

# Law as Interpretation†

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In this essay I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes, but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance. I propose that we can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly literature. I also expect that law, when better understood, will provide a better grasp of what interpretation is in general.

## I. Law

The central problem of analytical jurisprudence is this: What sense should be given to propositions of law? By propositions I mean the various statements lawyers make reporting what the law is on some question or other. Propositions of law can be very abstract and general, like the proposition that states of the United States may not discriminate on racial grounds in supplying basic services to citizens, or they can be relatively concrete, like the proposition that someone who accepts a check in the normal course of business without notice of any infirmities in its title is entitled to collect against the maker, or very concrete, like the proposition that Mrs. *X* is liable in damages to Mr. *Y* in the amount of \$1150 because he slipped on her icy sidewalk and broke his hip. In each case a puzzle arises. What are propositions of law really about? What in the world could make them true or false?

The puzzle arises because propositions of law seem to be descriptive—they are about how things are in the law, not about how they should be—and yet it has proved extremely difficult to say exactly what

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it is that they describe. Legal positivists believe that propositions of law are indeed wholly descriptive: they are in fact pieces of history. A proposition of law, in their view, is true if some event of a designated law-making kind has taken place, and otherwise not. This seems to work reasonably well in very simple cases. If the Illinois Legislature enacts the words, "No will shall be valid without three witnesses," then the proposition of law, that an Illinois will needs three witnesses, seems to be true only in virtue of that historical event.

But in more difficult cases the analysis fails. Consider the proposition that a particular affirmative action scheme (not yet tested in the courts) is constitutionally valid. If that is true, it cannot be so just in virtue of the text of the Constitution and the fact of prior court decisions, because reasonable lawyers who know exactly what the Constitution says and what the courts have done may yet disagree whether it is true. (I am doubtful that the positivists' analysis holds even in the simple case of the will; but that is a different matter I shall not argue here.)

What are the other possibilities? One is to suppose that controversial propositions of law, like the affirmative action statement, are not descriptive at all, but are rather expressions of what the speaker wants the law to be. Another is more ambitious: controversial statements are attempts to describe some pure objective or natural law, which exists in virtue of objective moral truth rather than historical decision. Both these projects take some legal statements, at least, to be purely evaluative as distinct from descriptive: they express either what the speaker prefers—his personal politics—or what he believes is objectively required by the principles of an ideal political morality. Neither of these projects is plausible, because someone who says that a particular untested affirmative action plan is constitutional does mean to describe the law as it is rather than as he wants it to be or thinks that, by the best moral theory, it should be. He might, indeed, say that he regrets that the plan is constitutional and thinks that according to the best moral theory, it ought not to be.

There is a better alternative: propositions of law are not simply descriptive of legal history in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation but is different from both. This suggestion will be congenial, at least at first blush, to many lawyers and legal philosophers. They are used to saying that law is a matter of interpretation; but only, perhaps, because they understand interpretation in a certain way. When a statute (or the Constitution) is unclear on some point, because

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some crucial term is vague or because a sentence is ambiguous, lawyers say that the statute must be interpreted, and they apply what they call "techniques of statutory construction." Most of the literature assumes that interpretation of a particular document is a matter of discovering what its authors (the legislators, or the delegates to the Constitutional Convention) meant to say in using the words they did. But lawyers recognize that on many issues the author had no intention either way and that on others his intention cannot be discovered. Some lawyers take a more skeptical position. They say that whenever judges pretend they are discovering the intention behind some piece of legislation, this is simply a smoke screen behind which the judges impose their own view of what the statute should have been.

Interpretation as a technique of legal analysis is less familiar in the case of the common law, but not unfamiliar. Suppose the Supreme Court of Illinois decided, several years ago, that a negligent driver who ran down a child was liable for the emotional damage suffered by the child's mother, who was standing next to the child on the road. Now an aunt sues another careless driver for emotional damage suffered when she heard, on the telephone many miles from the accident, that her niece had been hit. Does the aunt have a right to recover for that damage? Lawyers often say that this is a matter of interpreting the earlier decision correctly. Does the legal theory on which the earlier judge actually relied, in making his decision about the mother on the road, cover the aunt on the telephone? Once again skeptics point out that it is unlikely that the earlier judge had in mind any theory sufficiently developed so as to decide the aunt's case either way, so that a judge "interpreting" the earlier decision is actually making new law in the way he or she thinks best.

The idea of interpretation cannot serve as a general account of the nature or truth of propositions of law, however, unless it is cut loose from these associations with the speaker's meaning or intention. Otherwise it becomes simply one version of the positivist's thesis that propositions of law describe decisions made by people or institutions in the past. If interpretation is to form the basis of a different and more plausible theory about propositions of law, then we must develop a more inclusive account of what interpretation is. But that means that lawyers must not treat legal interpretation as an activity *sui generis*. We must study interpretation as a general activity, as a mode of knowledge, by attending to other contexts of that activity.

Lawyers would do well to study literary and other forms of artistic interpretation. That might seem bad advice (choosing the fire over the

frying pan) because critics themselves are thoroughly divided about what literary interpretation is, and the situation is hardly better in the other arts. But that is exactly why lawyers should study these debates. Not all of the battles within literary criticism are edifying or even comprehensible, but many more theories of interpretation have been defended in literature than in law, and these include theories that challenge the flat distinction between description and evaluation that has enfeebled legal theory.

## II. Literature

### A. *The Aesthetic Hypothesis*

If lawyers are to benefit from a comparison between legal and literary interpretation, however, they must see the latter in a certain light, and in this section I shall try to say what that is. (I would prefer the following remarks about literature to be uncontroversial among literary scholars, of course, but I am afraid they will not be.) Students of literature do many things under the titles of "interpretation" and "hermeneutics," and most of them are also called "discovering the meaning of a text." I shall not be interested, except incidentally, in one thing these students do, which is trying to discover the sense in which some author used a particular word or phrase. I am interested instead in arguments that offer some sort of interpretation of the meaning of a work as a whole. These sometimes take the form of assertions about characters: that Hamlet really loved his mother, for example, or that he really hated her, or that there really was no ghost but only Hamlet himself in a schizophrenic manifestation. Or about events in the story behind the story: that Hamlet and Ophelia were lovers before the play begins (or were not). More usually they offer hypotheses directly about the "point" or "theme" or "meaning" or "sense" or "tone" of the play as a whole: that *Hamlet* is a play about death, for example, or about generations, or about politics. These interpretive claims may have a practical point. They may, for example, guide a director staging a new performance of the play. But they may also be of more general importance, helping us to an improved understanding of important parts of our cultural environment. Of course, difficulties about the speaker's meaning of a particular word in the text (a "crux" of interpretation) may bear upon these larger matters. But the latter are about the point or meaning of the work as a whole, rather than the sense of a particular phrase.

Critics much disagree about how to answer such questions. I want, so far as is possible, not to take sides but to try to capture the disagreements in some sufficiently general description of what they are

disagreeing about. My apparently banal suggestion (which I shall call the “aesthetic hypothesis”) is this: an interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art. Different theories or schools or traditions of interpretation disagree on this hypothesis, because they assume significantly different normative theories about what literature is and what it is for and about what makes one work of literature better than another.

I expect that this suggestion, in spite of its apparent weakness, will be rejected by many scholars as confusing interpretation with criticism or, in any case, as hopelessly relativistic, and therefore as a piece of skepticism that really denies the possibility of interpretation altogether. Indeed the aesthetic hypothesis might seem simply another formulation of a theory now popular, which is that since interpretation creates a work of art, and represents only the fiat of a particular critical community, there are only interpretations and no best interpretation of any particular poem or novel or play. But the aesthetic hypothesis is neither so wild nor so weak nor so inevitably relativistic as might first appear.

Interpretation of a text attempts to show *it* as the best work of art *it* can be, and the pronoun insists on the difference between explaining a work of art and changing it into a different one. Perhaps Shakespeare could have written a better play based on the sources he used for *Hamlet* than he did, and in that better play the hero would have been a more forceful man of action. It does not follow that *Hamlet*, the play he wrote, really is like that after all. Of course, a theory of interpretation must contain a subtheory about identity of a work of art in order to be able to tell the difference between interpreting and changing a work. (Any useful theory of identity will be controversial, so this is one obvious way in which disagreements in interpretation will depend on more general disagreements in aesthetic theory.)

Contemporary theories of interpretation all seem to use, as part of their response to that requirement, the idea of a canonical text (or score, in the case of music, or unique physical object in the case of most art). The text provides one severe constraint in the name of identity: all the words must be taken account of and none may be changed to make “it” a putatively better work of art. (This constraint, however familiar, is not inevitable. A joke, for example, may be the same joke though told in a variety of forms, none of them canonical; an interpretation of a joke will choose a particular way in which to put it, and this may be wholly original, in order to bring out its “real” point or why it

is “really” funny.) So any literary critic’s style of interpretation will be sensitive to his theoretical beliefs about the nature of and evidence for a canonical text.

An interpretive style will also be sensitive to the interpreter’s opinions about coherence or integrity in art. An interpretation cannot make a work of art more distinguished if it makes a large part of the text irrelevant, or much of the incident accidental, or a great part of the trope or style unintegrated and answering only to independent standards of fine writing. So it does not follow, from the aesthetic hypothesis, that because a philosophical novel is aesthetically more valuable than a mystery story, an Agatha Christie novel is really a treatise on the meaning of death. This interpretation fails, not only because an Agatha Christie novel, taken to be a treatise on death, is a poor treatise less valuable than a good mystery, but because the interpretation makes the novel a shambles. All but one or two sentences would be irrelevant to the supposed theme; and the organization, style, and figures would be appropriate not to a philosophical novel but to an entirely different genre. Of course some books originally offered to the public as mysteries or thrillers (and perhaps thought of by their authors that way) have indeed been “reinterpreted” as something more ambitious. The present critical interest in Raymond Chandler is an example. But the fact that this reinterpretation can be successful in the case of Chandler, but not Christie, illustrates the constraint of integrity.

There is nevertheless room for much disagreement among critics about what counts as integration, about which sort of unity is desirable and which irrelevant or undesirable. Is it really an advantage that the tongue of the reader, in reading a poem aloud, must “mime” motions or directions that figure in the tropes or narrative of the poem? Does this improve integrity by adding yet another dimension of coordination? Is it an advantage when conjunctions and line endings are arranged so that the reader “negotiating” a poem develops contradictory assumptions and readings as he goes on, so that his understanding at the end is very different from what it was at discrete points along the way? Does this add another dimension of complexity to unity, or does it rather compromise unity because a work of literature should be capable of having the same meaning or import when read a second time? Schools of interpretation will rise or fall in response to these questions of aesthetic theory, which is what the aesthetic hypothesis suggests.

The major differences among schools of interpretation are less subtle, however, because they touch not these quasi-formal aspects of art but the function or point of art more broadly conceived. Does liter-

ature have (primarily or substantially) a cognitive point? Is art better when it is in some way instructive, when we learn something from it about how people are or what the world is like? If so, and if psychoanalysis is true (please forgive that crude way of putting it), then a psychoanalytic interpretation of a piece of literature will show why it is successful art. Is art good insofar as it is successful communication in the ordinary sense? If so, then a good interpretation will focus on what the author intended, because communication is not successful unless it expresses what a speaker wants it to express. Or is art good when it is expressive in a different sense, insofar as it has the capacity to stimulate or inform the lives of those who experience it? If so, then interpretation will place the reader (or listener or viewer) in the foreground. It will point out the reading of the work that makes it most valuable—best as a work of art—in that way.

Of course theories of art do not exist in isolation from philosophy, psychology, sociology, and cosmology. Someone who accepts a religious point of view will probably have a different theory of art from someone who does not, and recent critical theories have made us see how far interpretive style is sensitive to beliefs about meaning, reference, and other technical issues in the philosophy of language. But the aesthetic hypothesis does not assume that anyone who interprets literature will have a fully developed and self-conscious aesthetic theory. Nor that everyone who interprets must subscribe entirely to one or another of the schools I crudely described. The best critics, I think, deny that there is one unique function or point of literature. A novel or a play may be valuable in any number of ways, some of which we learn by reading or looking or listening, rather than by abstract reflection about what good art must be like or for.

Nevertheless anyone who interprets a work of art relies on beliefs of a theoretical character about identity and other formal properties of art, as well as more explicitly normative beliefs about what is good in art. *Both* sorts of beliefs figure in the judgment that one way of reading a text makes it a better text than another way. These beliefs may be inarticulate (or “tacit”). They are still genuine beliefs (and not merely “reactions”) because their force for any critic or reader can be seen at work not just on one isolated occasion of interpretation, but in any number of other occasions, and because they figure in and are amenable to argument.<sup>1</sup> (These weak claims do not, of course, take sides in the running debate on whether there are any necessary or sufficient

1. See Evans, *Semantic Theory and Tacit Knowledge*, in L. WITTGENSTEIN, *TO FOLLOW A RULE* (S. Holtzman & C. Leich eds.) (1981).

“principles of value” in art, or whether a theory of art could ever justify an interpretation in the absence of direct experience of the work being interpreted.)<sup>2</sup>

None of this touches the major complaint I anticipated against the aesthetic hypothesis: that it is trivial. Obviously (you might say) different interpretive styles are grounded in different theories of what art is and what it is for and what makes art good art. The point is so banal that it might as well be put the other way around: different theories of art are generated by different theories of interpretation. If someone thinks stylistics are important to interpretation, he will think a work of art better because it integrates pronunciation and trope; if someone is attracted by deconstruction, he will dismiss reference in its familiar sense from any prominent place in an account of language. Nor does my elaboration of the hypothesis in any way help to adjudicate amongst theories of interpretation or to rebut the charge of nihilism or relativism. On the contrary, since people’s views about what makes art good art are inherently subjective, the aesthetic hypothesis abandons hope of rescuing objectivity in interpretation except, perhaps, among those who hold very much the same theory of art, which is hardly very helpful.

No doubt the aesthetic hypothesis is in important ways banal—it must be abstract if it is to provide an account of what a wide variety of theories disagree about—but it is perhaps not so weak as all that. The hypothesis has the consequence that academic theories of interpretation are no longer seen as what they often claim to be—analyses of the very idea of interpretation—but rather as candidates for the best answer to the substantive question posed by interpretation. Interpretation becomes a concept of which different theories are competing conceptions. (It follows that there is no radical difference but only a difference in the level of abstraction between offering a theory of interpretation and offering an interpretation of a particular work of art.) The hypothesis denies, moreover, the sharp distinctions some scholars have cultivated. There is no longer a flat distinction between interpretation, conceived as discovering the real meaning of a work of art, and criticism, conceived as evaluating its success or importance. Of course some distinction remains because there is always a difference between saying how

2. It may be one of the many important differences between interpretation in art and law, which I do not examine in this essay, that nothing in law corresponds to the direct experience of a work of art, though some lawyers of the romantic tradition do speak of a good judge’s “sixth sense,” which enables him to grasp which aspects of a chain of legal decisions reveal the “immanent” principle of law even though he cannot fully explain why.



good a particular work can be made to be and saying how good that is. But evaluative beliefs about art figure in both these judgments.

Objectivity is another matter. It is an open question, I think, whether the main judgments we make about art can properly be said to be true or false, valid or invalid. This question is part of the more general philosophical issue of objectivity, presently much discussed in both ethics and the philosophy of language, and no one is entitled to a position who studies the case of aesthetic judgment alone. Of course no important aesthetic claim can be “demonstrated” to be true or false; no argument can be produced for any interpretation that we can be sure will commend itself to everyone, or even everyone with experience and training in the appropriate form of art. If this is what it means to say that aesthetic judgments are subjective—that they are not demonstrable—then of course they are subjective. But it does not follow that no normative theory about art is better than any other, nor that one theory cannot be the best that has so far been produced.

The aesthetic hypothesis reverses (I think to its credit) a familiar strategy. E.D. Hirsch, for example, argues that only a theory like his can make interpretation objective and particular interpretations valid.<sup>3</sup> This seems to me a mistake on two connected grounds. Interpretation is an enterprise, a public institution, and it is wrong to assume, a priori, that the propositions central to any public enterprise must be capable of validity. It is also wrong to assume much about what validity in such enterprises must be like—whether validity requires the possibility of demonstrability, for example. It seems better to proceed more empirically here. We should first study a variety of activities in which people assume that they have good reasons for what they say, which they assume hold generally and not just from one or another individual point of view. We can then judge what standards people accept in practice for thinking that they have reasons of that kind.

Nor is the point about reversibility—that a theory of art may depend upon a theory of interpretation as much as vice versa—an argument against the aesthetic hypothesis. I am not defending any particular explanation of how people come to have either theories of interpretation or theories of art, but only a claim about the argumentative connections that hold between these theories however come by. Of course, even at the level of argument, these two kinds of theories are mutually reinforcing. It is plainly a reason for doubting any theory of what an object of art is, for example, that the theory generates an obvi-

3. E. HIRSCH, VALIDITY IN INTERPRETATION (1967).

ously silly theory of interpretation. My point is exactly that the connection is reciprocal, so that anyone called upon to defend a particular approach to interpretation would be forced to rely on more general aspects of a theory of art, whether he realizes it or not. And this may be true even though the opposite is, to some extent, true as well. It would be a mistake, I should add, to count this fact of mutual dependence as offering, in itself, any reason for skepticism or relativism about interpretation. This seems to be the burden of slogans like "interpretation creates the text," but there is no more immediate skeptical consequence in the idea that what we take to be a work of art must comport with what we take interpreting a work of art to be than in the analogous idea that what we take a physical object to be must sit well with our theories of knowledge; so long as we add, in both cases, that the connection holds the other way around as well.

*B. Author's Intention*

The chief test of the aesthetic hypothesis lies, however, not in its resistance to these various charges, but in its explanatory and particularly its critical power. If we accept that theories of interpretation are not independent analyses of what it means to interpret something but are rather based in and dependent upon normative theories of art, then we must accept that they are vulnerable to complaints against the normative theory in which they are based. It does seem to me, for example, that the more doctrinaire author's intention theories are vulnerable in this way. These theories must suppose, on the present hypothesis, that what is valuable in a work of art, what should lead us to value one work of art more than another, is limited to what the author in some narrow and constrained sense intended to put there. This claim presupposes, as I suggested earlier, a more general thesis that art must be understood as a form of speaker-audience communication; but even that doubtful thesis turns out, on further inspection, not to support it.

Of course the "intentionalists" would object to these remarks. They would insist that their theory of interpretation is not an account of what is valuable in a book or poem or play but only an account of what any particular book or poem or play means and that we must understand what something means before we can decide whether it is valuable and where its value lies. And they would object that they do not say that only intentions of the author "in some narrow and constrained sense" count in fixing the meaning of his work.

In the first of these objections, the author's intention theory presents itself not as the upshot of the aesthetic hypothesis—not as the

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best theory of interpretation within the design stipulated by that hypothesis—but rather as a rival to it, a better theory about what kind of thing an interpretation is. But it is very difficult to understand the author's intention theory as any sort of rival to the present hypothesis. What question does it propose to answer better? Not, certainly, some question about the ordinary language or even technical meaning of the words "meaning" or "interpretation." An intentionalist cannot suppose that all his critics and those he criticizes mean, when they say "interpretation," the discovery of the author's intention. Nor can he think that his claims accurately describe what every member of the critical fraternity in fact does under the title "interpretation." If that were so, then his strictures and polemics would be unnecessary. But if his theory is not semantic or empirical in these ways, what sort of a theory is it?

Suppose an intentionalist replies:

It points out an important issue about works of literature, namely: What did the author of the work intend it to be? This is plainly an important question, even if its importance is preliminary to other equally or more important questions about significance or value. It is, in fact, what most people for a long time have called "interpretation." But the name does not matter, so long as the activity is recognized as important and so long as it is understood that scholars are in principle capable of supplying objectively correct answers to the question it poses.

This reply comes to this: we can discover what an author intended (or at least come to probabilistic conclusions about this) and it is important to do so for other literary purposes. But why is it important? What other purposes? Any answer will assume that value or significance in art attaches primarily to what the author intended, just because it is what the author intended. Otherwise, why should we evaluate what this style of interpretation declares to be the work of art? But then the claim that interpretation in this style is important depends on a highly controversial, normative theory of art, not a neutral observation preliminary to any coherent evaluation. Of course no plausible theory of interpretation holds that the intention of the author is always irrelevant. Sometimes it is plainly the heart of the matter, as when some issue turns on what Shakespeare meant by "hawk" as distinguished from "handsaw." But it is nevertheless controversial that we must know whether Shakespeare thought Hamlet was mad or sane pretending to be mad in order to decide how good a play he wrote. The intentionalist thinks that we do, and that is exactly why his theory of interpretation is not a rival to the aesthetic hypothesis but rather a suitor for the crown that hypothesis holds out.

The second objection to my charge against author's intention theories may prove to be more interesting. Intentionalists make the author's state of mind central to interpretation. But they misunderstand, so far as I can tell, certain complexities in that state of mind; in particular they fail to appreciate how intentions *for* a work and beliefs *about* it interact. I have in mind an experience familiar to anyone who creates anything, of suddenly seeing something "in" it that he did not previously know was there. This is sometimes (though I think not very well) expressed in the author's cliché, that his characters seem to have minds of their own. John Fowles provides an example from popular fiction.

When Charles left Sarah on her cliff edge, I ordered him to walk straight back to Lyme Regis. But he did not; he gratuitously turned and went down to the Dairy.

Oh, but you say, come on—what I really mean is that the idea crossed my mind as I wrote that it might be more clever to have him stop and drink milk . . . and meet Sarah again. That is certainly one explanation of what happened; but I can only report—and I am the most reliable witness—that the idea seemed to me to come clearly from Charles, not myself. It is not only that he has begun to gain an autonomy; I must respect it, and disrespect all my quasi-divine plans for him, if I wish him to be real.<sup>4</sup>

Fowles changed his mind about how the story in *The French Lieutenant's Woman* "really" goes in the midst of writing it, if we are to credit this description. But he might also have changed his mind about some aspect of the novel's "point" years later, as he is rumored to have done after seeing the film made from his book. He might have come to see Sarah's motives very differently after reading Harold Pinter's screenplay or watching Meryl Streep play her; Pinter and Streep were interpreting the novel, and one or both of their interpretations might have led Fowles to change *his* interpretation once again. Perhaps I am wrong in supposing that this sort of thing happens often. But it happens often enough, and it is important to be clear about what it is that happens.

The intentionalist wants us to choose between two possibilities. Either the author suddenly realizes that he had a "subconscious intention" earlier, which he only now discovers, or he has simply changed his intention later. Neither of these explanations is at all satisfactory. The subconscious is in danger of becoming phlogiston here, unless we suppose some independent evidence, apart from the author's new view of his work, to suggest that he had an earlier subconscious intention. I

4. J. FOWLES, *THE FRENCH LIEUTENANT'S WOMAN* 96-97 (1969).

do not mean that features of a work of art of which an author is unaware must be random accidents. On the contrary, if a novel is both more interesting and more coherent if we assume the characters have motives different from those the novelist thought of when he wrote (or if a poet's tropes and style tend to reinforce his theme in ways he did not appreciate at the time), the cause of this must in some way lie in the artist's talent. Of course there are unsolved mysteries in the psychology of creation, but the supposition of subconscious *intentions*, unsupported by other evidence of the sort a psychoanalyst would insist on, solves no mysteries and provides no explanation. This is not crucial to the point, however, because whether or not Fowles had a subconscious intention to make Charles or Sarah different characters from the "quasi-divine plan" he thought he had, his later decisions and beliefs neither consist in nor are based on any discovery of that earlier intention. They are produced by confronting not his earlier self but the work he has produced.

Nor is any new belief Fowles forms about his characters properly called (as in the intentionalist's second suggestion) a new and discrete intention. It is not an intention about what sort of characters to create because it is a belief about what sort of characters he has created; and it is not an intention about how others should understand the book, though it may or may not include an expectation of that sort. Fowles changed his view in the course of writing his book, but he changed it, as he insists, by confronting the text he had already written, by treating its characters as real in the sense of detachable from his own antecedent designs, in short by interpreting it, and not by exploring the subconscious depths of some previous plan or finding that he had a new plan. If it is true that he changed his mind again, after seeing the film, then this was, once again, not a retrospective new intention or a rediscovered old one. It was another interpretation.

An author is capable of detaching what he has written from his earlier intentions and beliefs, of treating it as an object in itself. He is capable of reaching fresh conclusions about his work grounded in aesthetic judgments: that his book is both more coherent and a better analysis of more important themes read in a somewhat different way from what he thought when he was writing it. This is, I think, a very important fact for a number of reasons; but I want, for my present purpose, only to emphasize one. Any full description of what Fowles "intended" when he set out to write *The French Lieutenant's Woman* must include the intention to produce something capable of being treated that way, by himself and therefore by others, and so must include the

intention to create something independent of his intentions. I quote Fowles once again, and again as a witness rather than for his metaphysics: "Only one reason is shared by all of us [novelists]: *we wish to create worlds as real as, but other than, the world that is*. Or was. That is why we cannot plan . . . . We also know that a genuinely created world must be independent of its creator . . . ." <sup>5</sup>

I suspect that regarding something one has produced as a novel or poem or painting, rather than a set of propositions or marks, *depends* on regarding it as something that can be detached and interpreted in the sense I described. In any case, this is characteristically how authors themselves regard what they have done. The intentions of authors are not simply conjunctive, like the intentions of someone who goes to market with a shopping list, but structured, so that the more concrete of these intentions, like intentions about the motives of a particular character in a novel, are contingent on interpretive beliefs whose soundness varies with what is produced and which might be radically altered from time to time.

We can, perhaps, isolate the full set of interpretive beliefs an author has at a particular moment (say at the moment he sends final galleys to the printer) and solemnly declare that these beliefs, in their full concreteness, fix what the novel is or means. (Of course, these beliefs would inevitably be incomplete, but that is another matter.) But even if we (wrongly) call this particular set of beliefs "intentions," we are, in choosing them, ignoring another kind or level of intention, which is the intention to create a work whose nature or meaning is not fixed in this way, because it is a work of art. That is why the author's intention school, as I understand it, makes the value of a work of art turn on a narrow and constrained view of the intentions of the author.

### III. Law and Literature

#### A. *The Chain of Law*

These sketchy remarks about literary interpretation may have suggested too sharp a split between the role of the artist in creating a work of art and that of the critic in interpreting it later. The artist can create nothing without interpreting as he creates; since he intends to produce art, he must have at least a tacit theory of why what he produces is art and why it is a better work of art through this stroke of the pen or the brush or the chisel rather than that. The critic, for his part, creates as he interprets; for though he is bound by the fact of the work, defined in

5. *Id.* at 96 (emphasis in original).

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the more formal and academic parts of his theory of art, his more practical artistic sense is engaged by his responsibility to decide which way of seeing or reading or understanding that work shows it as better art. Nevertheless there is a difference between interpreting while creating and creating while interpreting, and therefore a recognizable difference between the artist and the critic.

I want to use literary interpretation as a model for the central method of legal analysis, and I therefore need to show how even this distinction between artist and critic might be eroded in certain circumstances. Suppose that a group of novelists is engaged for a particular project and that they draw lots to determine the order of play. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then sends the two chapters to the next number, and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating, because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is.<sup>6</sup> He or she must decide what the characters are “really”

6. Even the first novelist has the responsibility of interpreting to the extent any writer must, which includes not only interpreting as he writes but interpreting the genre in which he sets out to write. Will novelists with higher numbers have less creative “freedom” than those with lower? In one sense, no novelist has any freedom at all, because each is constrained to choose that interpretation which (he believes) makes the continuing work of art the best it can be. But we have already seen (and the discussion of law below will elaborate) two different dimensions along which any interpretation can be tested: the “formal” dimension, which asks how far the interpretation fits and integrates the text so far completed, and the “substantive” dimension, which considers the soundness of the view about what makes a novel good on which the interpretation relies. It seems reasonable to suppose that later novelists will normally—but certainly not inevitably—believe that fewer interpretations can survive the first of these tests than would have survived had they received fewer chapters. Most interpreters would think that a certain interpretation of *A Christmas Carol*—that Scrooge was inherently evil, for example—would pass the test of integrity just after the opening pages, but not towards the end of the novel. Our sense that later novelists are less “free” may reflect just that fact. This does not mean, of course, that there is more likely to be consensus about the correct interpretation later rather than earlier in the chain, or that a later novelist is more likely to find an argument that “proves” his interpretation right beyond rational challenge. Reasonable disagreement is available on the formal as well as the substantive side, and even when most novelists would think only a particular interpretation could fit the novel to a certain point, some novelist of imagination might find some dramatic change in plot that (in his opinion) unexpectedly unifies what had seemed disparate and unnecessary, and redeems what had seemed wrong or trivial. Once again, we should be careful not to confuse the fact that consensus would rarely be reached, at any point in the process, with the claim that any particular novelist’s interpretation must be “merely subjective.” No novelist, at any point, will be able simply to read in a mechanical way the correct interpretation off the text he receives, but it does not follow from that fact alone that one interpretation is not superior to others overall. In any case, it will nevertheless be true, for all novelists beyond the first, that the assignment to find (what they believe to be) the correct interpretation of the text so far is a different assignment from the assignment to begin a new novel of their own. For a fuller discussion, see Dworkin, “*Natural*” Law Revisited, 34 U. FLA. L. REV. 165 (1982).

like; what motives in fact guide them; what the point or theme of the developing novel is; how far some literary device or figure, consciously or unconsciously used, contributes to these, and whether it should be extended or refined or trimmed or dropped in order to send the novel further in one direction rather than another. This must be interpretation in a non-intention-bound style because, at least for all novelists after the second, there is no single author whose intentions any interpreter can, by the rules of the project, regard as decisive.

Some novels have in fact been written in this way (including the soft-core pornographic novel *Naked Came the Stranger*<sup>7</sup>), though for a debunking purpose, and certain parlor games for rainy weekends in English country houses have something of the same structure. But in my imaginary exercise the novelists are expected to take their responsibilities seriously and to recognize the duty to create, so far as they can, a single, unified novel rather than, for example, a series of independent short stories with characters bearing the same names. Perhaps this is an impossible assignment; perhaps the project is doomed to produce not simply a bad novel but no novel at all, because the best theory of art requires a single creator or, if more than one, that each have some control over the whole. (But what about legends and jokes?) I need not push that question further because I am interested only in the fact that the assignment makes sense, that each of the novelists in the chain can have some idea of what he or she is asked to do, whatever misgivings each might have about the value or character of what will then be produced.

Deciding hard cases at law is rather like this strange literary exercise. The similarity is most evident when judges consider and decide "common-law" cases; that is, when no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law "underlie" the related decisions of other judges in the past. Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done*, in the way that each of our novelists formed an opinion about the collective novel so far written. Any judge forced to decide a law suit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial and political philosophies, in periods of dif-

7. P. ASHE, *NAKED CAME THE STRANGER* (1969).



ferent orthodoxies of procedure and judicial convention. Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.

The judge in the hypothetical case I mentioned earlier, about an aunt's emotional shock, must decide what the theme is, not only of the particular precedent of the mother in the road, but of accident cases, including that precedent, as a whole. He might be forced to choose, for example, between these two theories about the "meaning" of that chain of decisions. According to the first, negligent drivers are responsible to those whom their behavior is likely to cause physical harm, but they are responsible to these people for whatever injury—physical or emotional—they in fact cause. If this is the correct principle, then the decisive difference between that case and the aunt's case is just that the aunt was not within the physical risk, and therefore she cannot recover. On the second theory, however, negligent drivers are responsible for any damage they can reasonably be expected to foresee if they think about their behavior in advance. If that is the right principle, then the aunt may yet recover. Everything turns on whether it is sufficiently foreseeable that a child will have relatives, beyond his or her immediate parents, who may suffer emotional shock when they learn of the child's injury. The judge trying the aunt's case must decide which of these two principles represents the better "reading" of the chain of decisions he must continue.

Can we say, in some general way, what those who disagree about the best interpretation of legal precedent are disagreeing about? I said that a literary interpretation aims to show how the work in question can be seen as the most valuable work of art, and so must attend to formal features of identity, coherence, and integrity as well as more substantive considerations of artistic value. A plausible interpretation of legal practice must also, in a parallel way, satisfy a test with two dimensions: it must both fit that practice and show its point or value. But point or value here cannot mean artistic value because law, unlike literature, is not an artistic enterprise. Law is a political enterprise, whose general point, if it has one, lies in coordinating social and indi-

vidual effort, or resolving social and individual disputes, or securing justice between citizens and between them and their government, or some combination of these. (This characterization is itself an interpretation, of course, but allowable now because relatively neutral.) So an interpretation of any body or division of law, like the law of accidents, must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve.

We know from the parallel argument in literature that this general description of interpretation in law is not license for each judge to find in doctrinal history whatever he thinks should have been there. The same distinction holds between interpretation and ideal. A judge's duty is to interpret the legal history he finds, not to invent a better history. The dimension of fit will provide some boundaries. There is, of course, no algorithm for deciding whether a particular interpretation sufficiently fits that history not to be ruled out. When a statute or constitution or other legal document is part of the doctrinal history, the speaker's meaning will play a role. But the choice of which of several crucially different senses of speaker's or legislator's intention is the appropriate one cannot itself be referred to anyone's intention but must be decided, by whoever must make the decision, as a question of political theory.<sup>8</sup> In the common-law cases the question of fit is more complex. Any particular hypothesis about the point of a string of decisions ("These decisions establish the principle that no one can recover for emotional damage who did not lie within the area of physical danger himself.") is likely to encounter, if not flat counter-examples in some earlier case, at least language or argument that seems to suggest the contrary. So any useful conception of interpretation must contain a doctrine of mistake—as must any novelist's theory of interpretation for the chain novel. Sometimes a legal argument will explicitly recognize such mistakes: "Insofar as the cases of *A v. B* and *C v. D* may have held to the contrary, they were, we believe, wrongly decided and need not be followed here." Sometimes the doctrine of precedent forbids this crude approach and requires something like: "We held, in *E v. F*, that such-and-such, but that case raised special issues and must, we think, be confined to its own facts" (which is not quite so disingenuous as it might seem).

This flexibility may seem to erode the difference on which I insist, between interpretation and a fresh, clean-slate decision about what the law ought to be. But there is nevertheless this overriding constraint.

8. See Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469 (1981).

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Any judge's sense of the point or function of law, on which every aspect of his approach to interpretation will depend, will include or imply some conception of the integrity and coherence of law as an institution, and this conception will both tutor and constrain his working theory of fit—that is, his convictions about how much of the prior law an interpretation must fit, and which of it, and how. (The parallel with literary interpretation holds here as well.)

It should be apparent, however, that any particular judge's theory of fit will often fail to produce a unique interpretation. (The distinction between hard and easy cases at law is perhaps just the distinction between cases in which they do and do not.) Just as two readings of a poem may each find sufficient support in the text to show its unity and coherence, so two principles may each find enough support in the various decisions of the past to satisfy any plausible theory of fit. In that case substantive political theory (like substantive considerations of artistic merit) will play a decisive role. Put bluntly, the interpretation of accident law, that a careless driver is liable to those whose damage is both substantial and foreseeable, is probably a better interpretation, if it is, only because it states a sounder principle of justice than any principle that distinguishes between physical and emotional damage or that makes recovery for emotional damage depend on whether the plaintiff was in danger of physical damage. (I should add that this issue, as an issue of political morality, is in fact very complex, and many distinguished judges and lawyers have taken each side.)

We might summarize these points this way. Judges develop a particular approach to legal interpretation by forming and refining a political theory sensitive to those issues on which interpretation in particular cases will depend; they call this their legal philosophy. It will include both structural features, elaborating the general requirement that an interpretation must fit doctrinal history, and substantive claims about social goals and principles of justice. Any judge's opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share. If a judge believes that the dominant purpose of a legal system, the main goal it ought to serve, is economic, then he will see in past accident decisions some strategy for reducing the economic costs of accidents overall. Other judges, who find any such picture of the law's function distasteful, will discover no such strategy in history but only, perhaps, an attempt to reinforce conventional morality of fault and responsibility. If we insist on a high order of neutrality in our description of legal interpretation, therefore, we cannot make our

description of the nature of legal interpretation much more concrete than I have.

*B. Author's Intention in Law*

I want instead to consider various objections that might be made not to the detail of my argument but to the main thesis, that interpretation in law is essentially political. I shall not spend further time on the general objection already noted: that this view of law makes it irreducibly and irredeemably subjective, just a matter of what particular judges think best or what they had for breakfast. Of course, for some lawyers and legal scholars this is not an objection at all, but only the beginnings of skeptical wisdom about law. But it is the nerve of my argument that the flat distinction between description and evaluation on which this skepticism relies—the distinction between finding the law just “there” in history and making it up wholesale—is misplaced here because interpretation is something different from both.

I shall want, therefore, to repeat the various observations I made about subjectivity and objectivity in literary interpretation. There is no obvious reason in the account I gave of legal interpretation to doubt that one interpretation of law can be better than another and that one can be best of all. Whether this is so depends on general issues of philosophy not peculiar to law any more than to literature; and we would do well, in considering these general issues, not to begin with any fixed ideas about the necessary and sufficient conditions of objectivity (for example, that no theory of law can be sound unless it is demonstrably sound, unless it would wring assent from a stone). In the meantime we can sensibly aim to develop various levels of a conception of law for ourselves, to find the interpretation of a complex and dramatically important practice which seems to us at once the right kind of interpretation for law and right as that kind of interpretation.

I shall consider one further, and rather different, objection in more detail: that my political hypothesis about legal interpretation, like the aesthetic hypothesis about artistic interpretation, fails to give an adequate place to author's intention. It fails to see that interpretation in law is simply a matter of discovering what various actors in the legal process—constitutional delegates, members of Congress and state legislatures, judges, and executive officials—intended. Once again it is important to see what is at stake here. The political hypothesis makes room for the author's intention argument as a conception of interpretation, a conception which claims that the best political theory gives the intentions of legislators and past judges a decisive role in interpreta-

tion. Seen this way, the author's intention theory does not challenge the political hypothesis but contests for its authority. If the present objection is really an objection to the argument so far, therefore, its claim must be understood differently, as proposing, for example, that the very "meaning" of interpretation in law requires that only these officials' intentions should count or that at least there is a firm consensus among lawyers to that effect. Both of these claims are as silly as the parallel claims about the idea or the practice of interpretation in art.

Suppose, therefore, that we do take the author's intention theory, more sensibly, as a conception rather than an explication of the concept of legal interpretation. The theory seems on firmest ground, as I suggested earlier, when interpretation is interpretation of a canonical legal text, like a clause of the Constitution, or a section of a statute, or a provision of a contract or will. But just as we noticed that a novelist's intention is complex and structured in ways that embarrass any simple author's intention theory in literature, we must now notice that a legislator's intention is complex in similar ways. Suppose a delegate to a constitutional convention votes for a clause guaranteeing equality of treatment without regard to race in matters touching peoples' fundamental interests; but he thinks that education is not a matter of fundamental interest and so does not believe that the clause makes racially segregated schools unconstitutional. We may sensibly distinguish an abstract and a concrete intention here: the delegate intends to prohibit discrimination in whatever in fact is of fundamental interest and also intends not to prohibit segregated schools. These are not isolated, discrete intentions; our descriptions, we might say, describe the same intention in different ways. But it matters very much which description a theory of legislative intention accepts as canonical. If we accept the first description, then a judge who wishes to follow the delegate's intentions, but who believes that education is a matter of fundamental interest, will hold segregation unconstitutional. If we accept the second, he will not. The choice between the two descriptions cannot be made by any further reflection about what an intention really is. It must be made by deciding that one rather than the other description is more appropriate in virtue of the best theory of representative democracy or on some other openly political ground. (I might add that no compelling argument has yet been produced, so far as I am aware, in favor of deferring to a delegate's more concrete intentions, and that this is of major importance in arguments about whether the "original intention" of the Framers requires, for example, abolishing racial discrimination, or capital punishment.)

When we consider the common-law problems of interpretation, the author's intention theory shows in an even poorer light. The problems are not simply evidentiary. Perhaps we can discover what was "in the mind" of all the judges who decided cases about accidents at one time or another in our legal history. We might also discover (or speculate) about the psychodynamic or economic or social explanations of why each judge thought what he or she did. No doubt the result of all this research (or speculation) would be a mass of psychological data essentially different for each of the past judges included in the study, and order could be brought into the mass, if at all, only through statistical summaries about which proportion of judges in which historical period probably held which opinion and was more or less subject to which influence. But this mass, even tamed by statistical summary, would be of no more help to the judge trying to answer the question of what the prior decisions, taken as a whole, really come to than the parallel information would be to one of our chain novelists trying to decide what novel the novelists earlier in the chain had collectively written. That judgment, in each case, requires a fresh exercise of interpretation which is neither brute historical research nor a clean-slate expression of how things ideally ought to be.

A judge who believed in the importance of discerning an author's intention might try to escape these problems by selecting one particular judge or a small group of judges in the past (say, the judges who decided the most recent case something like his or the case he thinks closest to his) and asking what rule that judge or group intended to lay down for the future. This would treat the particular earlier judges as legislators and so invite all the problems of statutory interpretation including the very serious problem we just noticed. Even so, it would not even escape the special problems of common-law adjudication after all, because the judge who applied this theory of interpretation would have to suppose himself entitled to look only to the intentions of the particular earlier judge or judges he had selected, and he could not suppose this unless he thought that it was the upshot of judicial practice as a whole (and not just the intentions of some *other* selected earlier judge) that this is what judges in his position should do.

#### IV. Politics in Interpretation

If my claims about the role of politics in legal interpretation are sound, then we should expect to find distinctly liberal or radical or conservative opinions not only about what the Constitution and laws of our nation should be but also about what they are. And this is exactly

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what we do find. Interpretation of the equal protection clause of the Constitution provides especially vivid examples. There can be no useful interpretation of what that clause means independent of some theory about what political equality is and how far equality is required by justice, and the history of the last half-century of constitutional law is largely an exploration of exactly these issues of political morality. Conservative lawyers argued steadily (though not consistently) in favor of an author's intentions style of interpreting this clause, and they accused others, who used a different style with more egalitarian results, of inventing rather than interpreting law. But this was bluster meant to hide the role their own political convictions played in their choice of interpretive style, and the great legal debates over the equal protection clause would have been more illuminating if it had been more widely recognized that reliance on political theory is not a corruption of interpretation but part of what interpretation means.

Should politics play any comparable role in literary and other artistic interpretation? We have become used to the idea of the politics of interpretation. Stanley Fish, particularly, has promoted a theory of interpretation which supposes that contests between rival schools of literary interpretation are more political than argumentative: rival professoriates in search of dominion. And of course it is a truism of the sociology of literature, and not merely of the Marxist contribution to that discipline, that fashion in interpretation is sensitive to and expresses more general political and economic structures. These important claims are external: they touch the causes of the rise of this or that approach to literature and interpretation.

We are now concerned with the internal question, about politics in rather than the politics of interpretation.<sup>9</sup> How far can principles of political morality actually count as arguments for a particular interpretation of a particular work or for a general approach to artistic interpretation? There are many possibilities and many of them are parasitic on claims developed or in these essays. It was said that our commitment to feminism, or our fidelity to nation, or our dissatisfaction with the rise of the New Right, ought to influence our evaluation and appreciation of literature. Indeed it was the general (though not unanimous) sense of the conference that professional criticism must be faulted for its inattention to such political issues. But if our convictions about these particular political issues count in deciding how good some novel or play or poem is, then they must also count in deciding, among particular

9. See *Politics of Interpretation*, 9 CRITICAL INQUIRY 1 (1982).

interpretations of these works, which is the best interpretation. Or so they must if my argument is sound.

We might also explore a more indirect connection between aesthetic and political theory. Any comprehensive theory of art is likely to have, at its center, some epistemological thesis, some set of views about the relations that hold among experience, self-consciousness, and the perception or formation of values. If it assigns self-discovery any role in art, it will need a theory of personal identity adequate to mark off the boundaries of a person from his or her circumstances, and from other persons, or at least to deny the reality of any such boundaries. It seems likely that any comprehensive theory of social justice will also have roots in convictions about these or very closely related issues. Liberalism, for example, which assigns great importance to autonomy, may depend upon a particular picture of the role that judgments of value play in people's lives; it may depend on the thesis that people's convictions about value are beliefs, open to argument and review, rather than simply the givens of personality, fixed by genetic and social causes. And any political theory that gives an important place to equality also requires assumptions about the boundaries of persons, because it must distinguish between treating people as equals and changing them into different people.

It may be a sensible project, at least, to inquire whether there are not particular philosophical bases shared by particular aesthetic and particular political theories so that we can properly speak of a liberal or Marxist or perfectionist or totalitarian aesthetics, for example, in that sense. Common questions and problems hardly guarantee this, of course. It would be necessary to see, for example, whether liberalism can indeed be traced, as many philosophers have supposed, back into a discrete epistemological base, different from that of other political theories, and then ask whether that discrete base could be carried forward into aesthetic theory and there yield a distinctive interpretive style. I have no good idea that this project could be successful, and I end simply by acknowledging my sense that politics, art, and law are united, somehow, in philosophy.