Without critique, the charge goes, we are caught in an endlessly spinning round of interpretation that finds

53. Habermas's specific objections begin with his review of *Truth and Method in* JÜRGEN HABERMAS, ZUR LOGIC DER SOZIALWISSENSCHAFTEN 251-90 (1970), where he suggests that Gadamer's interpretive model is devoid of critical possibilities because it leaves no room for assessing deception and force. A good English translation of Habermas's review, prepared by Fred Dallmayr and Thomas McCarthy, is found in HERMENEUTICS AND MODERN PHILOSOPHY 243 (Brice Wachterhauser ed., 1986), together with Gadamer's reply, *On the Scope and Function of Hermeneutic Reflection*. Habermas replied with several subsequent essays, the best of which is *On Hermeneutics' Claim to Universality*, *in* THE HERMENEUTICS READER, *supra* note 1, at 294-319, a fusion of two early papers published in *Inquiry*. This collection also includes excerpts from *Truth and Method*. *See id.* at 257-74. Hoy provides a good overview of this debate. *See* Hoy, *Interpreting the Law*, *supra* note 48, at 319-38.

only what it sets out to find, a quickly turning rotor that fails to engage a critical engine.

There are two options here. We may, as Gadamer has done in work subsequent to *Truth and Method* (especially in replies to Habermas), emphasize the possibilities of "immanent critique" in this model. Because understanding is a transformative process, from which we never emerge unchanged, the very act of interpretation is itself critical: in the search for a shared language of understanding, it alters both text and reader. Immanent critique assesses acts of interpretation by playing them off against provisionally fixed elements of our horizon. We continue the critical process by assessing new aspects of our horizon against other elements, now themselves taken to be provisionally fixed. In this way we are able to be critical without performing the allegedly impossible feat of getting out of our horizon of concern—an act akin to jumping over our own shadows.

But that may seem insufficient. We may instead begin looking for a transcendent pivot by means of which genuinely critical assessments can be put into play. Habermas's work can be fairly described as an elaborate and detailed attempt to find a transcendent fulcrum that is not plagued by the difficulties made obvious in critiques of earlier attempts, especially those associated with thinkers in the Cartesian-Kantian tradition.[54] His answer is, like theirs, a characterization of what it means to be rational; unlike theirs, it is reconstructed from basic competencies, especially those of communication, and therefore avoids the problems of ideality and formalism associated with, for example, the Kantian account. According to Habermas, this reconstruction demonstrates that rational beings share a "transcendental-pragmatic" anticipation of agreement in communication. That is, when we make a claim, we are implicitly asking for (and expecting) all rational persons to agree with it. This implication, obvious for Habermas in normative as well as descriptive claims, points toward a shared commitment to what is sometimes called the "unforced force" of the better argument. The presuppositions of communication—that we all are making arguments and are committed to being moved by superior ones—are modeled by Habermas in the "ideal speech situation." Though our actual communication often fails to be rational, in that it does not result in agreement, Habermas's claim is that the very act of communication commits us to the rational possibility that all disputes could be resolved by common reference to a superior argument. This possibility then acts as a

54. Habermas's extensive work on this project began systematically with the two-volume work, *The Theory of Communicative Action* (Thomas McCarthy trans., 1984-88) and continued, emphasizing its role in moral theory, with the essays in *Moral Consciousness and Communicative Action* (Christian Lenhardt & Shierry W. Nicholsen trans., 1990) and *Justification and Application* (Ciarin P. Cronin trans., 1993).

"regulative ideal" that can guide and assess the rationality of our actual debates and the legitimacy of the norms secured in those debates.

What do Habermas's criticisms tell us about the Gadamerian model's relevance to legal interpretation and the analogy question?[55] Is immanent critique enough to deal with a conflict of interpretations? If not, is the model of any use for legal interpretation, where conflict must be resolved? In other words, even though we might be inclined to agree that the general account is a useful description of interpretive acts *tout court*, disanalogy will ultimately outweigh analogy if this account fails to provide a decisionmaking procedure when competing and incompatible interpretations arise. The differences between Gadamer and Habermas are what move David Hoy to call the former an interpretivist and the latter a noninterpretivist, and make Warnke seek release from interpretive conflict in a Habermasian "rational" pivot.[56] Since legal interpretation cannot tolerate a plurality of interpretive options in the way literary criticism can, Habermas's criticisms and reforms may show the Gadamerian general theory to be just what Posner and Fiss suspected—a true but trivial account, emphasizing similarity on a highly abstract level, but one that breaks down similarity when it comes to cases. How fair is this point?

Conflict among interpretations has always been a source of worry for legal theorists because it seems to threaten the possibility of a unique result, a strong practice-based desideratum. The real problem, however, is that conflict threatens the justifiability of any actually generated unique result. We can easily imagine, and use, mechanisms that achieve unique results but that nevertheless fail to justify their answers as uniquely right. So it is not simply that law cannot tolerate plurality in result; it cannot tolerate plurality in interpretation either, if that plurality casts aspersions on the legitimacy of results, however unique and enforceable they are. Hence, the conflict that concerns us here is not so much conflict concerning rival judicial decisions, since that kind of conflict is in practice ruled out by, among other things, a determinate (if imperfect) decisionmaking procedure that includes the hierarchy of courts. The conflict at issue really boils down to differing (descriptive) views of what judges are doing when they decide cases, and therefore what status those decisions have. Confusion enters when these descriptive conflicts are run together with normative

55. Paul Ricoeur's interpretive theory, which goes beyond the Gadamer-Habermas debate by, in effect, appropriating elements of each in a highly original way, may represent a superior position to either. For Ricoeur's defense of "critical hermeneutics," see, for example, *Interpretation Theory* (1976) and *The Conflict of Interpretations* (1974). Ricoeur attempts to reintegrate "method" with "truth" and thus build a critical pivot for interpretation in the form of what he calls "the dialectic of suspicion and recovery." For a short and accessible statement of this program, see Paul Ricoeur, *Hermeneutics and the Critique of Ideology*, *in* HERMENEUTICS AND MODERN PHILOSOPHY, *supra* note 53, at 300-39.

56. Hoy, *Interpreting the Law*, *supra* note 48, at 323; WARNKE, *Habermas and the Conflict of Interpretations*, *in* JUSTICE AND INTERPRETATION, *supra* note 32, at 87.

theories concerning what the law should be, and what judges should be doing.

Dworkin's recent work provides an example of this. The background struggle in *Law's Empire* is between a form of legal positivism, characterized (or recast) as the interpretive theory of conventionalism, and Dworkin's own constructivist theory, law as integrity. Though his presentation of the positivist case may indeed be weak and skewed, as some commentators have suggested, this conflict illustrates an important distinction.[57] Dworkin argues that when judges disagree about law, the issue is not always one where shared rules have been differently applied to the same matter, or where shared tests have (or have not) been met in particular cases; the issue may concern what law *is*. The disagreement may be, in other words, theoretical rather than empirical. The positivist claim that all judicial arguments are empirical in nature attempts simply to articulate the facts of law or previous decisions of legislatures and courts, and fails to account for such nonfactual controversy concerning law. The possibility of nonfactual controversy—the idea that judges may disagree not over facts but over philosophical commitment—undermines traditional theories of law based on the idea that law could be described semantically in terms of its truth conditions. It also provides the first point in favor of law as integrity, which allows for a plurality of interpretations as long as they are governed by the criteria, or constraints, discussed earlier.[58]

Yet, even if we accept Dworkin's motivation for the interpretive turn, even if we were to accept his view that interpretation is "constructive" rather than "conversational" (this choice is a false one—genuine interpretation is both),[59] we must still be disconcerted by the thought that disagreement remains a possibility. There is no reason to expect that two interpreters, each approaching the same material and each employing the constraints of law as integrity (or indeed of some other sensitive model), will always arrive at the same answer. And if they do not, how do we decide between the rival answers? It was at just this point, noticing that Gadamer's interpretive model could validate rival and incompatible interpretations, that Habermas was moved (as Richard Rorty has put it) to "go transcendental and offer principles."[60] It is only because Habermas

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57. *See, e.g.*, Brenda Baker's critique of *Law's Empire*, *Empire-Building*, 32 DIALOGUE 149-62 (1993).

58. I follow Baker's discussion here.

59. Notice that Dworkin's shying away from "conversational" models of interpretation is motivated by a desire to avoid debates concerning the intentions of temporally distant authors. His "constructive" model of interpretation concentrates on where I find myself, and on whether I can construct an interpretive stance I feel comfortable ascribing to myself. But since intention need not be the problem Dworkin apparently thinks it is, and cannot in practice be excised from a valid interpretation, there is no need to make this choice.

60. RICHARD RORTY, *Pragmatism, Relativism, and Irrationalism*, *in* CONSEQUENCES OF PRAGMATISM 173 (1982).

claims to find those principles in the structures of communication themselves that he is saved from the accusation of merely descending into positivism.

But it is also possible that Habermas makes his move too soon. Interpretations are never, after all, offered in an assessment vacuum, and we are rarely, if ever, faced with a choice between two (or more) interpretations that seem just as good as each other. (This was Warnke's point in challenging Dworkin's version of *McLoughlin v. O'Brian.*) Even in literary criticism, where plurality is arguably more desirable, there are strong personal and institutional pressures to find an interpretive "band" in which the acceptably interesting is separated from the unacceptably uninteresting. This part of the interpretive process is not governed only by factors peculiar to the act of interpretation itself, but rather by practice-based constraints that have to do, as always, with knowing how to play the game. The mistake often made in thinking about rival interpretations is to forget their embeddedness in such practices, which over time have developed ways not only of guiding interpretation but of deciding between different interpretations. In short, we give up on Gadamer's model too easily. Being in constructive conversation with the text is not something we do in isolation; it is something we do as members of a given community, whose shared goals and limitations govern our acts of interpretation as much as any goals or limitations we consider individual to ourselves.

Perhaps we give up on Dworkin's model too quickly as well: when we try to make the law the best it can be, we can only do so with reference to the moral and political values we think important to the community governed by the law. Since our sense of those values is an element of our interpretations, that sense too is available for assessment when members of the community try to decide whether our interpretations are any good. Awareness of contextual and institutional features of interpretation does not entail the absence of reason in our assessments. Any choice—as posed, for example, by *both* left-wing political realists like Roberto Unger *and* some extreme objectivists—between a miraculous harmony of reason and law and a cacophony of competing power claims is a false fork. We need not accept this account of the choices, or of the demand to choose.[61] The truth of an interpretation concerns *both* its "plain message" *and* its embeddedness within practices and institutions with determinate features

61. Hoy makes this point especially well in *Interpreting the Law*, *supra* note 48, at 324. For an accessible treatment of Roberto Unger's views, especially his political realism about the law, see his *The Critical Legal Studies Movement* (1983). Views like Unger's, which argue that law is little more than a set of institutional power plays, find themselves sharing diagnostic (though not, of course, prescriptive) commitments with some right-wing political realists in the strong objectivist school. *See also* CRITICAL LEGAL STUDIES (Allan Hutchinson ed., 1989).

(including ones of political and personal interest), for neither makes sense alone, and we cannot recover one without the other.[62]

Of course, this practice-based view of interpretation does not provide us with any definitive way to validate a given interpretation as objective or true, *if* those adjectives are taken to extend beyond the practice in question. *Within* the practice, however, many theoretical debates will concern precisely this question; the legacy of scholarship on law and literature is evidence of that fact. We have a practice called legal interpretation. What does it mean, and what status do its products enjoy? These questions exercise us because we want the practice to have a theoretical or rational sanction—we want it to be a legitimate practice, and not simply one with enormous but unjustified decisionmaking power. Yet, because there is another practice called scholarly debate, with its own set of ends and purposes (continuation high among them), there can be no *final* answer to these questions. As we will see in the next section, even those who claim not to be offering an answer cannot escape the round of statement and reply that marks the theoretical practice of philosophical debate.

It may be that the strongest benefit of seeing the limitations of any general interpretive account is a highlighting of the limitations of theory in general. There are those, like David Hoy and, arguably, Gadamer himself, who want to save the account from false assessment. It provides "heuristic recommendations," in Hoy's phrase, but not rules.[63] Since it was never intended to be systematic, rule-governed, precise, or normative, they argue, the account cannot satisfy demands that associate those features with a valid theory, as either necessary or sufficient conditions. Thus, it may succeed as an account, if not as a theory, once we surrender certain unrealistic aspirations presumably inherited from philosophy. But if the account is not a theory in this sense, how are we to explain (a) why it nevertheless seems to make cognitive claims, apparently redeemable via evidence or reflection, that interpretation has a certain and definite character; and (b) why it has an associated normative weight such that a reading that fails to exhibit such a character is in some sense invalid or incomplete?

These issues take us back to where we started, namely to the related questions of validity and status in interpretation. These questions were

62. To make this claim is, in some sense, to recapitulate Ricoeur's dialectic between suspicion and recovery: we note the pressures and limitations of institutions not to shut down further discernment of meaning, but precisely to make it possible. (I thank Matthew Parfitt for this point.)

63. Hoy, *Interpreting the Law*, *supra* note 48, at 325. Compare this view with Brice Wacherthauser's notion that hermeneutics provides the following "rules of thumb" concerning valid interpretation: comprehensiveness, semantic depth, inclusivity, and teleological structure (i.e., anticipation of completeness). Brice Wacherthauser, *Must We Be What We Say? Gadamer on Truth in the Human Sciences*, *in* HERMENEUTICS AND MODERN PHILOSOPHY, *supra* note 53, at 219-41.

raised by asking the analogy question explicitly. Can they also be solved by answering it equally explicitly?

IV. THEORY V. THERAPY

In an essay called "Rhetorical Hermeneutics," Steven Mailloux tells an affecting story of conflicting interpretations in a classroom situation. Noting the absurdity of a Defense Department interpretation of the 1958 Space Act ("We interpret the right to use space for peaceful purposes to include military uses of space to promote peace in the world"), he is dumbfounded to find a student disagreeing. As their conflict escalates, he finds to his chagrin that he possesses no knock-down way of defeating what he regards as a false interpretation. "It was at this point," he says, "that I felt the 'theoretical urge': the overwhelming desire for a hermeneutic account to which I could appeal to prove my student wrong. What I wanted was a general theory of interpretation that could supply rules outlawing my student's misreading."[64] It is probably obvious from the title of his essay that Mailloux thinks the theoretical urge is one that cannot be satisfied. His scheme for "rhetorical hermeneutics" is a non-foundational pragmatist account that emphasizes persuasive ability within a given institutional setting or context.

By acknowledging his desire, Mailloux is, in common with other thinkers of recent vintage, in the business of trying to cure us of it. We must surrender the wish for a knock-down theory of interpretation, he suggests, complete with explicit rules, that stops disagreement with finality. But the posed choice between theory and therapy represents only the latest of forks in contemporary interpretation theory. The attendant specters are easy to characterize. If we choose theory, we will skew our practices (and our understanding of those practices) as we worship before a false god; we will be blind to the rhetorical, institutional, and political elements of interpretation, and so fail to see the most important influences on what we are doing. If we choose therapy, on the other hand, we will surrender any claim to interpretations that can be called valid, true, correct, or objective; we will never overcome disagreement, and we will descend into a bottomless squabble of institutional forces. If we are very worried, we could go further and raise the specters of nihilism and relativism, perhaps not bothering to define them, and just suggest that anarchy will be loosed upon the world. Everything will be as good as everything else, and so (what does not actually follow) nothing will mean anything anymore.

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64. Steven Mailloux, *Rhetorical Hermeneutics, in* INTERPRETING LAW AND LITERATURE, *supra* note 2, at 345. Another version of the "therapeutic" position is given by Steven Knapp and Walter Benn Michaels in their response to Hoy's hermeneutical position. *Intention, Identity, and the Constitution, in* LEGAL HERMENEUTICS, *supra* note 1, at 187-99.

As before, the choices—and the consequences—are rarely so stark. The theory of interpretation discussed in Section III does not, apparently, have the knock-down status associated with the "theoretical urge." It has, moreover, no strict rules that attempt to guarantee validity and rule out misreading. On the contrary, it is a theory that emphasizes precisely the institutional, contextual, and historical elements of interpretation, while insisting at the same time on the importance of the intentions and context of the work interpreted. It is a theory not in its generation of precise rules, but in its attempt to say what goes on in the practices of interpretation. Even Fiss, when he defends "disciplining rules" or "professional grammar" in interpretation, does not attempt to articulate them in detail. That is a matter for the practice itself. (To that extent, there is no conflict between Fiss and Fish: Fish does not deny that you can have rules of basketball; he just denies that you can have them, complete and before the fact, to define the practice.) And from the other side, Fish's emphasis on institutional elements in interpretation—the fact of interpretive communities—is distinctly *not* intended to make interpretation a bottomless pit of disagreement: some interpretations will be ruled out as uninteresting or simply not sufficiently accomplished.

Both theorist and therapist, in other words, are attempting to say what goes on in interpretation. Both are making claims about the status of certain interpretive practices. If one were inclined to be reductive, one could say that the therapist is just another theorist: he or she intends claims about interpretation, including the claim that we cannot have a theory of interpretation, to be cognitive. If they can be redeemed at all—that is, if the therapist can be right or wrong, accurate or inaccurate—then therapy is indeed theory in some basic sense.[65] Or, like Barbara Herrnstein Smith, one could distinguish theory from the narrower desires of "axiology": the precise rules and discussion-ending fixed points of human rationality that were, and are, supposed to be the only reliable guides of judgment.[66] The real conflict here, it seems, is a disagreement about what the law is, and whether legal theory has any bearing on the law. Therapists incline to the view that the law is "a surface play of forces," a social practice that has no grounding in metaphysical truth or objective essences. Theorists allegedly cling to the view that the law is in the business of securing objectively true

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65. Hoy makes this point, that even therapists are theorists—though in some weaker sense than that for which they attack others. Hoy, *Intentions and the Law*, *supra* note 48, at 173.

66. SMITH, *supra* note 24. Smith's claim is that certain Enlightenment tendencies, in particular those associated with Hume's "natural standard of taste" and Kant's "pure judgment," have twisted subsequent philosophical reflection concerning judgment, leading to, among other things, a debilitating fact/value distinction. Another version of the middle position in the current fork is STANLEY ROSEN, HERMENEUTICS AS POLITICS (1987), which criticizes Derridean deconstruction by emphasizing the inevitable political and institutional features of interpretation.

answers to questions of contract, liability, rights, and the like, answers which bind a society together in a strong way.

The choice is a false one because the positions are not so different from each other. But it is also false because it is possible for people to hold both positions, though perhaps not at exactly the same time. What posing the choice misses is the irony, in Rorty's sense, that we might be capable of exercising in this realm.[67] It also misses the ability to distinguish (again following Rorty) *causal explanation* of a practice from *justification* of it. As lawyers or judges, we will certainly argue for an interpretation's truth and will regard the decision reached by an appeal court as binding, even if we think it wrong. At the level of practice, in other words, we can all behave as realists about the law—just as, at the level of practice, we want our surgeons to treat us merely as bodies. In addition, at the level of a practice-specific theory—a theory called legal interpretation—we will attempt to say as clearly as possible what goes on in the acts of interpretation themselves. Only at the level of philosophy, the level of non-specific and justificatory theorizing, will we attempt to say what is "really" going on in interpretation.

It is this last level that creates the problems, for here it is possible to entertain alternative claims about status, including pragmatic or skeptical ones that appear to undermine the authority of the law. Posner, responding to Fish, says that "skepticism is an interesting and perhaps irrefutable philosophical stance, but, when pushed as far as Fish pushes it, one incapable of guiding action or interpretation."[68] Even if this is so, Posner's criticism misses the point. Fish's skepticism is not about guiding action or interpretation, and he is not worried (as Posner seems to think he should be) about "reconciling" his skepticism with the existing consensus in some interpretive communities. His skepticism concerns the *justification* of such consensus, not the fact of it, which he does not—and cannot—deny. Posner, by contrast, seems to think, like Fiss, that demonstrating the fact of legal consensus is tantamount to justifying it philosophically. Fish may be wrong about his skepticism, but here he is thinking more clearly than the lawyers.

When philosophizing, we have traditionally tried to join our accounts onto something called "the nature of reality" or "the world" or "the truth." When theorizing in the specific sense, we merely try to say as clearly as

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67. Rorty's "irony" is the ability to be of two minds about a practice and its theoretical description. RORTY, *The Contingency of Language*, *in* CONTINGENCY, IRONY, AND SOLIDARITY 3 (1989); *see also Private Irony and Liberal Hope*, *in id.* at 73. One version of this crucial distinction is thus that a pragmatist—favorite enemy of the objectivist—is pragmatic not about theory (in the practice-specific sense) but about philosophy; that is to say, his pragmatism is no threat to quantum physics, for example, but is a repudiation of certain philosophical attempts to hook quantum physics onto something called "the world" or "the nature of reality."

68. POSNER, *supra* note 2, at 263-64.

possible what is going on in a practice: we try to state the rules of the game, knowing that without the game there are no rules. And when practicing, we sometimes do our best only by, among other things, forgetting the kinds of doubt and uncertainty possible in the philosophical realm. Strong theorists—those who confuse specific theorizing with non-specific theorizing—think that practices flow from theories, and therefore that they need to bolster the law's objective security philosophically. Strong therapists think, by contrast, that theories flow from practices, and therefore that they need to construct theories of indeterminacy, institutional forces, and social pragmatism.

Once we break the strong connection between these realms, however—once we see the obscuring force of philosophy—the fork disappears. We should then be able to stop scratching where it does not itch. Of course, what we find is that even the best therapists, the ones who counsel leaving philosophy behind, cannot in fact leave it because their counsels are themselves philosophical. Self-contradiction may threaten; or else they are left remarking (like Rorty) that their general theoretical speaking is just another practice or (like Fish) that it is just something some lucky few of us get to do for a living—"nice work if you can get it." But the issue is not even as pressing as it appears. Philosophy has always also been meta-philosophy: reflection on the nature of reality is perforce reflection on the possibility of such reflection. Pragmatists like Rorty and Fish, like other "end of philosophy" or "against theory" thinkers, are merely continuing a long and honorable tradition.

Does this observation mean, as Fish is keen to maintain, that theory simply doesn't matter? Fish's views on the issue have certainly contributed to a small but vocal anti-theoretical pragmatism in some recent legal and literary theory.[69] And in the sense that no philosophical theory, however knock-down, will by itself alter a practice as complex as law, he is right. But in the sense that our philosophical commitments *will* alter how we view practices, and what status we grant the products of those practices, he is wrong. Pledging philosophical allegiance is not merely, as he suggests, of rhetorical importance. Finding no sanction for thinking a legal interpretation objective in the strong sense will certainly alter how we view our imprisonment in the county jail, for example, though it will not change the fact that we are prisoners. Furthermore, future acts of interpretation and lawmaking will certainly be shaped by philosophical views concerning the status of the acts of interpreters and lawmakers. In short, philosophy,

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69. *See, e.g.*, AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM (W.J.T. Mitchell ed., 1985); *see also* Steven Knapp & Walter B. Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 CRITICAL INQUIRY 49-68 (1987). Of course, philosophical pragmatism is itself a theory, but one whose central therapeutic claim is to undermine a certain kind of philosophical justification.

theory, and practice are on discrete levels, and there is no straightforward or precise—no axiological—relation between them. But there is a relation, and one of the purposes of philosophy is to try to discern it.

Where does this leave us with regard to the analogy question? As always, literature seems more tolerant of diversity and ambiguity. Competing theories of literature do not seem to cause the same outrage among literary theorists that competing theories of law cause among legal theorists. This difference may be a question of training, since many legal theorists are lawyers, not philosophers, and so may be less inclined to face vertiginous epistemological possibilities. If we were to introduce non-professorial readers of literature into the theoretical debates, we would quickly see similar confusion, reaction, and objection to antirealist or indeterminist theories. (Indeed, such a reaction was evident when a trend for theoretical innovation caused some elements of literary theory to trickle down into general reader consciousness.) In both realms, we can no more vouchsafe validity in advance than we can specify the rules of a complex game. To say that literary interpretation is more given to diversity than legal interpretation is to say something about a difference in goal, but it does not get us very far because it does not say what counts as acceptable diversity in either realm. We are left wondering if it is a difference in degree or in kind, or indeed whether those are the only choices. We are left, in other words, with all the interesting questions still unanswered.

I suggested at the beginning that the answer to the analogy question would be that law is utterly like literature, utterly unlike it, and that it hardly matters. Law is utterly like literature because it consists of written texts that are subject to interpretation. To the extent that a general theory of interpretation is valid—a limited but very important extent—law and literature are two instances of the same human activity: divining meaning from written artifacts. But law is utterly unlike literature in that the practices governed by its texts have quite different goals. This difference may mean that the texts themselves have a different character, but that claim is often misstated. There is no metaphysical or essential difference at work here: law and literature are not different in any "deep" (which is to say, practice-independent) manner. Attempts to identify such a difference, and answers to the analogy question based on such a difference, just foster confusion. The issue hardly matters, finally, in that the general theory of interpretation—and theory generally—does not have a locked-in relationship with practices of interpretation. Theory can affect practice, and vice versa, but why and how much are questions that cannot be answered in advance and in general—that is, philosophically.

So we do not need to stifle the theoretical urge. By the same token, the therapeutic urge should be seen accurately as itself an attempt to "get it right" with respect to practices. We are still philosophizing, like it or not, when we advance strong practice-based accounts of interpretation. The

more self-aware our efforts become, however, the more disappointing they may appear. In this, we cannot except the present effort. It too leaves all the hard questions unanswered, postponed to the practices themselves, where they belong, and so leaves the strong theoretical urge unsatisfied. We cannot say what a valid literary interpretation will be. Likewise, we cannot say what a valid legal one will be. And though we can say that their respective answers will be different, we cannot, beyond articulating some features of the practices, say of what that difference consists, for there is no essence of the difference to be discerned.

I suggested at the beginning that this disappointment concerning the law-and-literature analogy would itself be instructive. Seeing our limits is a crucial aspect of seeing ourselves, and our practices, clearly. I can now say, in true philosophical fashion, that I told you so.