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**“Same As It Ever Was”:  
Rethinking the Politics of Legal Interpretation**

**Rosemary J. Coombe\***

This article, which places the development of the “law-and-interpretation” or “legal hermeneutics” school of legal scholarship in historical and political context, is meant primarily to serve as an accessible introduction to the literature on legal hermeneutics.

The author situates the law-and-interpretation debate in the context of intellectual developments in the humanities and social sciences, and points out some of its empirical and theoretical limitations.

While a great deal of the literature on legal hermeneutics either ignores the politics of interpretation or deals with it superficially, claiming it to be outside of the scope of inquiry of those interested in this field of legal study, the author argues that politics is in fact constitutive of the very act of interpretation.

Cet article situe le développement de l'école d'« herméneutique juridique » aussi appelée « droit et interprétation » dans un contexte historique et politique. Il se veut une introduction au domaine de l'herméneutique juridique.

L'auteure situe le débat de l'herméneutique juridique dans le contexte du développement des idées à l'intérieur des sciences humaines et sociales, tout en en soulignant quelques unes des limites empiriques et théoriques d'un tel débat.

Trop souvent en herméneutique juridique on ignore les aspects politiques de l'interprétation des textes, ou on ne les aborde que superficiellement, sous prétexte qu'ils ne sauraient intéresser ceux qui s'intéressent à ce champ d'étude du droit. L'auteure quant à elle soutient que dans les faits, le politique est inhérent à toute démarche d'interprétation.

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\*Assistant Professor of Law, University of Toronto. I would like to thank Tom Grey at Stanford Law School for his comments on this paper. I would also like to extend my thanks to Renato Rosaldo and to fellow graduate students in the Department of Anthropology at Stanford University. Derede Arthur, Ethan Goldings, Don Moore, Merwin Pond, Lisa Rofel, and Joel Streiker encouraged me to think critically about meaning and to address the political meaning of critique in our ongoing discussions of culture and power. Ernesto Laclau helped me to reconceive politics in his seminar on Postmodernism and Politics at the New School for Social Research. The usual disclaimers apply.

*Synopsis*

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The development of a “law as interpretation” or “law and literature” school of legal scholarship in the 1980s must be understood in historical and political context. It reflects both the dawning cognizance by legal scholars of major trends in twentieth century social theory, and a renewed concern with judicial review in contentious political climates. In the United States the interest in a hermeneutic understanding of legal decision-making also resonates with a desire to preserve constitutional interpretations established by the liberal reform efforts of the Warren court (in light of the Supreme Court’s retreat from these in the Reagan era) in particular, and with a felt necessity to question the legitimacy of judicial review in general. In Canada, the American interpretive turn has been imitated and adapted by constitutional legal scholars. Both those at the centre and those on the left who are concerned with judicial interpretation of the Charter of Rights have found in the arsenal of hermeneutic and linguistic theory (as this has been refracted in American legal scholarship) potent weapons for either supporting judicial review or for questioning its political legitimacy.

This article is designed to accomplish three things. It is meant to serve first and foremost as an accessible introduction to the law-and-interpretation literature for newcomers to this dialogue. Secondly, it attempts to situate this debate in the context of wider intellectual developments in the humanities and social sciences, with which many legal scholars are unfamiliar. Finally, it is intended to stimulate new discussion and research by pointing

to some of the empirical and theoretical limitations of this scholarship, particularly with respect to the abbreviated concept of politics that seems prevalent in this discourse. I do not purport to represent all contributions to the law-and-interpretation literature, but to engage what I take to be representative positions within this dialogue. Many of these positions were established very quickly and find their most articulate and lucid expression in some of the earliest contributions to the literature. I have made no attempt to trace these ideas throughout this entire body of scholarship, nor to focus on their most recent manifestations. I am convinced that, to a large degree, most contributors to the dialogue are simply elaborating and adding further examples to illustrate propositions that were theoretically cogent in the first "conversations" of the early 1980s.<sup>1</sup>

I will argue that a great deal of the law-and-interpretation literature either ignores the politics of interpretation, deals with it superficially as a matter of the personal predilections of judges, or claims politics to be inevitable, but as somehow outside the scope of inquiry of those interested in the issue of interpretation. None of these positions seems justified or sufficient, however, and I will suggest that we consider the political, not as standing outside of or as a background context to practices of interpretation, but as constitutive of that activity itself. This suggestion will be made by way of a commentary on central texts in the literature.

## I. Intellectual History

The "interpretive turn" in legal scholarship may be understood in terms of the acknowledgment by legal academics that modern developments in the social sciences and humanities have profound implications for the study of law and legal systems. In particular, the rejection of scientism and positivist explanation in the social sciences and the assault on conventional understandings of language in linguistics and literary criticism, were recognized as challenging some of the fundamental assumptions on which traditional legal scholarship was premised.<sup>2</sup>

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<sup>1</sup>Three published collections are representative: see (1982) 60 *Tex. L. Rev.* 373-586; W.J.T. Mitchell, ed., *The Politics of Interpretation* (Chicago: University of Chicago Press, 1983) and (1985) 58 *S. Cal. R. Rev.* [Interpretation Symposium].

<sup>2</sup>There is an alternative perspective that sees the "turn to interpretation" in legal scholarship as a liberal reaction to the Critical Legal Studies claim of legal indeterminacy. See B. Langille, "Revolution without Foundation: The Grammar of Scepticism and Law" (1988) 33 *McGill L.J.* 451 and J. Bakan, "Retreat to the Elite" (A paper delivered at a workshop on 'Feminism, Critical Theory, and the Canadian Legal System', June 4-7, 1988)[unpublished] for statements to this effect. Perhaps there is evidence here of revisionist intellectual history. It would seem that mainstream legal scholars were contending with some of the implications of linguistic philosophy and literary criticism before they recognized the relevance of this work to the emerging Critical Legal Studies scholarship on legal indeterminacy. For quite some time (roughly 1979-1985, to judge by publishing dates) these simultaneous initiatives developed autonomously and without explicit reference to each other.

### A. *Paradigms for Understanding Social Life*

The rejection of scientism was a reaction to a paradigm which had long dominated American social science. During the post-war period the attempt to formulate general social or political philosophies had been abandoned in favour of a “scientific” model of investigation which privileged the purportedly value-neutral task of constructing empirical theories of social behaviours and development. A positivist account of what constituted an explanation dominated the philosophy of science—to explain a set of facts was a matter of showing that their occurrence could be deduced and therefore predicted from a known law. Social scientists became ever more convinced that the deduction and prediction of social phenomena involved a similar search for regularities and relationships among social facts, and that human behaviours could be viewed and explained in the same manner as natural events. Consequently, piecemeal, empirical research in the social sciences was privileged as the only kind of inquiry that could be described as “scientific” (a normative term in that era) and by the early 1960s this kind of research dominated the field.<sup>3</sup> The social sciences were dominated by the view that the objectives and the logic of social science were the same as those of natural science. Proponents of this approach conceived of the aims of the social sciences in relation to a particular model of natural science, that of logical empiricism. The concept of natural science to which the aspirations of social science were tied, however, fell into disrepute in the philosophy of science long before it was abandoned in sociology.<sup>4</sup> By the early 1970s, philosophers of science, notably Thomas Kuhn<sup>5</sup> and Paul Feyerabend<sup>6</sup>, had challenged the belief that scientific models were objective descriptions and demonstrated that scientific models were themselves partial interpretations, dependent upon the perspectives and disciplinary conventions of scientific observers.

The reaction against positivism and empiricism in the social sciences gained momentum throughout the 1970s, developing on many fronts and in many distinct and often divergent intellectual endeavours. These diverse reactions, however, shared at least some general characteristics and were united by a

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<sup>3</sup>This account is derived from Q. Skinner, “Introduction, The Return of Grand Theory”, in *The Return of Grand Theory in the Human Sciences*, Q. Skinner, ed., (Cambridge, Cambridge University Press, 1985) 1, which is typical of narratives delineating twentieth century intellectual developments in the social sciences.

<sup>4</sup>A. Giddens, “The Social Sciences and Philosophy” in A. Giddens, ed., *Social Theory and Modern Sociology* (Stanford: Stanford University Press, 1987)52 at 54.

<sup>5</sup>*The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970).

<sup>6</sup>*Against Method: Outline of an Anarchistic Theory of Knowledge* (London: Verso, 1978).

reaction against the assumption that the natural sciences offer an adequate or even a relevant model for the practice of the social disciplines. The clearest reflection of this growing doubt has been the revival of the suggestion that the explanation of human behaviour and the explanation of natural events are logically distinct undertakings, and thus that the positivist contention that all successful explanations must conform to the same deductive model must be fundamentally misconceived.<sup>7</sup>

In 1984, Anthony Giddens, a leading British sociologist, asserted that in the English-speaking world, the social sciences had changed dramatically since 1970, and that the orthodox consensus that had defined mainstream social science had disintegrated into a “bewildering variety of schools of social theory”, most of which shared a rejection of scientific premises about social behaviour<sup>8</sup>. Perhaps central to the rejection of positivism is the recognition that social phenomena have meaning for social agents who are constantly interpreting the situations in which they find themselves. (The scientific model, on the other hand, presupposes a subject whose activities can be generalized and understood as context-free operations.<sup>9</sup>) This has resulted in the revival of a cry for a hermeneutic approach to human action, the demand that social science acknowledge the claim that explanation of human behaviours must attempt to recover and interpret the meanings of social actions from the point of view of those performing them. Philosophers who had made such claims earlier in this century, like Dilthey, Collingwood, Heidegger, and especially Wittgenstein, were again sources of influence, for they had asserted that the human sciences were interpretive endeavours — an understanding of social phenomena should be concerned with explicating the historical and cultural context or “form of life” in which such phenomena have meaning. As Giddens asserts, “the recovery of the hermeneutic tradition is one of the most significant occurrences in recent trends of development.”<sup>10</sup>

Changes in the field of anthropology both reflected this shift in the human sciences and, to a large degree, helped to shape it.<sup>11</sup> Clifford Geertz has been extremely influential in elaborating and re-defining the anthropological concept of culture and making it central to the discipline. Geertz rejected the traditional view of anthropological analysis as manipulation of discovered facts or logical reconstructions of empirical realities and pro-

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<sup>7</sup>Skinner, *supra*, note 3 at 6.

<sup>8</sup>Giddens, *supra*, note 4 at 56.

<sup>9</sup>P. Rabinow & W.M. Sullivan, “The Interpretive Turn: Emergence of an Approach”, in *Interpretive Social Science, a Reader* (Berkeley: University of California Press, 1979) 1.

<sup>10</sup>Giddens, *supra*, note 4 at 56.

<sup>11</sup>See G. Stocking, *Race, Culture, and Evolution: Essays in the History of Anthropology* (Chicago: University of Chicago Press, 1982) at 303-07 for a discussion of how the anthropological concept of culture became part of common social science discourse in the post-WWII period.

posed instead an interpretive theory of culture,<sup>12</sup> which he later referred to as “cultural hermeneutics” in the tradition of Wittgenstein’s philosophy.<sup>13</sup>

The concept of culture I espouse ... is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning.<sup>14</sup>

Analysis of social life involves sorting out structures of signification and understanding human behaviour as symbolic action, the import of which lies in what it signifies. Culture, then, was socially established structures of meaning or

interworked systems of construable signs ... , [it] is not power, something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context, something within which they can be intelligibly – that is thickly – described.<sup>15</sup>

Anthropologists, then, must attempt to understand other cultures “from the native’s point of view”; descriptions of other cultures must be cast in terms of the constructions that people in those cultures place upon their experiences, the interpretive meanings they ascribe to their lives, because it is those lives and those experiences that anthropologists profess to describe.

Geertz saw his first collection of essays on “thick description”<sup>16</sup> as witness to an increased interest, not only in anthropology but in social studies generally, in the role of symbolic forms in human life. “Meaning, that elusive and ill-defined pseudoentity we were once more than content to leave philosophers and literary critics to fumble with, has now come back into our discipline. Even Marxists are quoting Cassirer; even positivists, Kenneth Burke.”<sup>17</sup>

In 1983, Geertz looked back and commented that:

Ten years ago, the proposal that cultural phenomena should be treated as significant systems posing expositive questions was a much more alarming one for social scientists – allergic as they tend to be, to anything literary or inexact – than it is now. In part, it is a result of the growing recognition that the established approach to treating such phenomena, laws-and-causes social phys-

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<sup>12</sup>“Thick Description: Toward an Interpretive Theory of Culture” in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) at 3.

<sup>13</sup>See “Introduction” in C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) 3 at 5.

<sup>14</sup>Geertz, *supra*, note 12 at 5.

<sup>15</sup>*Ibid.* at 14.

<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.* at 29.

ics, was not producing the triumphs of prediction, control, and testability that had for so long been promised in its name.<sup>18</sup>

With its contextualist, antiformalist, relativizing tendencies, and its attention to the ways in which the world is talked about, depicted, and represented, rather than the way it 'really' is, cultural anthropology became a model discipline when these same tendencies emerged in other social science disciplines. Anthropologists' hermeneutic attempts to understand the understandings of others, to explain things "by placing them in local frames of awareness"<sup>19</sup>, became increasingly influential.<sup>20</sup>

If we accept the notion that human activity can be understood only in terms of the contexts that inform and limit the human agent's understandings of the social world in which she lives and her own activities in that world, we must also accept the premise that we can only understand these understandings in terms of the contexts which inform and limit our own practices of interpretation. In other words, both the observer and those she observes are situated in historical and cultural contexts. Both the object of investigation and the tools with which investigation is carried out share inescapably the same pervasive context that is the human world.<sup>21</sup> As Geertz put it with respect to anthropology, "[our] writings are themselves interpretations, and second and third order ones to boot."<sup>22</sup>

One of the most comprehensive expositions of the interpretive position in the human sciences was offered by Charles Taylor in his article *Interpretation and the Sciences of Man*, first published in 1971. As Taylor describes it, the baseline realities for both observer and observed in the human sciences are social practices that are intersubjective, forming the most general level of shared meanings which are the basis of community, argument, and discourse.<sup>23</sup> To understand something is to understand its meaning, and meaning is for a subject, in a situation, about something, and exists as part of a field of meanings. For the social scientist this entails that our capacity to understand is rooted in the cultural world in which we live:

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<sup>18</sup>*Supra*, note 13 at 3. See also "Blurred Genres: The Refiguration of Social Thought", *ibid.* at 19.

<sup>19</sup>*Ibid.* at 6.

<sup>20</sup>In the discipline of history, for example, social history has surpassed political history as the most important area of research, and there has been a major shift in emphasis towards the study of culture. Anthropological models predominate in historians' approaches to cultural phenomena and the interpretive strategies propounded by Geertz have been the subject of intense discussion. See L. Hunt, "Introduction: History, Culture and Text" in L. Hunt, ed. *The New Cultural History* (Berkeley: University of California Press, 1989).

<sup>21</sup>See Rabinow & Sullivan, *supra*, note 9 at 5.

<sup>22</sup>*Supra*, note 12 at 15.

<sup>23</sup>C. Taylor, "Interpretation and the Sciences of Man" in Rabinow & Sullivan, *supra*, note 9, 25 at 48-51.

There is no outside, detached standpoint from which to gather and present brute data. When we try to understand the cultural world, we are dealing with interpretations and interpretations of interpretations.

Culture, the shared meanings, practices and symbols that constitute the human world, does not present itself neutrally or with one voice. It is always multivocal and overdetermined, and both the observer and the observed are always enmeshed in it; that is our situation. There is no privileged position, no absolute perspective, no final recounting.<sup>24</sup>

The German philosopher Hans-George Gadamer has been influential in calling our attention to the limitations of our own horizons and the prejudices and preconceptions that necessarily shape our understandings of others, thereby casting doubt on whether we can ever hope to grasp alien behaviours, customs, or 'texts' objectively on their own terms.<sup>25</sup> We may, therefore, have to recognize that if social science is to be interpretive in nature, it may be impossible to think of it as a method for attaining 'truth' as we commonly tend to understand it.

If all human access to reality is inevitably conditioned by specific beliefs about what counts as knowledge, then the claim of science (or any realm of intellectual endeavour) to be finding out more and more about the world as it really is, looks suspicious. As Skinner states, "[e]pistemology, conceived in Kantian terms as the study of what can be known with certainty, begins to seem an impossibility; instead we appear to be threatened with the spectre of epistemological relativism."<sup>26</sup>

### *B. Models for Understanding Language*

As Skinner's statement indicates, epistemology and metaphysics have increasingly become suspect in the field of philosophy. The concept of culture has also played a major role in helping philosophers come to terms with the nature of certainty in a world devoid of absolutes. Here, however, we see how the concept of culture is integrally tied to new understandings of language. The "interpretive turn" in legal scholarship is also motivated by legal scholars' assimilation of these shifts in understanding.

As Gerald Graff suggests, legal scholars like to cling to what is left of the 'commonsense' view of language, according to which words are essentially names of things and the meanings of words are securely fastened ... onto the things the words denote.<sup>27</sup> Legal theory would seem fairly con-

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<sup>24</sup>Rabinow & Sullivan, *supra*, note 9 at 6.

<sup>25</sup>H.-G. Gadamer, "The Problem of Historical Consciousness" in *Interpretive Social Science*, *supra*, note 9 at 103.

<sup>26</sup>Skinner, *supra*, note 3 at 11.

<sup>27</sup>G. Graff, " 'Keep off the Grass' 'Drop Dead' and Other Indeterminacies: A Response to Sanford Levinson" (1982) 60 *Tex. L. Rev.* 405 at 405.

sistent in its appeals to the image of legal discourse as a neutral medium which merely reflects social events.<sup>28</sup> This is only possible given a conventional understanding of language as a transparent vessel for expressing meaning. Words must be treated as invisible transporters of intended meaning, but not themselves constructive of meaning.<sup>29</sup> Furthermore, although we recognize that meaning can only be communicated through linguistic conventions, the traditional view is that linguistic categories immediately reflect a direct correlation with the objects or thoughts to which they refer.<sup>30</sup> The idea that representational terms — “signifiers” — have a direct correlation with the concepts represented, their “signified” meaning, depends upon an assumption of positive content — a natural tie between the word and the thing.<sup>31</sup>

Increasingly, however, legal theorists are being compelled to acknowledge that the idea that meanings reside “in” language is fundamentally misguided. Linguists, anthropologists, literary theorists, and semioticians have launched a sweeping assault upon such notions of language, demonstrating that words themselves are only arbitrary and conventional symbols or sounds that bear no necessary relation to the “real world” of things, and that, in fact, the language we use to describe this world constructs it, rather than reflects it, by dividing it up in a culturally distinct manner.

Developments in linguistics indicated that observers construe facts (even in their first perception of them) according to pre-existing social categories. These structuring filters, through which different peoples construct the realities they recognize, are radically contingent and rooted in language. The American linguists Edward Sapir and Benjamin Whorf were influential in demonstrating that our most basic perceptual categories including colour, time, and space, were not universal, but culturally filtered through the contingent categories of language. The distinct languages of different societies constitute unique worlds for those who live within them. These are distinct worlds, not merely the same world with differing names for the same phenomena.<sup>32</sup>

Sapir and Whorf’s work was not widely known in North America until the late 1950s and became influential in the 1960s along with the structural linguistics of Ferdinand de Saussure. He approached language as a unified,

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<sup>28</sup>See G. Peller, “The Metaphysics of American Law” (1985) 73 Calif. L. Rev. 1151 at 1159.

<sup>29</sup>*Ibid.* at 1161.

<sup>30</sup>*Ibid.* at 1163.

<sup>31</sup>*Ibid.*

<sup>32</sup>See D. G. Mandelbaum, ed., *Selected Writings of Edward Sapir in Language, Culture, and Personality* (Berkeley: University of California Press, 1949).

synchronic system,<sup>33</sup> in which the relationship between a word and its referent (signifier and signified) was arbitrary,<sup>34</sup> and the sign's meaning arose not from its relationship to an external world, but from its relationship to other signs within that system.<sup>35</sup>

Structuralist linguistics (and its elaboration and extension in structuralist anthropology) was particularly important in its rejection of subjectivist, phenomenological understandings of language which viewed language as an instrument in the hands of conscious subjects. Instead it favoured an objectivist understanding of language as preceding and defining the characteristics of consciousness itself.

The argument of the structuralists that won so much favor was that language was not a tool at the disposal of the authorial subject, but instead, the mediation of language contained constraints so powerful that the relationship of meaning and subject was actually reversed. In short, language, to the structuralists, situated meaning and the subject, not the reverse. Whatever the strengths of the structuralist position, the crucial point was made — meaning was no longer the creation of the author or subject, but was an effect of the complex set of relationships known as the structure.<sup>36</sup>

In philosophy, linguistic theory proved influential in the development of a new epistemological framework to replace discredited metaphysical claims. This framework was explicated in terms of a social inter-subjectivity constituted by and through language.<sup>37</sup> The revival of Wittgenstein's contextual hermeneutics aided philosophers in this endeavour. He argued that arbitrary symbols, governed by arbitrary rules, serve to create meanings that appear clear, self-evident, and certain, but only to those who accept the conventions of the language game in which those systems and rules operate.<sup>38</sup> Wittgenstein thus saw language not as a hermetic system in which meanings were generated, but as integral to and constitutive of regular ways of behaving, fixed forms of life, or what anthropologists call culture. Con-

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<sup>33</sup>F. de Saussure, *Course in General Linguistics*, C. Bally & A. Sechehaye, eds, trans. W. Baskin (New York: McGraw Hill, 1966) at 101.

<sup>34</sup>*Ibid.* at 65.

<sup>35</sup>*Ibid.* at 120.

<sup>36</sup>M. Poster, "Interpreting Texts: Some New Directions" (1985) 58 S. Cal. L. Rev. 15 at 16. For a discussion of the critical implications of this claim for liberal legal discourse, see T. Heller, "Structuralism and Critique" (1984) 36 Stan. L. Rev. 127. Heller also discusses some of the major criticisms of structural linguistics and anthropology, both of which have greatly declined in influence since the peak of their popularity in the late 1960s.

<sup>37</sup>See for example R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979); J. Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Boston: Beacon Press, 1984).

<sup>38</sup>L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: B. Blackwell, 1953).

tingencies were, therefore, experienced as certainties by virtue of shared forms of life.

Legal thought has only slowly assimilated these twentieth century developments in the theory of language and culture, although they have long been acknowledged to hold the potential of undermining the notion of any neutral interpretive function for legal decision-making. Legal realists were arguably the first to counter the formalist claim that the legal system could produce neutral decisions because the judiciary were involved in an apolitical exercise — the interpretation of the plain meaning of the words of the law. Realists recognized that there were no real or plain meanings of words, and that language was contextual and purposive, a view of language which accorded with their insistence on purposive interpretation. “It was by insisting that one always needed to look to purpose in order to interpret even the plain meaning of words that the realists unfroze rules, shattering their brittle reified form and dissolving them back into their constituent policy goals.”<sup>39</sup> The judge who purported to apply the plain meaning of a word could be seen to be “committing the fallacy of reification — abstracting a meaning from its context and purpose and treating it as though it were an external thing, capable of value-free investigation.”<sup>40</sup> The movement from the interpretation of the plain meaning of words to the interpretation of purpose and intention, however, has given way to the realization that purposes and intentions are equally reified and that one cannot look to purposes and intentions without delving into the political struggles which produced the law in question.

Given conventional understandings of language, the attribution of meaning may be seen to be determinate and free from the mediation of interpretation. Once we recognize signs as arbitrary and conventional, and that there exists no natural tie between representational terms and the concepts they signify, we still have to deal with the tendency to assume that however arbitrary the signifier, it ultimately has reference to a ‘real’ signified, to something actually out there, independent of our construction of it. But again, all that we can apprehend of this reality is that which is distinguished by the linguistic categories available to us. As Peller asserts, this “suggests that meaning is created socially through the economy of difference within representational contexts. Thus, there is no re-presentation, only interpretation”<sup>41</sup> and there is nothing beyond interpretation to be interpreted.

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<sup>39</sup>J. Boyle, “The Politics of Reason: Critical Legal Theory and Local Social Thought” (1985) 133 U. Pa. L. Rev. 685 at 711.

<sup>40</sup>*Ibid.* at 712.

<sup>41</sup>Peller, *supra*, note 28 at 1167.

## II. Legal Interpretation

### A. *Defining the Field*

The rejection of positivism in the social sciences and humanities has slowly filtered into legal scholarship, making it inevitable that legal academics rethink the nature of legal interpretation. Curiously, however, most of the debate about the nature of legal interpretation within legal academic fora has focused exclusively on the activities of judges interpreting authoritative texts like the American Constitution, the Canadian Charter of Rights, statutes, and common law precedent, to decide hard cases.

So, for example, in an early article in this genre, Owen Fiss recognizes that adjudication is interpretation, but defines this as a process in which a judge comes to understand and express the meaning of a legal text.<sup>42</sup> He recognizes that interpretation has emerged in recent decades as an attractive method for studying *all* social activity and that the idea of a written text has been expanded to embrace social action and situations which are sometimes referred to as text-analogues.<sup>43</sup> Further, he acknowledges the growing importance of interpretation in the disciplines of social study and suggests that a view of adjudication as a form of interpretation promises to build bridges between legal studies and this developing humanistic strand in the social sciences. Promptly, however, he retreats from exploring the implications of these connections by claiming that appreciation for the distinctive social function of adjudication requires care in identifying the kinds of texts to be construed; judges, he insists, are “to read the legal text, not morality or public opinion, not, if you will, the moral or social texts.”<sup>44</sup>

It immediately seems apparent that whole areas of legal interpretation have been excluded from the inquiry. Judges, after all, interpret not only cases and statutes, but evidence of various kinds, the oral arguments of counsel, the testimony and demeanour of witnesses, the attitudes and proclivities of juries, rules of civil procedure, community morals and standards (in obscenity and slander cases for example) — to name only a few of the myriad ‘texts’ interpreted in an adjudication context.

Legal scholars limit the nature of the insights we might glean from this consideration of legal interpretation by *starting* their inquiries at the *end* of the adjudication process. By conflating *legal* interpretation with *judicial* activity, whole realms of legal interpretation are precluded as subjects of investigation. The process through which people with disputes become lit-

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<sup>42</sup>O.M. Fiss, “Objectivity and Interpretation” (1982) 34 Stan. L. Rev. 739 at 739.

<sup>43</sup>*Ibid.*

<sup>44</sup>*Ibid.* at 740.

igants is one permeated with legal interpretations; how else do people decide something is a legal matter, lawyers translate social realities into legal argument, counsel interpret each other's activities in pre-trial negotiations, litigants perceive their attorney's behaviours, juries translate instructions, witnesses their roles, court officers their duties?

The determination of facts in the adjudication context, for example, is clearly an interpretive exercise. Kim Lane Scheppelle illustrates just how interpretive fact-finding can be in her discussion of rape trials.<sup>45</sup> The statement of "what happened" is an interpretive act and one which may be understood differently by the man and the woman involved.

In one of the cases ... the defendant claimed that he engaged in heavy caressing. The victim experienced light choking ... [I]t may have been that one or the other was lying. But ... it may also have been that both descriptions were true because men and women have different perceptions of force. What was heavy caressing to the man may have been the very same action that counted as light choking to the woman. ... But the different descriptions have different legal consequences ... .<sup>46</sup>

Judges and juries have to choose between different perceptions of the facts: not between truth and falsehood but between alternative truths. In the context of ascertaining the facts about sexual relations between men and women, there will often be conflicting true versions of the same event.<sup>47</sup>

Furthermore, if we were to take our investigation of legal interpretation outside of the adjudication context, and into corporate boardrooms, prisons, factories, and classrooms, we might come up with some insights into legal interpretation that would yield fruitful contributions to the increasingly hermeneutic study of social life and possibly also add something to our understanding of the reproduction and transformation of dominant ideologies in the social world.

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<sup>45</sup>K.L. Scheppelle, "The Re-Vision of Rape Law" (1987) 54 U. Chi. L. Rev. 1095. Scheppelle's discussion (a review of Susan Estrich's *Real Rape: How the Legal System Victimizes Women* (Cambridge: Harvard University Press, 1987) is an application of a theoretical argument about legal fact-finding authored by anthropologist Clifford Geertz. See the essay "Local Knowledge" in *Local Knowledge, supra*, note 13 at 167.

<sup>46</sup>*Ibid.* at 1105.

<sup>47</sup>To anticipate the argument I will later make with regard to the interpretation of legal texts, ascertaining facts has political ramifications. Deciding between the divergent perceptions of men and women is a decision with political consequences. Scheppelle demonstrates that the law delegitimizes the perceptions and experiences of women in this context, and that women themselves, when they sit as judges and on juries, have a tendency to consider their own perspectives inappropriate in a legal setting, thereby participating in their own silencing and in shaping the legal system's signal to women that their experiences are not real and their perceptions are not to be taken seriously.

### B. *Defining the Problem*

Although the literature on legal interpretation is unduly restricted in the scope of its inquiry, it has provoked scholars to formulate some central dilemmas and to offer competing resolutions to these. Again, however, it would seem that these preoccupations are narrowly conceived. Basically, the central dilemma revolves around the social and political ramifications of the proposition that words have no 'plain meanings' or objective referents, and that meaning is therefore indeterminate. The predominant concern is that the abandonment or rejection of positivism or objectivism raises the spectre of "nihilism" and subjectivism, thereby threatening the legitimacy of adjudication and ultimately the rule of law itself. Much of the scholarship in this area, however, seems directed towards demonstrating that such a concern is unfounded.

Levinson, in one of the earliest and most provocative accounts of the dilemmas raised for legal theorists by developments in literary theory, sees the problem in rather black and white terms.<sup>48</sup> Traditionally law was seen as the science of extracting meaning from words, which enabled one to believe in law as a process of submission to the commands of authoritative texts (the rule of law) rather than as the creation of wilful interpreters (which would produce the rule of men). "The ordinary language of all developed legal systems includes constant recourse to texts that authorize specific conduct."<sup>49</sup> For example, the authority of the written, stable Constitution, which controls and transcends political activity because of the fixed nature of its language, is a prominent and pervasive feature of American political thought.

Developments in literary criticism dispute such commonsense notions, and suggest the radical instability and indeterminacy of the meaning of texts at all times. The suggestion has been that language and image are unavoidably ambiguous, and the ascription of meaning is the product of an interchange between object and viewer rather than an attribute of the object itself.<sup>50</sup> Despite a general rejection of originalist constitutional interpretation, legal scholars have been loath to abandon the belief that there is something *in* the text (be that the Constitution or judicial decisions considering it) that can be extracted if only we can determine the best method to mine its meaning. Such quests for the essential meanings of texts have been abandoned by literary critics who increasingly view interpretation as a constructive art in which the reader plays an active role in creating a 'meaning' which the text simply does not have prior to or independent of its inter-

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<sup>48</sup>S. Levinson, "Law as Literature" (1982) 60 *Tex. L. Rev.* 373.

<sup>49</sup>*Ibid.* at 374.

<sup>50</sup>*Ibid.* at 377.

pretation. Such theorists reject the idea that meaning is discovered, and see the search for truth as fundamentally in error if it presumes a privileged foundation for measuring the attainment of truth. There is no finality of interpretation, and there can be no determinate meanings.

This has serious implications, Levinson claims, especially for legal theories of constitutional interpretation, because it suggests that interpretation is merely an exercise of power and that legal texts can be read to serve political purposes. This is particularly alarming given that “the principal social reality of law is its coercive force vis-à-vis those who prefer to behave other than as the law ‘requires’”.<sup>51</sup> If we abandon the claim that certain judges “got the essence right” in their interpretations of the Constitution, don’t we have to recognize instead “the extent to which we have been subdued by their political visions”<sup>52</sup>? Because there are competing visions, there are different Constitutions, and arguably as many plausible readings of the U.S. Constitution as there are interpretations of Hamlet. Ultimately, we can only launch attacks on constitutional interpretations in political terms.

Reactions to Levinson’s characterization of the dilemma emerged on many fronts and spawned their own bodies of criticism. Foremost amongst those generating criticism was the reaction of Owen Fiss, who asserts that conceptualizations of legal interpretation like Levinson’s raise the spectre of nihilism and cast doubt on the legitimacy of adjudication:

This new nihilism might acknowledge the characterization of adjudication as interpretation, but then would insist that the characterization is a sham. The nihilist would argue that for any text — particularly such a comprehensive text as the Constitution — there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power.

...

The law aspires to objectivity, so the nihilist observes, but he concludes that the nature of the constitutional text makes this impossible. The text is capable of any number of possible meanings, and thus it is impossible to speak of one interpretation as true and the other false. It is impossible to speak of law with the objectivity required by the idea of justice.<sup>53</sup>

As Stanley Fish correctly observes, the dilemma has been (unfortunately) cast as involving a choice between positivism, or the idea that meaning is embedded in texts and can be read without interpretive effort, and subjectivism, the idea that because texts have many meanings (or none) the

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<sup>51</sup>*Ibid.* at 386.

<sup>52</sup>*Ibid.* at 389.

<sup>53</sup>Fiss, *supra*, note 42 at 740-42.

reader or judge is free to impose or invent whatever meaning serves her partisan purposes.<sup>54</sup>

### C. *Constructing Solutions: The Constraints of Convention*

Fiss' own resolution to the dilemma he poses is to find a source for and constraint on the determination of meaning in the "disciplinary rules" which intervene between the text and the reader and derive from the institutional setting of interpretive activity. These rules, suggest Fiss, provide the standards which permit judicial interpretation to achieve the measure of objectivity required by the idea of law, because they constitute a set of norms that transcend the particular vantage point of the person offering the interpretation.<sup>55</sup> Secondly, he finds an additional source of constraint in the idea of an "interpretive community" which recognizes these rules as authoritative, and confers authority on them. This, he acknowledges, implies that the objective quality of interpretation is bounded, limited, or relative, but, he asserts, bounded objectivity is the only kind of objectivity to which we can or do aspire.

Fiss' notions of disciplinary rules and interpretive communities are representative of a whole series of attempts by legal scholars to find a source of constraint on legal interpretation that will render it less politically problematic.<sup>56</sup> Although a number of acute and specific criticisms have been launched, against both Fiss' characterization of the interpretive dilemma, and his resolution of it (which I will discuss in more detail when I address the alternatives offered by their authors), his resolution shares some fundamental inadequacies with many others which seek institutional sources of constraint on the interpretive process.

As a source of constraint, the idea of an interpretive community clearly does not provide a politically neutral referent. Paul Brest, for example, argues that the 'objectivity' of the interpretive process is an illusion, and that we must examine the implications of the fact that our 'interpretive

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<sup>54</sup>S. Fish, "*Fish v. Fiss*" (1984) 36 Stan. L. Rev. 1325 at 1325.

<sup>55</sup>Fiss, *supra*, note 42 at 744.

<sup>56</sup>Paul Chevigny also endeavours to define the institutional constraints which are "native to legal interpretation" and to explain the fact that although numerous possible interpretations are available, even given the broad constraints of culture and tradition, in practice legal interpreters will consider only a small number of these. He defines three sources of constraint that are enterprise specific: a decision must be reached, a thread of value-intent must be found in the law, and an interpretation must be taken from a point of view independent of that of the parties. These practical constraints on judicial behaviour imply that numerous alternative constructions of meaning will be discounted, because by failing to meet our conventional understandings of these constraints, they simply do not come within the realm of legal interpretation. See P.G.Chevigny, "Why the Continental Disputes are Important: A Comment on Hoy and Garet" (1985) 58 S. Cal. L. Rev. 199.

community' is predominantly white, male, and relatively wealthy, and supposedly articulates 'our' public values. We "must confront the question of the relationship, if any, between the composition of the dominant legal interpretive community and the outcomes of its interpretations."<sup>57</sup> Society's values are viewed through one's own spectacles and try as we will, we cannot escape the perspectives that come with our particular backgrounds and experiences. Not only particular interpretations, but understandings of interpretive conventions themselves reflect the backgrounds and experiences of those privileged to constitute the legal interpretive community, and isolate interpretive judgments from public scrutiny. In the Canadian context, Joel Bakan argues that the "law as interpretation" school, by accepting that law is indeterminate but that adjudication is nonetheless constrained and rational because of judicial internalization of disciplinary rules, attitudes of impartiality, and other decision-making conventions, merely celebrates and validates the authority of the legal elite because the conventions of legal culture reflect their perspectives, which are invariably those of dominant social groups with an interest in maintaining the status quo.<sup>58</sup>

Moreover, I would add, legal interpretive communities do not exist 'a priori' but are constituted and continually reconstituted in a process of ongoing *struggle*. The definition of the interpretive community is itself interpreted and politically negotiated.<sup>59</sup> Furthermore, such communities are themselves divided, and dissensus rather than consensus over interpretive strategies may well be the norm.<sup>60</sup> Fiss finds the possibility of disputes within the community unproblematic because there are procedures for resolving these. This, however, merely begs the question. Such procedures are themselves interpreted and may well be interpreted differently by social actors differentially situated, whose interpretations will be accorded varying degrees of authority as a consequence of political struggles in which not all of

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<sup>57</sup>P. Brest, "Interpretation and Interest" (1982) 34 *Stan. L. Rev.* 765 at 771.

<sup>58</sup>Bakan, *supra*, note 2. The relationship between judges' backgrounds and the constitution of legal conventions is probably more complex than one of mere reflection. See P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 *Hastings L.J.* 805 for an interesting if limited perspective on this point.

<sup>59</sup>For example, Patricia Monture, a Queen's University law student, is currently engaged in a political struggle with the Law Society of Upper Canada for the right to practice law without the necessity of swearing allegiance to the Queen. As a native Canadian and a member of a sovereign people, Ms. Monture cannot and should not be expected to swear allegiance to a foreign sovereign. That it was never historically anticipated that native peoples would endeavour to join the legal profession and thus obtain the minimum credentials necessary to be considered for inclusion in the "interpretive community" only underscores the political constitution of these communities.

<sup>60</sup>See M.J. Perry, "The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation" (1985) 58 *S. Cal. L. Rev.* 551 for the same point. Perry, however, does not find that dissensus threatens the importance of the notion of community.

the participants have equal material resources or equivalent degrees of symbolic capital.<sup>61</sup> To accept the standards for the evaluation of interpretations that are found within the disciplinary rules authorized by (and authorizing) the interpretive community, is to wilfully ignore the fact that these embody moral and political principles which are hegemonic; to cast aside as non-legal (and implicitly therefore, as non-legitimate), criticisms which derive from standards emerging outside that community,<sup>62</sup> is to effectively assign legitimacy to the victors by virtue of their victory.

#### D. Denying the Problem: The Constraints of Context and Tradition

In the accounts of interpretation thus far offered, institutional conventions have been offered as sources of constraint which prevent interpretation from having unacceptable political implications. The 'politics' of legal interpretation is seen to be a problem of judicial values, normative commitments, interpretive assumptions, class backgrounds, and personal experiences. In some senses, this represents a movement beyond Levinson's conclusion that judges deliberately interpret in ways which serve their political visions towards a more sophisticated understanding of the social factors which influence judicial behaviours. Although the political danger of legal interpretation is still recognized to be a matter of the judicial imposition of political values, there is an increasing sense that such an imposition is not completely a matter of volition or free choice.<sup>63</sup> The politics of legal interpretation, however, is still a problem seen to be rooted in the attributes of individual interpreters. More refined accounts of the contextual constraints which define legal interpretation, however, may generate more comprehensive understandings of the inherently political nature of legal interpretation.

Gerald Graff, for example, offers a contextual argument against the proposition that texts are radically indeterminate in the practice of legal interpretation. Although he acknowledges the need to abandon the common

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<sup>61</sup>The concepts of cultural and symbolic capital are drawn from Pierre Bourdieu: see *Outline of a Theory of Practice*, trans. R. Nice (Cambridge: Cambridge University Press, 1977)[hereinafter *Outline*]; *Distinction: A Social Critique of the Judgment of Taste*, trans. R. Nice (Cambridge, Harvard University Press, 1984); "The Forms of Capital" in J. G. Richardson ed., *Handbook of Theory and Research for the Sociology of Education* (Westport, Conn.: Greenwood Press, 1986).

<sup>62</sup>See Fiss, *supra*, note 42 at 749 for Fiss' distinction between internal and external perspectives on legal interpretations. See also, L. Simon, "The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation" (1985) 58 S. Cal. L. Rev. 603 and Fish, *supra*, note 54 for critiques of this distinction.

<sup>63</sup>The Canadian commentators do not, however, seem to have grasped this, with the exception of Langille, *supra*, note 2, who, after recognizing that politics is not a matter of a judge's imposition of personal values, seems to assume that politics therefore ceases to be an issue. See discussion of Langille, *infra*.

sense view of language, he doesn't feel that the exposure of such fallacies impairs our practical ability to make sense of texts.<sup>64</sup> The fact that meaning is not to be found through the realization of some presumed inner essence that reposes in the text does not entail the conclusion that texts are radically indeterminate and that there are no constraints on their interpretation. Graff feels that such constraints are inherent in the context in which texts are interpreted. Meaning, he argues, is not a function of words or sentences, but of the practical sense to which they are put; we have conventional, recognized uses for such symbols which provide the context in which we apprehend them. Although many symbols have wide ranges of meaning, certain meanings are likely discerned as the clear meaning of a symbol because of the particular context in which we find ourselves. It's the same as it ever was. "In short, the practical concerns of law occasion the imposition of a number of *artificial* restrictions on interpretive procedure ... ."<sup>65</sup>

The assertion that the determination of meaning is a contextual enterprise is impossible to refute, and must certainly be central to our understanding of legal interpretation. Graff's discussion of the nature of this context is a relatively simple one, however, and others have presented more complex and elaborate explications of the context in which legal interpretation, defined by the paradigm of judicial interpretation, takes place. These shall be explored in some detail, before considering the inadequacies of reference to context as a source of interpretive constraint.

Drawing inspiration from the German philosopher Hans-George Gadamer, others have found sources of constraint (and enablement) in the relationship between legal interpretation and tradition. Basically, they have explored the hermeneutic rejection of the positivist proposition that there is a sharp distinction between understanding the text on its own terms, and reading the interpreter's concerns into it. David Couzens Hoy has perhaps been most influential in bringing Gadamer's ideas to bear in legal circles, and in so doing, has introduced a new level of sophistication to the discussion of the way in which context constrains interpretation.

Gadamer argues that older traditions which separate interpretation into the distinct operations of cognitive understanding, normative interpretation of a text's significance, and the application of the sense thereby gleaned to a specific situation or enterprise, fail to grasp the role that context plays in shaping the parameters within which meaning is appropriated from a text. It is impossible to read meaning 'out of' a text by bracketing the modern assumptions and prejudices of the interpreter, because these pre-

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<sup>64</sup>Graff, *supra*, note 27 at 406.

<sup>65</sup>*Ibid.* at 411.

understandings are what *enable* interpretation as well as constrain it.<sup>66</sup> In other words, no sharp distinction can be drawn between understanding the text on its own terms and reading the interpreter's concerns into it, because the context in which a reader approaches a text will condition the reader's grasp of it.<sup>67</sup> This context is historically and culturally contingent, and does not depend upon subjectivist or voluntaristic factors; it would seem to include historical and social factors as well as normative considerations. Moreover, the context within which interpretation of a text takes place incorporates an awareness of the historical growth and transmission of that text, and hence its influence and effectivity.<sup>68</sup> Interpretation then, is tradition-bound. "Central to hermeneutic theory, but most susceptible to the charge of historical relativism is the thesis that the interpretation of a work is invariably conditioned by the prior history of the effects of that work. Any prior interpretation will count as part of that history but other effects will also be influencing factors."<sup>69</sup> Judges are never free to read what they want into or out of a legal text; current context, present needs, and the history of legal interpretation condition and delimit their interpretations.<sup>70</sup>

For Gadamer, the idea that constitutional review, for example, has involved the imposition of 'external' values, in the sense that judges have wilfully and arbitrarily imposed political visions into constitutional doctrine, would seem less credible than an understanding of an historical change in the meaning of the Constitution that is based on the historical and cultural factors which influence and constrain both the judge's reading of the Constitution and her reading of intervening interpretations of it. Thus, argues Hoy, hermeneutic approaches to interpretation would reject as untenable the dilemma that Fiss presents as central to the legitimacy of the adjudication process. The divorce of textual meaning from authorial or utterance meaning does not imply that textual meaning can be interpreted arbitrarily, and the idea that interpreters can choose an interpretation from numerous possible meanings that are somehow independently engendered by the text misconstrues the activity of the interpreter

in interpreting we do not so to speak, throw a signification over some naked thing present-at-hand, we do not stick a value on it; but when something within the world is encountered as such, the thing in question already has an involve-

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<sup>66</sup>W. Outhwaite, *Hans-George Gadamer*, in Skinner, ed., *supra*, note 3, 21 at 23.

<sup>67</sup>D.C. Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives" (1985) 58 S. Cal. L. Rev. 135 at 137-38 [hereinafter "Interpreting the Law"]. See also *The Critical Circle: Literature, History and Philosophical Hermeneutics* (Berkeley: University of California Press, 1982).

<sup>68</sup>Outhwaite, *supra*, note 66 at 25.

<sup>69</sup>Hoy, "Interpreting the Law", *supra*, note 67 at 147.

<sup>70</sup>*Ibid.* at 141.

ment which is disclosed in our understanding of the world and this involvement is one which gets laid out by the interpretation.<sup>71</sup>

Gadamer's basic metaphor for this process of mediation is the "fusion of horizons", in which we approach what we wish to understand, not in a state of factitious virginity, but with the prejudices which "constitute the historical reality of [our] being".<sup>72</sup> This process of coming-to-understand is not a matter of unprejudiced appropriation of an object such as a text, but a fusion of one's own horizons of meanings and expectations (prejudices) with that of the text, the other person, the alien culture.<sup>73</sup> This suggests that what a judge does when confronting a legal text is not different in kind from what anthropologists do when making sense of another culture, or what any of us do when dealing with the unfamiliar in everyday life. For "understanding is *not* a special feature of the human sciences, but a fundamental way in which human beings exist in the world."<sup>74</sup>

These refinements on the nature of the context that constrains legal interpretation have had implications for the way that scholars think about the politics of legal interpretation. Dworkin, for example, asserts that all legal practice is an exercise of interpretation, and so conceived, law 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 politics that does not understand this difference will provide poor understanding and even poorer guidance."<sup>75</sup>

Dworkin asserts that when literary critics disagree about interpretations they disagree because they assume different normative theories about what literature is, what it is for, and what makes one work of literature better than another.<sup>76</sup> Interpreters proceed within certain interpretive conventions, but major disagreements do not focus on these conventions, but on the function or point of art more broadly conceived. Since people's views about what makes art good are inherently subjective, this aesthetic hypothesis abandons hope of rescuing objectivity in interpretation. Theories of interpretation are candidates for the best answer to the substantive questions posed by interpretation; they incorporate evaluative beliefs about art.

Legal interpretation, like literary interpretation, also relies upon beliefs and conventions of a formal character about what is involved in interpreting

<sup>71</sup>Outhwaite, *supra*, note 51 at 26 citing M. Heidegger, *Being and Time*, 7th ed., trans. J. Macquarrie and E. Robinson (Oxford: Oxford University Press, 1962) at 190-91.

<sup>72</sup>*Ibid.* at 27, citing H.-G. Gadamer, *Truth and Method*, trans. W. Glyn-Doepel (London: 1975) at 245.

<sup>73</sup>*Ibid.* at 31.

<sup>74</sup>*Ibid.* at 29.

<sup>75</sup>R. Dworkin, "Law as Interpretation", in W.J.T. Mitchell, ed., *supra*, note 1, 249 at 249.

<sup>76</sup>*Ibid.* at 253.

a legal text, and substantive convictions about the purpose or value of the history of decisions, structures, convictions, and practices:

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 individual effort, or resolving social and individual disputes or securing justice between citizens and between them and their government, or some combination of these. ... 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.<sup>77</sup>

Interpretive disputes then, are arguments about political theory. When different interpretations are plausible, even given conventional or enterprise-specific practical constraints, then substantive political theory will play a decisive role. Hence we find distinctly liberal, radical, and conservative opinions not only about what the Constitution and laws of a nation should be, but also about what they are; reliance on political theory is not a corruption of interpretation but part of what interpretation means.<sup>78</sup>

Hoy agrees with Dworkin that any understanding of legal interpretation must concern itself with the relation between interpretation and its normative commitments, but cautions against a conception of the relationship which assumes a situation in which the interpreter reads his normative convictions into the text.<sup>79</sup> A theory of interpretation that takes Gadamer's insights into account would not, he posits, disagree with the proposition that politics forms a normative background for legal interpretation if that is understood to mean that there is no such thing as pure interpretation that is not shot through with normative and evaluative components.<sup>80</sup> Such a theory of understanding again demonstrates that the cognitive act of understanding, the normative interpretation of a text's significance, and the reproductive application of that sense to a specific situation are not severable operations, and makes it clear that such normative considerations or value preferences preserved in interpretation are not optional or volitional. In general, the process of interpretation is misdescribed if it is construed as a secondary imposition of values on a primary set of facts.<sup>81</sup>

While I don't believe that Dworkin's theory is guilty of such misdescription, his representation of normative commitments as "inherently subjective" does create the danger of such a reading, particularly in an intellectual climate permeated by a liberal vision in which subjective realms

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<sup>77</sup>*Ibid.* at 264.

<sup>78</sup>*Ibid.* at 269.

<sup>79</sup>Hoy, "Interpreting the Law" *supra*, note 67.

<sup>80</sup>*Ibid.* at 150.

<sup>81</sup>*Ibid.* at 151.

of value and belief are assumed to belong to freely autonomous individuals as matters of volition and choice. Walter Benn Michaels, for example, argues that although acts of interpretation may be influenced by political interests and have political consequences, the interpretive act is not a political one because interpretations do not involve "free political choices" for which we can be held responsible as we are for other political acts.<sup>82</sup> Interpretations are never freely chosen, and neither are beliefs; legal interpreters are never in a position of choosing between political theories or in choosing between possible meanings on the basis of these beliefs.

Again, a 'context' is presumed to make such choices impossibilities. Since our understandings always are already mediated by cultural meaning and belief systems, we are never in a position of believing nothing, and therefore we are never required to 'choose' beliefs because no such space exists, and if it did, we wouldn't be able to choose beliefs but be in a situation where choice would be an impossibility.<sup>83</sup> Michaels suggests that the whole debate about the politics of interpretation can be traced to a difficulty which is "a function of an epistemological scenario in which the interpreter is understood first as believing nothing and second as responding to this 'meaningless' or 'undecidable' situation by choosing beliefs for political reasons."<sup>84</sup> Because the first stage never takes place, the conditions required for the second stage — the moment of ethical choice — never exist.

Such arguments<sup>85</sup> are less than compelling; we can, for example, accept all of Michaels' premises and still deny his conclusions. Obviously we live in social worlds and are always in a position of believing something, but this doesn't mean that choice is non-existent, but that it is informed, constrained, and bounded by certain presuppositions. Clearly in a space of utter conceptual emptiness choice would be an impossibility (in such a space we

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<sup>82</sup>W.B. Michaels, "Is There a Politics of Interpretation?" in W.J.T. Mitchell, ed., *supra*, note 1, 335.

<sup>83</sup>*Ibid.* at 341.

<sup>84</sup>*Ibid.* at 343.

<sup>85</sup>The master of this type of argument is Stanley Fish, whose most recent efforts include a dismissal of Mark Kelman's efforts to deconstruct some of the interpretive constructs which characterize criminal law. See S. Fish, "Dennis Martinez and the Uses of Theory" (1987) 96 *Yale L.J.* 1773 at 1794-1800. Again, all of our interpretive constructs are always already there and in-place and such constructs are a condition of consciousness and therefore cannot be chosen (and presumably therefore cannot be challenged) and will not be rendered any the less compelling just because "a few guys in Cambridge and Palo Alto" are now able to deconstruct law by pointing them out to us. It's the same as it ever was. To accept this argument you need to believe that interpretive constructs have no plasticity, cannot and do not change, and that you have to have recourse to all of them, all of the time, to do any thinking at all. The possibility that there are several of them, that they are not mutually coherent, that they may contradict and that we may use some of them to put others in issue, and thus that our interpretive constructs contain the conditions for their own transformation, cannot be addressed.

would not be human); but we don't need such a space for choice to be conceivable. As Terry Eagleton points out, the notion that the political is primarily a matter of personal choice is based upon an unrealistic ideological and psychologistic model of 'free', conscious choice:

When I adopt a political position freely, I do not usually mean that an act of choosing precedes or accompanies my adopting. It means that I am not forced mindlessly into it by my class interests or by some ideological or pathological obsession, that nobody is holding a gun to my head, that I am in a situation to be able to weigh the arguments and recognize what would count as counterarguments, and so on. 'Freedom' describes the material conditions in which my believing goes on: it has a social and political reference rather than the narrowly psychologistic one assigned to it by Michaels. ... It is true that we do not choose to believe, but there is an important sense in which belief is not ineluctable either.<sup>86</sup>

Moreover, Eagleton astutely rejects the premise that the political is primarily a matter of free choice as lacking an understanding of ideology (and, we might add, as deriving its authority from and reinforcing liberal premises which are themselves ideological). If interpretations are or seem irresistible, this is a moral and *political* matter, "in so far as we find ourselves 'irresistibly' gripped (while being none the less free for all that) by certain interpretations which are inscribed in a tradition of practices received from the past."<sup>87</sup> There are beliefs which we cannot help holding because to do otherwise would involve a radical transformation in our practical forms of social life, but to suggest that this form of 'ineluctability' logically entails that interpretation is therefore an apolitical act, is certainly disingenuous. *The recognition that our interpretations are inscribed in the practical forms of our lives should force us to acknowledge just how pervasive and ubiquitous the "politics of interpretation" really is, rather than give us licence to ignore or deny it.*

Stanley Fish's contribution to this debate is also one that emphasizes cultural and historical context as limiting (or defining) the interpretive process. Fish has used legal texts as exemplary cases in his arguments about interpretation for a number of years, and an early example appears in an article instructively titled, "Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without

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<sup>86</sup>T. Eagleton, "Ineluctable Options" in W.J.T. Mitchell, ed., *supra*, note 1, 373 at 376.

<sup>87</sup>*Ibid.* at 378.

Saying and Other Special Cases".<sup>88</sup> Fish argues that there is a level of observation or discourse at which meanings are obvious and indisputable and that these are not properties of the world but properties of the world as it is given to us by our interpretive assumptions. What we see is a product of our mental and verbal categories, and because these categories do not add to our perception or limit or distort it, but are in fact the very possibilities of our perception, they seem to be a part of the world itself. Moreover, they are historically and culturally contingent; they change, and so, therefore, does what seems obvious, common-sensical, what goes without saying. For Fish, the interpretive act is performed at so deep a level that it is indistinct from consciousness itself.<sup>89</sup>

Therefore, Fish suggests, there exist no texts nor meaning in texts independent of or prior to our interpretations. What is 'in' the text is a function of interpretive activity, but because such activities are performed at so primary a level, what they yield seems to be really in the text, and to pre-exist the activity itself. Fish argues not "for an infinitely plural or an open text, but for a text that is always set; and yet because it is set not for all places or all times but for wherever and however long a particular way of reading is in force, it is a text that can change."<sup>90</sup> It is the knowledge that is the content of being in a situation that stabilizes the meaning of texts. As contexts shift, so do the meanings of things, but in any situation there is a meaning that seems so obvious that we don't even recognize our activity as interpretation.

So, for example, he discusses the reading of statutes in the adjudication process to demonstrate the way in which the 'literal' meaning of the statute

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<sup>88</sup>In Rabinow & Sullivan, eds., *supra*, note 9 at 243. See generally S. Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980) for the most complete account of Fish's interpretive community thesis. Fish's literary theory is usually categorized as reader-response literary criticism, a field or movement which became significant in the late 1970s and early 1980s as one of several reactions against formalism and New Criticism. It was seen to have the potential to repoliticize literature and literary criticism due to its acceptance of "the relativity of interpretation and the constitutive power of interpretive systems: 'When discourse is responsible for reality and not merely a reflection of it, then whose discourse prevails makes all the difference.'": M. L. Pratt citing J. Tompkins in "Interpretive Strategies/Strategic Interpretations: On Anglo-American Reader-Response Criticism" in J. Arac, ed., *Postmodernism and Politics* (Minneapolis, University of Minnesota Press, 1986) 26 at 33-34. However, as Pratt makes clear, rather than re-politicize literature and literary criticism, reader-response theorists have gone to great lengths to avoid addressing the political implications of their assumptions. Jeffrey Malkan also sees Fish's work as "a fascinating case study of how ideas originally thought to have a liberating or at worst a value-neutral effect on social change can be made to accommodate a new set of conservative political goals.": "Against Theory,' Pragmatism and Deconstruction" (1987) *Telos* 129 at 129.

<sup>89</sup>S. Fish, "Normal Circumstances" in Rabinow & Sullivan, *supra*, note 9 at 245.

<sup>90</sup>*Ibid.* at 248.

is determined by reference to the purposes for which the statute was passed. This, he suggests, is not something external to the text which is brought in to aid the statute's interpretation, but is integral to the interpretive process itself; "[a] statute without a purpose would be meaningless ... . To speak of the literal meaning of a statute ... is already to have read it in the light of some purpose, to have engaged in an interpretation."<sup>91</sup> The specification of what is in a statute, like the specification of what is in the text, can always be made, but as situations and the purposes that inform them change, it will have to be made again.<sup>92</sup> We never apprehend texts independently of the context in which they are perceived, and therefore we never know them except in the stabilized form a context has already conferred.<sup>93</sup>

Given these premises, Fish asserts that there is no need to look for external sources of constraint in legal interpretation like the disciplinary rules Fiss posits. The fear of unbridled interpretation upon which this search is based is groundless because to be inside a context is "to be already and always thinking with and within norms, standards, definitions, routines, and understood goals that both define and are defined by that context."<sup>94</sup> Readers and texts are never in any need of the kind of constraints that disciplinary rules purportedly provide. The assumptions and categories of understanding embodied in the practice of legal interpretation, internalized through the training or socialization for that practice, already constrain the interpreter, who only apprehends the text in light of these. All interpretive practice *is* a structure of constraints which are already in place, rendering impossible uninterpreted texts and freely interpreting readers. In all circumstances, one's interpretation will be at once constrained and enabled by a general and assumed understanding of the goals, purposes, concerns, and procedures of the enterprise.<sup>95</sup>

In Fish's opinion, fears that law may be nothing but masked power, judicial interpretation nothing but the exercise of official will, or adjudication nothing but random, irresponsible activity, are ungrounded and unrealizable, because the shared understandings of the general purposes of the legal enterprise and its underlying rationales will ensure both rational adjudication and readings of legal texts that yield determinate results.<sup>96</sup> He agrees with Dworkin<sup>97</sup> that legal interpretation is always an extension of an

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<sup>91</sup>*Ibid.* at 253 citing K. Abraham, "Intention and Authority in Statutory Interpretation" (unpublished manuscript).

<sup>92</sup>*Ibid.* at 254.

<sup>93</sup>*Ibid.* at 256.

<sup>94</sup>Fish, *supra*, note 54 at 1332.

<sup>95</sup>S. Fish, "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism", in W.J.T. Mitchell, ed., *supra*, note 1, 271 at 285, n. 4.

<sup>96</sup>Fish, *supra*, note 54 at 1340-45.

<sup>97</sup>Dworkin, *supra*, note 75.

institutional history made up of numerous decisions, structures, practices, and conventions which ensure that interpretation is neither wholly objective, since there is room for disagreement, nor wholly subjective, since interpreters do not proceed independently of what others in the institution have done.<sup>98</sup> Legal interpreters are constrained by the conventions of legal interpretive practice in the sense that they must advance the enterprise at hand; a judge cannot decide a case in a manner that would have no relationship to the history of previous decisions, because such a decision wouldn't be recognized as a legal decision and wouldn't be supported by reasons that would be considered as such in the legal community.<sup>99</sup> The dangerously free or inventing agent is simply not possible given the constraints of the enterprise. But the constraints of the enterprise do not, admits Fish, predetermine the interpretation. Although the boundaries of practice mark the limits of what anyone who is thinking within them can do, within these limits they do not *direct* anyone to do this rather than that.<sup>100</sup> Fish presents a picture of practice that, like Gadamer's, gives central place to tradition as a force which both limits and permits the transformation of practice:

To see a present-day case as similar to a chain of earlier ones is to resee that chain by finding in it an applicability that had not always been apparent. Paradoxically one can be faithful to legal history only by revising it, by re-describing it in such a way as to accommodate and render manageable the issues raised by the present. This is a function of the law's conservatism which will not allow a case to remain unrelated to the past and so ensures that the past, in the form of the history of decisions, will be continually rewritten.<sup>101</sup>

Like Gadamer, Fish does not feel that recognition of the present-day situation and the application of a history of legal texts to that situation are distinct operations but rather that "they emerge together in the context of an effort to see them as related embodiments of some legal principle."<sup>102</sup>

Fish and Michaels would seem to share a similar view of interpretation and context, but whereas Michaels denies the politics of interpretation, Fish wholeheartedly accepts its pervasiveness and, indeed, its ubiquity, and then proceeds to ignore it, as an inevitable nuisance lying outside the scope of

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<sup>98</sup>Fish, *supra*, note 95 at 272.

<sup>99</sup>*Ibid.* at 275. See also R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) for another statement of the history of judicial enterprise as the primary means of stabilizing legal interpretation. Dworkin's views here are similar to those that look to cultural tradition as a source of constraint. The limitations and inadequacies of such an approach are discussed *infra*.

<sup>100</sup>*Ibid.*

<sup>101</sup>*Ibid.* at 277-78.

<sup>102</sup>*Ibid.* at 277, n. 2.

inquiry of those interested in studying interpretation<sup>103</sup>. Knowledge is situational. Facts can only be known by persons. Persons are always situated in some institutional context. Thus facts are always context-relative and do not have a form independent of the structure of interest within which they emerge into noticeability.<sup>104</sup> Knowledge is a product of being in a situation, and like knowledge, conviction, belief, and persuasion spring from historical conditions.

### III. The Politics of Interpretation

While these assertions about practice seem indisputable, this hardly seems the point at which we should evoke closure. If legal interpretations and the knowledge, convictions, beliefs, and persuasions on which they are based and in terms of which they are debated do not have a form independent of the structure of interest within which they emerge, then it is precisely the nature of this 'dependence' we need to examine. While we might agree with Fish that it is far too simplistic to examine this in terms of individual interest or values,<sup>105</sup> I doubt that an interest-group theory of politics is going to advance this inquiry much further. I suspect that Fish (despite his energetic refutations of the pluralist vision that he believes most participants in the interpretation debate share) does hold a pluralist vision of politics. The fact that political and institutional forces confer meaning on the Constitution, is for Fish, "simply a reflection of the even more basic fact that values derive from the political and social visions that are always competing with one another for control of the state's machinery"; such visions are socially rooted in some conventional system of purposes, goals, and standards, and the very notion of individual interests is empty.<sup>106</sup>

A pluralist vision such as this avoids examining the constitution of the competition it takes as given. It seems fairly clear that some social and political visions never even enter the realm of this competition. Certain conventional systems of purposes, goals, and standards, shared by certain groups with certain types of social experiences, are routinely denied legitimacy. Fish tells us that disagreements about meaning are possible, not because a text has any number of meanings, but because different persons may be reading according to the assumptions of different circumstances. Such conflicts, however, are always being settled, and "the means of settling them are political, social, and institutional, in a mix that is itself subject to

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<sup>103</sup>As Daniel Cottom commented: "Only an academic and, probably, only an American could have such a jolly sense of satisfaction in the submission of human beings to forms of authority." "The Enchantment of Interpretation" (1985) 11 *Critical Inquiry* 573 at 579.

<sup>104</sup>S. Fish, "Interpretation and the Pluralist Vision" (1982) 60 *Tex. L. Rev.* 495 at 497.

<sup>105</sup>Fish, *supra*, note 54 at 1346.

<sup>106</sup>*Ibid.*

modification and change.”<sup>107</sup> Again, we should critically examine these ‘means’; to what extent do they weigh the contentions of participants differentially? Evaluations of legal interpretations may emanate from political, religious, and moral concerns, but not all concerns or those of all social groups find a voice or hearing in the evaluation process.<sup>108</sup> To characterize choice in the interpretive process as being a matter of interpretive assumptions is to recognize that the struggle is one between understandings generated by particular forms of social experience.<sup>109</sup> We have to acknowledge that in legal interpretation we are always affirming the legitimacy of the understandings that are generated by certain varieties of experience and denying the legitimacy of others.<sup>110</sup> To resign yourself, in the manner that Fish and Dworkin do, to the fact that the whole system is political is to concede the right of those with the licence and privilege to participate in legal interpretive decisions to determine the outcome of the struggle. Generally, accounts of interpretation which stress the contextual constraints that characterize interpretive practice, whether these be defined in narrowly in-

<sup>107</sup>*Ibid.* at 1336.

<sup>108</sup>The historical experience of indigenous peoples with the Canadian criminal law system and the long-term lack of recognition accorded to their cultural understanding of justice is telling in this regard.

<sup>109</sup>See P.J. Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22 Harv. C.R.-C.L. L. Rev. 401 for an enlightening discussion of how “rights” can have entirely different meanings for people from different racial, socioeconomic, and gender groups with different types of experiences. Her discussion suggests, *inter alia*, that we should stop arguing about whether “rights” have any intrinsic or essential meaning and start thinking about the ways in which we can assist those who are silenced and oppressed in the project of putting this “meaninglessness” to work in the service of their quests for empowerment. Signifiers only become “fixed” in their association with a signified through political practices of articulation (which is also the means to “unfix” them). For a discussion of this process see E. Laclau, “‘Socialism’, the ‘People’, ‘Democracy’: The Transformation of Hegemonic Logic” (1983) 7 Social Text 115; “Politics and the Limits of Modernity” in A. Ross, ed., *Universal Abandon? The Politics of Postmodernism* (Minneapolis: University of Minnesota Press, 1988) 63; C. Mouffe, “Radical Democracy: Modern or Postmodern?” in A. Ross, ed., *supra*, this note, 31-45, and E. Laclau & C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso Books, 1985).

<sup>110</sup>A similar point is made by Peller, *supra*, note 28. Some examples of this are collected in (1987) 42 *U. Miami L. Rev.*, a symposium issue entitled *Excluded Voices: Realities in Law and Law Reform*. The articles in that issue suggest, *inter alia*, that:

- (i) the conditions defined at any time as problems, to which the law should respond, are not facts but social constructions that reflect and reinforce established beliefs, and rationalize inequalities based upon class, race, and gender;
- (ii) law as elite ideological production is (although not recognized as such) the self-interested response of elites to pressures and demands created by social recognition and acceptance of these social constructions as problems that must be dealt with; and
- (iii) in these legal responses, sexual and racial violence are legitimated and the experiences and understandings of women and racial minorities are marginalized and the full impact of their narratives of injury muted, diverted or evaded.

stitutional or more broadly cultural terms, must be recognized as both necessary and in accord with the anti-positivist intellectual climate which gave rise to the current debate about legal interpretation. We *do* need to identify the enterprise-specific institutional constraints that operate within legal interpretive practices, examine the ways in which the tradition of interpretive activities influences current practice, investigate the assumptions and values of those who confer authority on such practices, and think more generally and more critically about the ways in which dominant cultural categorical systems both enable and legitimate such practices. The importance of understanding the historically and culturally contingent contexts in which interpretive practices are possible cannot be overstressed, especially in an arena where the idea of the free and autonomous individual and the commonsense view of language are dominant elements of a pervasive liberal ideology.

If I have reservations about this recourse to context in the debate about legal interpretation, it is because context, convention, and cultural tradition take on curiously rigid, static, and monolithic forms in these accounts. Modern (or, more precisely, postmodern) anthropology has made significant contributions to our understanding of cultural context by stressing that cultural context is not a singular structure of constraints that, so to speak, “descends from above”, but a dynamic of multiple discourses<sup>111</sup> which exist only in their reproduction and transformation in everyday practices.<sup>112</sup> Culture is

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<sup>111</sup>To presage my argument hereinafter, anthropologists in the 1980s have increasingly recognized the limitations of Geertzian interpretive anthropology. The symbolic systems approach popularized by Geertz in the 1970s was seen as representing culture as altogether too coherent, and to lack an adequate sociology, or a sufficient grasp of the political processes at work in cultural production. Anthropologists have shifted their attention to exploring the ways in which systems of symbolic meaning or cultures reproduce specific forms of social order (and, therefore, relations of domination and subordination), how culture shapes consciousness, action, and event (now understood in terms of hegemony), and the tactics and strategies through which humans manipulate, interpret, legitimize, and reproduce the cultural categories that order their social world. For a comprehensive overview of developments in anthropological theory see S. Ortner, “Theory in Anthropology Since the Sixties” (1984) 26 *Comparative Studies in Society and History* 126. See also R. Rosaldo, *Culture and Truth: The Remaking of Social Analysis* (Boston: Beacon Press, 1989) for an extended discussion.

<sup>112</sup>I have addressed the importance of attending to social practice in a larger discussion of the nature of legal “structure”, symbolic improvisation, and cultural transformation in “Room for Manoeuvre: Towards a Theory of Practice in Critical Legal Studies” 14 *Law and Social Inquiry: Journal of the American Bar Foundation* 69 [hereinafter “Room for Manoeuvre”]. See also P. Bourdieu, *Outline of a Theory of Practice*, trans. R. Nice (New York: Cambridge University Press, 1977); “Symbolic Power” in D. Gleeson, ed., *Identity and Structure: Issues in the Sociology of Education* (Dimmifield, England: Nefferton, 1977); “The Social Space and the Genesis of Groups” (1985) 14 *Theory and Society* 723; A. Giddens, *New Rules of Sociological Method: A Positive Critique of Interpretative Sociologies* (New York: Basic Books, 1976); *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Berkeley: University of California Press, 1979) [hereinafter *Central Problems*]; *The Consti-*

multivocal and overdetermined. It does not present itself neutrally with one voice.<sup>113</sup> We live in a world of multiple, overlapping, and often contradictory discourses.<sup>114</sup> Fish, however, wants us to accept the proposition that there will always be *a* singular context in which meaning appears self-evident and what the context enables you to see seems obvious and inescapable.<sup>115</sup> It's the same as it ever was. We *know*, though, that we often find ourselves in situations and circumstances where we are aware of a multiplicity of relevant contexts, which make differential sense of the 'texts' we seek to understand, or are cognizant of the claims and demands of competing audiences, where we are compelled to deal with contradiction and ambiguity and, therefore, to reflect on the question of meaning:

[Fish] recognizes, some of the time, that consensus is never peaceful, that interpretations are always jostling for space, thumping on each others' walls, but he seems unwilling to pursue the full consequence of this fact, namely that there is always doubt, conflict, disagreement, because interpretations are always there in multiplicity denying each other the illusion of self-containment and truth ... . People and groups are constituted not by single unified belief systems, but by competing self contradictory ones. Knowledge is interested, and interest implies conflict; to advance an interpretation is to insert it into a network of power relations.<sup>116</sup>

Judges, regardless of their training, the institutional constraints within which they operate, or the governing conventions they accept, must confront these circumstances rather frequently.

Accounts of legal interpretation which point to contexts, however defined, as stable referents which constrain practice, misunderstand the dynamic *process* whereby context or culture is both reproduced and

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*tution of Society: Outline of the History of Structuration* (Berkeley: University of California Press, 1984) [hereinafter *The Constitution of Society*]; P. Smith, *Discerning the Subject* (Minneapolis: University of Minnesota Press, 1988); A. Touraine, *The Self-Production of Society*, trans. D. Colman (Berkeley: University of California Press, 1977); *Return of the Actor: Social Theory in Postindustrial Society*, trans. M. Godzich (Minneapolis: University of Minnesota Press, 1988).

<sup>113</sup>Historians who adopted cultural anthropology as a model for social history in the 1970s have become increasingly aware of this. Here, as in anthropology itself, we see a rejection of symbolic forms as organized into systems which presuppose a coherent, unified, socially shared, symbolic universe, in favour of analyses which explore the differences in appropriation and use of cultural forms in divergent social struggles. See the discussion in Hunt, *supra*, note 20.

<sup>114</sup>Heller, *supra*, note 36. This is especially true today, "[f]or cultural heritages in the modern world are plural, not monolithic and unified. They intersect and clash according to the complex circumstances surrounding the institutional and symbolic formation of interrelated social groups.": J. Brenkman, *Culture and Domination* (Ithaca: Cornell University Press, 1987) at viii.

<sup>115</sup>*Supra*, note 88 at 261.

<sup>116</sup>Pratt, *supra*, note 88 at 52.

transformed by the practices it enables.<sup>117</sup> So, again to take Fish's position as exemplary, textual interpretations are deemed to change according to which contingent context is currently 'in place'. This neither recognizes nor attends to historical forces, contingent circumstances, or the impact of event; a situation of stasis always seems to prevail, although arguably it is a different situation of stasis in each interpretive exercise. Fish gives us no sense of the ways in which the structural constraints of the enterprise contend with empirical circumstances and are thereby put at risk, or how conventions become reevaluated and transformed through the practical activities, like interpretation, which both constitute and modify them. To quote anthropologist Marshall Sahlins:

Human social experience is the appropriation of specific percepts by general concepts: an ordering of men and the objects of their existence according to a scheme of cultural categories which is never the only one possible, but in that sense is arbitrary and historical. ... [T]he use of conventional concepts in empirical contexts subjects the cultural meanings to practical revaluations. ... [T]raditional categories are transformed. For even as the world can easily escape the interpretive schemes of some given group of mankind, nothing guarantees either that intelligent and intentional subjects, with their several social interests and biographies, will use the existing categories in prescribed ways. I call this double contingency the risk of the categories in action.<sup>118</sup>

The task of legal interpretation is clearly one in which the conceptual or conventional meets the existential or empirical, and is thereby continually put at risk. The fact that in most cases legal interpretations probably reproduce the conventions, interpretive assumptions, and verbal and mental categories which make such practices possible, should not blind us to the real and continuous potential for transformation that such activity contains.

I think, then, that we can appreciate Dworkin's complaint that Fish represents interpretation as altogether too homogeneous an activity, but regret his failure to fully explore the ramifications of this. As he notes, the fact that nothing judges do is pure finding nor pure inventing does not imply that what judges do in interpretation is always necessarily the same.<sup>119</sup> Fish argues that if in deciding a case, a judge is able to give recognizable reasons, then he is not doing anything new, but something that is implicit in the enterprise. But, Dworkin responds, all sorts of radical innovations are

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<sup>117</sup>I discuss this in some detail in *Room for Manoeuvre: Towards a Theory of Practice in Critical Legal Studies*, *supra*, note 112. Another articulation of this may be found in Giddens's "theory of structuration" which is developed in *Central Problems of Social Theory* and *The Constitution of Society*, *supra*, note 112.

<sup>118</sup>M.D. Sahlins, *Islands of History* (Chicago: University of Chicago Press, 1985) at 145.

<sup>119</sup>R. Dworkin, "My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More" in W.J.T. Mitchell, ed., *supra*, note 1, 287 at 306.

thereby “implicit”. There are radically different ways in which a judge can continue the practice of judging.<sup>120</sup>

Dworkin comes closest to approaching a “cultural hermeneutics”<sup>121</sup> in his insistence that we need to understand the understandings of those involved in practices of interpretation to comprehend the nature of such practices and the ways in which it is possible for practitioners to argue about the relative validity of interpretations themselves. It is only in terms of the role that such concepts play in interpretive enterprises that notions of objectivity, right and wrong, and true and false interpretations have any meaning at all. Interpretive judgments have the sense or force they do because they figure in a collective interpretive enterprise and they cannot have any ‘real’ sense or truth-value which transcends this enterprise and somehow encompasses the ‘real world’.<sup>122</sup>

Brian Langille has also made a strong case for a cultural hermeneutics of legal practice in his eloquent and persuasive appeal for an approach to legal interpretation which does full justice to the philosophy of the later Wittgenstein.<sup>123</sup> For Langille, the central message to be gleaned from a reading of Wittgenstein is that there can be no external foundation for interpretation because interpretation involves language, and language (and hence law) is an activity. Understanding is akin to an ability or mastery of a technique and the criteria for understanding or interpretation lies in behaviour — the proper use of an expression in the “language game” in which that expression has a home.<sup>124</sup> We cannot, therefore, claim that the lack of any metaphysical foundation for language, or linguistic “indeterminacy” is corrosive for law, “because our language has the determinacy of an activity.”<sup>125</sup> Nor should recognition of indeterminacy lead us to “refer out” to political context, but should instead provoke insights into the idea of practice as “bedrock.”<sup>126</sup>

I agree with Langille that the indeterminacy of language does not require that judges “refer out to” or “smuggle in” their *personal* political preferences and that this is a fallacy that too many of the Canadian constitutional critics on the left<sup>127</sup> fall into, as a consequence of their unfortunate acceptance of

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<sup>120</sup>*Ibid.* at 305.

<sup>121</sup>This phrase is borrowed from Geertz, *supra*, note 13 at 5.

<sup>122</sup>Dworkin, *supra*, note 119 at 300.

<sup>123</sup>Langille, *supra*, note 2.

<sup>124</sup>*Ibid.* at 488.

<sup>125</sup>*Ibid.*, citing Graff, *supra*, note 27 at 408.

<sup>126</sup>*Ibid.*

<sup>127</sup>See A. Petter, “The Politics of the Charter” (1986) 8 Sup. Ct L. Rev. 473; P.J. Monahan, “Judicial Review and Democracy: A Theory of Judicial Review” (1987) 21 U.B.C.L. Rev. 87.

the subjectivity of value.<sup>128</sup> However, Langille provides us with no reason whatsoever as to why we should be sanguine with respect to the *determinacy* of judicial activity or the *bedrock* of adjudicative practice (unless of course one is entirely happy with the history of judicial practice in Canada). The fact that such activities are (or seem) determinate or so completely cast in stone that they have (or seem to have) the character of bedrock, should give us less cause for complacency than it does for alarm. That a close reading of Wittgenstein would indicate that judicial action upon encountering a rule — say a sign-post — is best explained by the fact that judges “have been trained to react to this sign in a particular way”, and that judges go by these sign-posts “only in so far as there exists a regular use of sign-posts, a custom”, and thus that “following a rule” or “using an expression correctly” is not a mental process but a form of activity<sup>129</sup>, advances us no further. What *kind* of activity is it? What consequences does it have?

Langille argues that this is not a point about “community consensus” or “custom” (voluntaristically characterized), but a point about the necessary background conditions (defined as “normality conditions”) which make the use of concepts possible. What makes language games (like legal practice) possible is not simply agreement in definitions, but agreement in judgments, not in opinions, but in forms of life.<sup>130</sup> Constancy in human nature and the constancy of the physical world are the only examples of such “normality conditions” proffered, but even they should give us reason for pause. We know (or we should know if we’ve left our positivism far enough behind to be engaging in this discussion) that human nature is socially and culturally constructed; it is not everywhere the same. What is taken to be generically human varies from culture to culture; it is conventional.<sup>131</sup> Moreover, for-

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<sup>128</sup>I find this unfortunate because it would seem that one of the central premises of liberalism — the subjective nature of value, interest, and desire — forms the linchpin of the arguments of those legal scholars in Canada who seek to criticize liberal constitutional discourse on political grounds with which I am in sympathy. I have addressed the need to reconstitute our conceptual understanding of subjectivity (and thus of subjective value) in efforts to deconstruct liberal legal discourse elsewhere. See Coombe, *supra*, note 112 at 72-88.

<sup>129</sup>Langille, *supra*, note 2 at 489-90.

<sup>130</sup>See *ibid.* at 491-92.

<sup>131</sup>For example, Geertz argues that the Enlightenment view of man as having an immutable human nature has been discredited by modern anthropology; “. . . men unmodified by the customs of particular places do not in fact exist, have never existed, and most important, could not in the very nature of the case exist. . . . [T]he drawing of a line between what is natural, universal, and constant in man and what is conventional, local, and variable [is] extraordinarily difficult” and may, in fact, falsify the human situation. In other words, “there is no such thing as a human nature independent of culture.”: “The Impact of the Concept of Culture on the Concept of Man”, *supra*, note 12, 33 at 35-36 and 49.

Geertz also gives examples of incredible cultural variations in the notion of personhood that make the Western conception of the person appear to be a rather peculiar idea in the context of world cultures. See “‘From the Native’s Point of View’: On the Nature of Anthropological Understanding” *supra*, note 13 at 55.

mulations of "human nature" in any given culture support particular configurations of power<sup>132</sup> and facilitate practices of domination. We might consider the implications of the fact that what has been taken historically, and expressed linguistically, to be generically human in our own society, has always had the attributes of the male person as those gender attributes have been constructed in Western cultures. In numerous and subtle ways, legal language games have reflected and reinforced understandings of the human which posit the white, adult male as the norm and the language that privileges this particular agent as neutral, objective and universal.<sup>133</sup>

"The law reflects social visions that involve privilegings of particular conceptions of human nature."<sup>134</sup> As critical legal scholars have demonstrated, liberal legal discourse shares the logocentric bias of Western philosophy; it presumes a Cartesian "truth" of human nature in which one's existence, desires, intent, and needs are immediately, transparently, and fully evident, present to one's consciousness and acted upon:<sup>135</sup>

We can think of a system of law as a community's attempt to realize human ends. This presupposes a description of the good and bad in human nature: what people want from their lives and what their limitations are. This description necessarily involves privilegings of certain aspects of human nature over others. Later, we justify our system by claiming that it is the best, given the natural constraints of the human condition. For example, an advocate of laissez-faire might argue that, given the natural self-interestedness of people, unregulated market transactions are the best way to realize human goals. But ... our social vision and system of laws are not based upon human nature as it really is, but rather upon an interpretation of human nature, a privileging. We do not experience the "presence" of human nature; we experience different versions of it in the stories we tell about what we are "really like." These stories are incomplete; they are metaphors and can be deconstructed. Too often we forget that our systems of law are based upon metaphor and interpretation;

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<sup>132</sup>See the discussion between Noam Chomsky and Michel Foucault in "Human Nature: Justice versus Power" in F. Elders, ed., *Reflexive Water: The Basic Concerns of Mankind* (London: Souvenir Press, 1974) at 135-97. See also P. Rabinow, "Introduction" in P. Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984).

<sup>133</sup>L. Finley, "Breaking Women's Silence in Law - What Language Can We Use?: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 *Notre Dame L. J.* [forthcoming]. Also, Robin West suggests that modern legal theory and jurisprudence and moral and political philosophy assume as a first premise the universal existence of a human being whose attributes and "nature" are not, in fact, "human" but exclusively male. The "natures" of women (and, arguably, of those who live in non-Western cultures) put them outside of the community of "human beings" who share the "universal human condition" to which legal regimes are seen to respond. See "Jurisprudence and Gender" (1988) 55 *U. Chi. L. Rev.* 1.

<sup>134</sup>J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 *Yale L. J.* 743 at 755.

<sup>135</sup>For a partial critique of this understanding of human nature as it manifests itself in law and economics scholarship see M. Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987) at 127-50.

we mistake the dominant or privileged vision of people and society for real "present" human nature ...<sup>136</sup>

Human nature, then, is not a "normality condition" within which or upon which legal practice proceeds but, rather, fundamentally contested and shifting terrain; a politically reverberating faultline (vulnerable to seismic shifts if we are to believe Foucault) within that "bedrock" of practice itself.

The physical world exhibits no more constancy; it is inscribed with our social relations, narrativized with our history, rationalized through our relations of production, and commodified by our markets. Its "natural" rhythms and patterns are read differently according to the needs of the "forms of life" in which it figures.

While I agree with Langille that the "conventionalism" to which Wittgenstein points in his reference to the "normality conditions" that underlie "forms of life," does not require conscious (by which I believe he means intentional or voluntaristic) agreement or consensus,<sup>137</sup> it is nonetheless the case that "normality conditions" are socially based, culturally and historically differential, and thus *contingent*, in the sense that things could be, and have been, otherwise.<sup>138</sup> This means, amongst other things, that things could change, and that we have resources, drawn from other forms of life, in other times and places (and from the margins of our own society), with which to challenge the sense of inevitability which language games, like law, embody. In other words, complacent, pacificatory declarations that "This is just the way things are. There is as much stability as there is"<sup>139</sup> and that "It is not reasonable or unreasonable. It is there, like our life"<sup>140</sup> and the passivity

<sup>136</sup>Balkin, *supra*, note 134 at 762.

<sup>137</sup>Langille, *supra*, note 2 at 493.

<sup>138</sup>Terry Eagleton argues that Wittgenstein cannot successfully avoid metaphysical illusions merely by recourse to a context of everyday life. Concepts of certainty, exactness, truth, etc. may operate only within practical forms of social life, but by failing to give these any historical specificity, and positing a transcendently unhistorical "context" or "language game" or "form of life", commentators merely reproduce the metaphysical idealism Wittgenstein was attempting to counter. If Wittgenstein's point is that language is internally related to its social conditions, then the political character of those social conditions is contained in language. As Eagleton sees it, "Wittgenstein's philosophy is reactionary not in its referring of beliefs and discourses to social activity but in its assumption that such referring constitutes a liberation from the metaphysical", because metaphysics is nowhere more at home than in the ordinary language of the everyday where objectification, reification, logocentrism, and the illusion of presence are quotidian practices and experiences. (They are also the practices through which ideology operates.) See "Wittgenstein's Friends" in *Against the Grain: Essays 1975-1985* (London: Verso, 1986) 99 at 107.

<sup>139</sup>Langille, *supra*, note 2 at 493, citing D.F. Pears, *Wittgenstein* (Cambridge: Harvard University Press, 1986).

<sup>140</sup>*Ibid.* at 495, citing L. Wittgenstein, *On Certainty*, G.E.M. Anscombe & G.H. von Wright eds, trans. D. Paul & G.E.M. Anscombe (New York: Harper & Row, 1969) para. 559.

that these declarations engender (It's the same as it ever was; it just is), *can be and should be resisted*. Conscious human agreement or consensus never has been necessary for certain "normality conditions" to achieve such *social* predominance in a given historical period that they seem to be common-sense assumptions and the form of life for which they are the framework conditions to constitute an hegemony.<sup>141</sup> But an hegemony is never total and always contains both residual and emergent elements which may contain the seeds of its destruction. Normality conditions are not fixed. They just seem to be so, and this is a *social* and *political* matter.

The fact that legal practice is a way of acting, a form of activity, a social practice, does not provide us with any licence to deny, evade, or in any way marginalize the politics of interpretation. It puts it directly before us, and it does so as a direct consequence of Wittgenstein's propositions,<sup>142</sup> which Langille summarizes as follows:

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<sup>141</sup>The concept of cultural hegemony was developed by A. Gramsci, *Selections from the Prison Notebooks*, ed. & trans. Q. Hocere (New York: International Publishers, 1971) and is clarified and elaborated by R. Williams in *Marxism and Literature* (Oxford: Oxford University Press, 1977) at 108-10:

'[H]egemony' is a concept which at once includes and goes beyond two powerful earlier concepts: that of 'culture' as a 'whole social process', in which men define and shape their whole lives; and that of 'ideology', in any of its Marxist senses, in which a system of meanings and values is the expression or projection of a particular class interest.

'Hegemony' goes beyond 'culture' as previously defined, in its insistence on relating the 'whole social process' to specific distributions of power and influence. . . . Gramsci therefore introduced the necessary recognition of domination and subordination in what has still, however, to be recognized as a whole process.

It is in just this recognition of the wholeness of the process that the concept of 'hegemony' goes beyond 'ideology'. What is decisive is not only the conscious system of ideas and beliefs, but the whole lived social process as practically organized by specific and dominant meanings and values. . . . [The concept of hegemony] sees the relations of domination and subordination, in their forms as practical consciousness, as in effect a saturation of the whole process of living . . . to such a depth that the pressures and limits of what can ultimately be seen as a specific economic, political, and cultural system seem to most of us the pressures and limits of simple experience and common sense. . . . [Hegemony] thus constitutes a sense of reality for most people in the society . . . . It is . . . a 'culture', but a culture which has also to be seen as the lived dominance and subordination of particular classes.

<sup>142</sup>Joan Williams, in an article to which Langille does not refer, also assesses the implications of the "new epistemology" (which rejects a belief in objective truth and the associated claims of certainty) for legal theory using the philosophy of Wittgenstein. She comes, however, to a radically different conclusion:

An acceptance of the new epistemology necessarily leads one to the conclusion that doctrine's role in constraining discussion is political. But, as I have shown, it does not follow that law is inherently a method of domination, as critical legal scholars often appear to assume. The message of the new epistemology is that, in the absence of absolutes, our law - like our language - is what we choose to make

The upshot of Wittgenstein's view of language is that all of our language has meaning only within the language games and "forms of life" in which they are embedded. One must understand the use, the context, the activity, the purpose, the game which is being played... . [E]ven the simplest and most concrete use of simple language, manipulation of straightforward concepts, and application of the most basic rules can only be understood within the framework of the language game or "form of life" in which the language, concept, or rule is embedded ... . "[H]uman rationality is essentially social in character".<sup>143</sup>

It is also the case that the social is essentially political in character, and so, too, is rationality. A "form of life" is also a lived experience of social relations of inequality and domination, and thus "even the simplest and most concrete use of simple language," can only be understood within the framework of the language game or social form of domination and oppression "in which the language, concept, or rule is embedded."<sup>144</sup> We may accept that there are no foundations for ethics, knowledge, or language, and that, as Langille approvingly cites John Searle, no such foundations are necessary, because the lack of such foundations "doesn't threaten science, language, or common sense in the least." As Wittgenstein says, "it leaves everything exactly as it is."<sup>145</sup> Things are left exactly as they are.

For some of us, however, leaving things exactly as they are, is quite problematic. If metaphysical foundations are neither possible nor necessary, then I suggest that our task is to look at things, exactly as they are, and to insist that if no *transcendental* basis of legitimacy for the language game that is law can be found, a *social* and *experiential* basis of legitimacy had better be provided. The language game of law, its bedrock as practice and its determinacy as activity exist as part of a form of life. We have every

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it. Since our choices about doctrine constrain the scope of our conversations about vital issues, and delimit future sense and nonsense, they are important choices indeed. For example, do we want a legal system in which our pain at seeing poor people homeless has no voice? Do we want a law in which our sharp concern over environmental degradation is discussed largely in terms of whether bureaucrats have followed correct procedures in enforcing often unsatisfactory statutes?

... The ultimate message of the new epistemology is not ethical relativism, but that ethical choices are ours to make, and that we must accept responsibility for the constraints and choices we have embodied in our law." "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells" (1987) 62 N.Y.U.L. Rev. 429 at 495.

<sup>143</sup>Langille, *supra*, note 2 at 495-96.

<sup>144</sup>One need only consider the social constructions of gender difference that form background conditions for our everyday language use. For a discussion of the ideological dimensions of language use see J.B. Thompson, *Studies in the Theory of Ideology* (Cambridge: Polity Press, 1984) at 1-15. For examples of the gendered nature of legal language, see Finley, *supra*, note 133.

<sup>145</sup>J. Searle, "The World Turned Upside Down" *New York Review of Books* (27 October 1983) as cited by Langille, *supra*, note 2 at 497.

reason, and every obligation, to ask what social qualities this form of life *has* and to protest if we find it wanting.<sup>146</sup>

To the extent that "law as a set of social rules" embodies a "language game" "embedded" in a "form of life" that is constituted, in any part, by such injustices, we should attempt to understand *if* and *how* "the use, the context, the activity, the purpose, the game which is being played"<sup>147</sup> (the social rules of the legal system) exacerbate rather than alleviate hunger, pain, grief, and the rage of disempowerment. We can only do so from a position which attempts to understand the experiences of those who suffer such hunger, pain, grief, and rage, and in a manner which conveys and amplifies the voices of those whose experiences these are.

Legal decision-making may perhaps only be understood and analyzed in terms of forces or ideas internal to the actual concepts or reasons which those engaged in the practice allege they utilize but this is no position from which to consider either its political constitution or its social consequences. The meanings of the legal system's practices to persons who are privileged enough to participate in them are not the same meanings as those which these practices have to persons who merely endure their omnipresence. To reiterate a point made earlier, to solely accept the standards of those who stand within this charmed circle and dismiss all criticism engendered elsewhere as non-legal (and implicitly non-legitimate) is to accept that "might is right". If we are "external legal sceptics" to insist that the "meaningfulness of legal behavior" is not the same meaningfulness for those who do not participate in such behaviours (or who do so from marginalized positions), it may not necessarily be because we miss "the point, the purpose, the meaning of the activity involved."<sup>148</sup> It may be because "the point, the purpose, the meaning of the activity" to its most influential practitioners *is not the sole meaning that this activity has*. It has other meanings in the lives of those who must live with its values, ideals, and consequences.

It is indeed true that "it is only within a practice, culture, and form of life that meaning is possible."<sup>149</sup> But there are practices other than those of law (and differentiations of practice within law): cultures are never seamless, integral wholes, but fractured constellations of multiple, often discordant discourses (which cohere as much through tension as through harmony), and forms of life are often forms of domination, oppression, and exploi-

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<sup>146</sup>We do not have, nor do we need, any transcendental or metaphysical foundation to legitimate our convictions that poverty and sexual violence, torture and racial discrimination should not be tolerated as part of the social reality or form of life in which we live, and the lack of such foundations will not alter our political practices in the least.

<sup>147</sup>Langille, *supra*, note 2 at 496.

<sup>148</sup>*Ibid.* at 501.

<sup>149</sup>*Ibid.*

tation. Meaning is never singular and transparent but multivalent; it is always contextually, and therefore *socially*, specific. It depends upon where you stand. If, as legal academics, some of us choose to stand outside of legal practice to understand it, it is not because we cannot or will not understand its internal constitution of meaning; it is because “the crucial dimensions of human life that matter to law”<sup>150</sup> are not always synonymous with the crucial dimensions of human life that matter to those who find their voices silenced, their understandings delegitimated, and their injuries belittled or denied recognition when they encounter the legal system.

Langille does allow that “[e]xternalist analysis of the conditions under which certain concepts are ‘made available’ within a form of life is a viable enterprise” but insists (quite rightly) that there is no perspective beyond our form of life from which it can be *critically* analyzed.<sup>151</sup> My point is that we can engage in critique without claiming any transcendental observation point because the form of life in which we *are* embedded is not a singular, hermetically sealed system, but a constellation of shifting conjunctures of multiple discourses which itself provides resources that make criticism both possible and meaningful.

Although the descriptive and interpretive enterprise that Dworkin and Langille advocate is an important one, it should now be clear that I consider it to be a grossly inadequate means to explore the practices of legal interpretation. It risks both idealism and apologia. We cannot focus on meaning-systems, especially such ideological and politically consequential ones as those shared by legal interpretive communities, merely as social semiotic systems whose significance can be determined by an analysis wholly internal to that community. In fact, one of the general charges laid against hermeneutic approaches is their inability to deal with the ideological nature of the symbolic systems they explore.<sup>152</sup> Language and the cultural systems through which communication is effected are part of more general social processes which cannot be reduced to communication alone.

As the German social and political philosopher Jurgen Habermas responded to Gadamer, we should not absolutize cultural tradition. To do so,

overlooks the fact that language itself is dependent upon social processes which are not wholly linguistic. ... “Language is *also* a medium of domination and social force. It serves to legitimate relations of organised power”. ... [T]o hy-

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<sup>150</sup>*Ibid.*

<sup>151</sup>*Ibid.* at 504.

<sup>152</sup>See for example, Giddens, *Central Problems in Social Theory*, *supra*, note 112 at 251.

postatise language in the manner of linguistic and hermeneutic philosophy, is to fall into the conservative clutches of a naive and submissive idealism.<sup>153</sup>

Or, according to cultural theorist John Brenkman:

Culture does not stand above or apart from the many other activities and relationships that make up a society, including the socially organized forms of domination, exploitation, and power pervasive in our own society and its history. Granted, cultural practices foster social solidarity and collective identity. But that does not keep them from participating in social divisions and exclusions ... . Indeed, whether conceived as spirit, consciousness, superstructure, or the symbolic, culture is not a realm unto itself or a separate domain.

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[S]ocial relations of domination [are] inscribed within cultural practices.<sup>154</sup>

In the discipline of cultural anthropology, Talal Asad has commented on the tendency of interpretive anthropology to reduce problems about the nature and consequence of particular public discourses (like law) to questions of meaning.<sup>155</sup> Asad criticizes hermeneutical or interpretive approaches to cultural forms which accord priority to systems of human meaning on the basis that they leave unasked the question of how it is that particular political and economic conditions maintain or undermine given forms of authoritative discourse.<sup>156</sup> Are there, for example, specific political and economic conditions which make certain rhetorical forms objectively possible and authoritative? Emphasis on meaning deflects attention from our endeavours to explore the "social connections between historical forces and relations on the one hand, and the characteristic forms of discourse sustained or undermined by them on the other."<sup>157</sup> Crucial questions about how different forms of discourse come to be materially produced and maintained as authoritative systems, and how and in what context of social, material processes these may come to be undermined, cannot be posed.

Asad also argues that we cannot look at ideological systems merely as systems of meaning, and that we cannot establish the determinate function of a given 'meaningful' discourse if we continue to isolate what is said from its rhetorical context. So doing

suppresses the tensions and ambiguities (conscious as well as unconscious) that obtain within a given field of discourse in specific historical conditions, and thus suppresses also the process by which motives, rhetorical devices and forms

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<sup>153</sup>J.B. Thompson, *Critical Hermeneutics: A Study in the Thought of Paul Ricoeur and Jurgen Habermas* (Cambridge: Cambridge University Press, 1981) at 82, citing J. Habermas, *Zer Logik der Sozialwissenschaften* (Frankfurt: Suhrkamp, 1970) at 287 [Thompson's translation].

<sup>154</sup>Brenkman, *supra*, note 114 at vii.

<sup>155</sup>"Anthropology and the Analysis of Ideology" (1979) 14 *Man* (N.S.) 607.

<sup>156</sup>*Ibid.* at 607.

<sup>157</sup>*Ibid.* at 616.

of comprehension are constructed and reconstructed. It is of course precisely these ambiguities of discourse and the elaboration they call for, that makes political argument possible.<sup>158</sup>

Not only should we bear this in mind when we consider the process of legal interpretation and the legal discourses sustaining this process, but we should consider its relevance for our own debates about the nature of legal interpretation and the reliance on "context" (however defined) as a source of constraint. I think we should appreciate Peller's assertion that we cannot assume that "context" simply exists around social events like legal interpretation independently of the representation of "context" in discourse.<sup>159</sup> The contexts, communities, or conversations adduced to serve as foundations for law "are not given but produced - produced by exclusions"<sup>160</sup> of the constructions of meaning and significance that marginalized peoples give to their experiences. "Context" is not a self-present source for meaning, but the derivative effect of representational practices in which some elements of social life are said to constitute context to the exclusion of others.<sup>161</sup>

The metaphysics of contextual presence accordingly reverses the metaphor of subjective priority into one of objective priority. Thus meaning does not flow intrinsically from the words or intent of the subject, but extrinsically from factors outside the subject which are seen to constitute subjective meaning. The inside, the text, is seen to originate in the outside, the context. This outside, as a self-present and undifferentiated source or origin, thus is taken as a transcendental object, existing prior to and separate from the social construction of context.<sup>162</sup>

Peller reminds us that context is a discursive construction of situated social agents and thus that we should attend to the rhetorical strategies that shape the way "context" is defined amongst scholars in the academic discourse about legal interpretation.

I think we have to be particularly suspicious of accounts of legal interpretation which waive fears of illegitimate exercises of power by asserting that the necessary constraints are always already in place due to the fact that meanings seem clear to most interpreters most of the time because the contexts in which texts are apprehended generally ensure that meaning seems indisputable. A recent variation on this theme is found in Fish's *Dennis Martinez and the Uses of Theory*<sup>163</sup> in which he shows his interlo-

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<sup>158</sup>*Ibid.* at 620-21.

<sup>159</sup>Peller, *supra*, note 28.

<sup>160</sup>See J. Culler, *On Deconstruction: Theory and Criticism after Structuralism* (Ithica: Cornell University Press, 1982) at 153.

<sup>161</sup>Peller, *supra*, note 28 at 1224.

<sup>162</sup>*Ibid.* at 1224-25.

<sup>163</sup>*Supra*, note 85. See also my discussion there of the premises that must be sustained to accept this argument.

cutors (Michael Moore, Ronald Dworkin and Mark Kelman) that judges need no theory to properly perform their tasks, that judicial practice is not random or *ad hoc* activity without such a theory, and that *we need not despair* about the inability of theory to generate or guide practice because when judges are judging, they are not using any theory at all,

[but] merely registering what they see and proceeding in ways that seem to them ... obligatory and routine, and they do these things not because they have applied this or that epistemology, but because within the beliefs and assumptions that constitute their perception and their sense of possible courses of action, *there is nothing else they could do*.<sup>164</sup>

“[J]udging ... cannot be understood as an activity in the course of which practitioners regularly repair for guidance to an underlying set of rules and principles”<sup>165</sup> because practice, “rather than being in need of the guidance theory might claim to provide, *is itself sufficient*, is, in fact, self-sufficient, *and in need of nothing* additional”<sup>166</sup> because practice constrains and needs no additional constraints.<sup>167</sup> To be an agent embedded in that practice, “[is to be] an agent who need not look to something in order to determine where he is or where he now might go because that determination is built into, comes along with, his *already-in-place* sense of being a competent member of the enterprise.”<sup>168</sup> “[A]n experienced judge is working simply by being what practice has enabled him to be”<sup>169</sup> and “[t]he internalized ‘know how’ or knowledge of ‘the ropes’ that practice brings *is sufficient unto the day* and no theoretical apparatus is needed to do what practice is already doing, that is providing the embedded agent with a sense of relevancies, obligation, directions for action, criteria, etc.”<sup>170</sup> It’s the same as it ever was and ever shall be, Amen. “Fish’s discourse shows us how things couldn’t be otherwise.”<sup>171</sup>

Fish’s paean to the *status quo* of judicial practice, its sense of its own complete and utter integrity, and its total disregard for and disinterest in any suggestion that its “sense of relevancies, obligation, directions for action, criteria, etc.” might be misguided, biased, or have socially destructive consequences is, and should be, an occasion for despair. As a descriptive claim about the way in which judicial interpretive assumptions often, but not always, shape judges’ perceptions of things, we should appreciate that meaning often *does* seem indisputable. Once again, however, this shouldn’t be

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<sup>164</sup>*Ibid.* at 1785 (emphasis added).

<sup>165</sup>*Ibid.*

<sup>166</sup>*Ibid.* at 1787 (emphasis added).

<sup>167</sup>*Ibid.* at 1788.

<sup>168</sup>*Ibid.* at 1789 (emphasis added).

<sup>169</sup>*Ibid.*

<sup>170</sup>*Ibid.* at 1790 (emphasis added).

<sup>171</sup>Malkan, *supra*, note 88 at 154.

seen as the end of our inquiry, but as its beginning. Texts may seem to have fixed qualities when a particular way of reading is in force, but this ignores crucial questions about *how* particular ways of reading become dominant and attain such legitimacy that they seem to be a matter of common sense. In other words, it evades an examination of the political struggles that produce this sense of inevitability, and the ongoing political battles that are waged to sustain it. Our common-sense assumptions about the world (or, to use Wittgenstein's language, the normality conditions that make possible language games like law) are culturally and historically contingent and, as Peller forcefully argues, they always reveal traces of their own artificiality.<sup>172</sup>

Moreover, as I endeavoured to establish earlier, these assumptions are not unrelated to the structure of the social world. Indeed, as social theorists and critical legal scholars have attempted to illustrate, it is these very common-sense assumptions that reinforce and reproduce social relations of inequality in society.<sup>173</sup> "Domination is a human act that tends to appear to human beings themselves as a mere fact of life. It is a violence that disguises itself as the order of society and the stability of meanings and values."<sup>174</sup> We cannot conscientiously address the activity of legal interpretation in isolation from a larger understanding of the nature of the hegemonic process.

One very important operation of the hegemonic process is the continuous creation of cultural traditions. Thus, attempts to embrace cultural 'traditions' incorporating the effective histories of texts, as a source of limitation (and constrained transformation) in legal interpretation, share the same inadequacies as those attempts which resort to interpretive communities, contexts, language games, or the history of the enterprise, to the extent that they efface the social struggles involved in the construction of these referents. Dworkin, for example, suggests that the ideal judge always makes reference to the community's political and legal principles - its traditions - which will constrain the judge's interpretation of what justice and fairness

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<sup>172</sup>Peller, *supra*, note 28. See also Geertz, "Common Sense as a Cultural System" *supra*, note 13 at 73 for a discussion of how dramatically common sense varies from one people to the next, with examples of the wild heterogeneity of its diverse cultural forms.

<sup>173</sup>See also B. Smart, "The Politics of Truth and the Problem of Hegemony" in D. C. Hoy, ed., *Foucault: A Critical Reader* (Oxford: B. Blackwell, 1986) at 157-63 for a discussion of how:

Hegemony contributes to or constitutes a form of social cohesion not through force or coercion, nor necessarily through consent, but most effectively by way of practices, techniques, and methods which infiltrate minds and bodies, cultural practices which cultivate behaviors and beliefs, tastes, desires, and needs as seemingly naturally occurring qualities and properties embodied in the psychic and physical reality (or 'truth') of the human subject. [at 160]

See also both Peller, *ibid.*, and R.D. Gordon, "New Developments in Legal Theory" in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982) 281, for discussions of law and hegemonic processes.

<sup>174</sup>Brenkman, *supra*, note 114 at 4.

mean in that context.<sup>175</sup> His allegiance to the legitimacy and binding authority of tradition, however, fails to provide room for any critical reflection on tradition and its construction, or for any questioning of the community's legacy of principles. Hermeneutics renders itself complicit with traditionalism and rehabilitated prejudice by remaining "impervious to the ways in which coercive and nonreciprocal relationships within a society shape its culture".<sup>176</sup>

Most commentators on legal hermeneutics do recognize that tradition is an actively shaping force. But as Raymond Williams reminds us, "[w]hat we have to see is not just 'a tradition' but a *selective tradition*: an intentionally selective version of a shaping past and a pre-shaped present, which is then powerfully operative in the process of social and cultural definition and identification."<sup>177</sup> To quote Brenkman:

The heritage of modern culture has indeed to be actively constructed. As a consequence, we have not only conflicting interpretations and valuations of specific texts but also competing constructions of tradition. When interpreters seek to recover, preserve, or reconstruct cultural heritages, they enter into the politically charged conflicts of interpretation - the wars of persuasion - that characterize modern culture.<sup>178</sup>

Traditions can be shown to be radically selective. History is full of examples of situations in which specific interpretations get 'read out of' the effective history of the text; they are denied legitimacy for one reason or another. Williams argues that this selection of certain meanings and practices, and concomitant exclusion of others, is presented and usually successfully passed off as "*the tradition*", "*the significant past*", and is therefore one of the decisive processes within any hegemony.<sup>179</sup> Traditional hermeneutic approaches actively engage in the construction of "a cultural tradition in the guise of a unified realm of meanings and values separated from social relations of domination and power."<sup>180</sup>

Theorists of legal interpretation should consider and address the challenge that postmodern critical literary theorists have posed to their counterparts in the literary academy. Traditional literary criticism, the postmodern critics contend, "refuses to take seriously the effects of the social world on the aesthetic and visionary figuration which it values, defends,

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<sup>175</sup>Dworkin, *supra*, note 99.

<sup>176</sup>Brenkman, *supra*, note 114 at viii.

<sup>177</sup>Williams, *supra*, note 141 at 115. For examples of this, see E. Hobsbawm & T. Ranger, eds, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

<sup>178</sup>Brenkman, *supra*, note 114 at viii.

<sup>179</sup>Williams, *supra*, note 141 at 115.

<sup>180</sup>Brenkman, *supra*, note 114 at viii.

and studies".<sup>181</sup> This objection to literary criticism is often countered with claims that literature is a semi-autonomous social institution with its own internal system of rules and traditions that can be examined and comprehended in isolation from other socially powerful discourses:

one might answer that it is incumbent on anyone holding such a belief to demonstrate that these rules and traditions are generated internally, independently of any other actions in the social world ... They would have to show, in other words, that there is an "inside" to literary history that is independent of the "outside" history of other material practices [instead they have just assumed it]. Or, alternatively, they would have to admit that what they produced was a static ideological model representing present interests.<sup>182</sup>

Substitute law for literature and legal for literary and the challenge to academic commentators on legal interpretation is quite clear.

The recourse to forms of life, language games, cultural context, disciplinary conventions, and institutional traditions to situate law, legal meaning, and legal practice was and is a promising one but only if these social domains are addressed in their historical specificity. Instead what we have seen is an endless invention of new idealist devices that repress history and the voices of its antagonists. If truth, meaning, certainty, right and wrong have sense only in social practices, let us look then at the numerous histories, struggles, competing claims, and differential relations of which these practices are always internally conflictual effects. If we must situate legal texts and practices in relevant contexts to understand them, then why limit this context to an idealistically conceived, ahistorical, unified system of meaning - the imaginary culture of a privileged elite. Instead, let us take the contextualizing impulse seriously and reinscribe legal practice, legal meaning, and historically specific cultures of legal decision-making within the historical movements and structures of the relational, differential social processes of which they are a product.

There are a number of grounds then, for the need to fundamentally rethink the 'political' nature of legal interpretation. Thus far, the 'politics' of legal interpretation has been addressed in terms of the danger of the imposition of personal or partisan values, the influence of a judge's background and experience on his reading of texts, or the ubiquity of politics as an inevitable *background* context to interpretive practices. A more powerful statement about the nature of the 'politics' of interpretation was made by Robert Cover, who argued that the literature focusing on the importance

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<sup>181</sup>P. Bove, "The Ineluctability of Difference: Scientific Pluralism and the Critical Intelligence" in *Postmodernism and Politics*, *supra*, note 88 at 5.

<sup>182</sup>*Ibid.* at 6.

of interpretive practices in law blithely ignores the central fact that “legal interpretation takes place in a field of pain and death.”<sup>183</sup>

Legal interpretive acts signal and occasion the imposition of violence upon others. A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.<sup>184</sup>

Legal interpretation, he reminded us, takes place in the context of the organized social practice of violence. The meaning-construction or world-building which constitutes law is maintained “only to the extent that there are commitments that place bodies on the line. ... [T]he interpretive commitments of officials are realized, indeed, in the flesh.”<sup>185</sup>

Cover made a crucial and too-often evaded point when he claimed the priority of the fact that legal interpretation is essentially related to the legitimated practice of political violence. But I question his representation of this relationship and wonder whether it doesn't *underestimate* the violence inherent in legal interpretation. His discussion proceeds under the assumption that legal interpretation takes place in a context *of* violence, because it signals or occasions the potential *for* violence, and violence (be it capital punishment, imprisonment, being deprived of one's children or property) is the likely *result* or *consequence* of such interpretation.

What Cover might have argued, and what most critical modern social theory implies, is that legal interpretation is not something joined *with* the practice of violent domination, but an example of that practice; in other words, the process of legal interpretation can itself be seen as a practice of political violence, not simply a practice which has political violence as a likely consequence. To accept this, however, we would have to radically reconstrue the way we think about violence in the social world. While I do not wish to deny the reality of the pain experienced both in anticipation of and upon the infliction of brute force, I do think the equation of pain with legally sanctioned capital punishment, imprisonment, manhandling, and deprivation of family and property, resonates only with the perspective of those comfortable enough never to have imagined the myriad forms of violence that those in minority groups in our society face on an everyday basis (the quotidian carnage of industrial accidents, the everyday experience of incest and wife battering, the habitual encounters with racial intolerance,

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<sup>183</sup>R.M. Cover, “Violence and the Word” (1986) 95 Yale L.J. 1601 at 1601.

<sup>184</sup>*Ibid.*

<sup>185</sup>*Ibid.* at 1605.

homophobia, and sexual degradation and harassment, the constant fear of homelessness, deportation, AIDS, rape, etc.). Most people's *lives* are played out in fields of pain and death, as are the interpretations in which they figure.

This can be clarified through a comprehension of Pierre Bourdieu's concept of "symbolic violence". Bourdieu, who can best be described as a social theorist, is one of a growing number of scholars interested in the role of language in the reproduction of social life. He insists upon exploring the social and political conditions of language use, and attempts to demonstrate that "there is no linguistic exchange, however insignificant or personal it may seem, which does not bear traces of the social structure that it helps to reproduce."<sup>186</sup>

Bourdieu develops a theoretical framework which enables one to "analyze the ways in which symbolic practices exercise their own type of violence, a gentle invisible form of violence which is never recognized as such, or which is recognized only by concealing the mechanisms upon which it depends."<sup>187</sup> He has approached the symbolic practices involved in art, science, language, religion, and law, to explore the intimate relationships between culture, power, and stratification in both pre-industrial and modern social "forms of life".<sup>188</sup>

Bourdieu sees the social world as one in which:

different classes and class factions are engaged in a specifically symbolic struggle to impose the definition of the social world most in conformity with their interests. The field of ideological positions reproduces in transfigured form the field of social positions. They may carry on this struggle either directly in the symbolic conflicts of everyday life, or indirectly through the struggle waged by specialists in symbolic production (full time producers), in which the object at stake is the monopoly of legitimate symbolic violence — that is to say, the power to impose (and even indeed to inculcate) instruments of knowledge and expressions of social reality (taxonomies) which are arbitrary (but unrecognized as such). The field of symbolic production is a microcosm of the struggle between the classes.<sup>189</sup>

Bourdieu, then, focuses upon those attitudes, dispositions and ways of perceiving reality that are taken for granted by members of a profession, social group, or a society, and that form the normality conditions, back-

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<sup>186</sup>Thompson, "Symbolic Violence: Language and Power in the Writings of Pierre Bourdieu" *supra*, note 144 at 43.

<sup>187</sup>*Ibid.*

<sup>188</sup>For a complete bibliography of Bourdieu's work, see L. Wacquant, "Toward a Reflexive Society: A Workshop with Pierre Bourdieu" (1989) 7 Soc. Theory [forthcoming].

<sup>189</sup>P. Bourdieu, "Symbolic Power", *supra*, note 112 at 115. For a more elaborate explication of Bourdieu's theory of ideological production and his understanding of the functions of the juridical field as an instance thereof, see Coombe, *supra*, note 112.

ground “contexts”, or cultural “traditions” that are taken so unproblematically to constrain legal decision-makers in the legal scholarship that theorizes legal interpretation. For Bourdieu, as for Williams, these unquestioned ‘cultural arbitraries’ are the underpinnings of any system of domination, of the hierarchies that characterize relations both among individuals and among social classes in society.<sup>190</sup>

For legal scholars, Bourdieu’s work suggests several lines of inquiry. Although we are becoming more comfortable thinking about law as a form of language or discourse, we have yet to seriously explore the social and political conditions of its formation and its use (except in instrumental or functionalist terms) or to examine the ways in which legal discourse “bears traces of the social structure it helps to reproduce.”<sup>191</sup>

Bourdieu’s understanding of “ideology” also suggests that we think about judicial interpreters as one group of symbolic producers who exercise a monopoly on certain forms of legitimate symbolic violence in our society, by imposing and reproducing certain arbitrary representations of social reality which serve to sustain and reproduce relations of inequality. Moreover, it suggests that we reconsider the specific conventions of legal decision-making and the particular institutional constraints on legal interpretation, not in terms of how they limit the willful imposition of personal or subjective political values, but in terms of how these operate as rationalizations advanced by legal institutions about their own processes. Such rationalizations serve to obscure the reproduction of hierarchies which legal institutions effect by contributing to the systematic misrecognition of the institution’s processes which are accepted both by practitioners in these institutions and by the public they purport to serve. As Bourdieu makes clear, symbolic violence involves the imposition of a “cultural arbitrary” and is, in modern societies, exercised by institutions of ideological production which succeed in such imposition only insofar as arbitrariness is misrecognized as such, that is, is recognized as legitimate because of the objective and relative autonomy claimed by such institutions.<sup>192</sup>

Legal interpretation, then, appears to be ‘political’ in a far more complex and pervasive fashion than legal scholars have thus far acknowledged. It is not a field of study that can conscientiously be isolated from a study of the social and economic conditions which sustain and enable it, or from a comprehension of the nature and scope of ideology, or more general hegemonic processes. Legal meanings are continually mobilized for the main-

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<sup>190</sup>P. Di Maggio, “On Pierre Bourdieu” (1979) 84 Am. J. Soc. 1460 at 1461.

<sup>191</sup>Thompson, *supra*, note 186.

<sup>192</sup>I provide a longer and more critical discussion of the potential resources afforded by Bourdieu’s theoretical insights for legal scholarship in “Room to Manoeuvre”, *supra*, note 112.

tenance of relations of domination, and legal interpretation plays an integral part in the maintenance of social relations of inequality in our society. Our heightened awareness of the indeterminacy of meaning should not cow us into positions where we either deny the politics of interpretation, reassure ourselves that our conventions protect us from the consequences of it, or retreat into a complacent, smug, or resigned sense that it's the "same as it ever was" (and ever shall be), and that we need do no more than leave it to the experts. A greater understanding of the implications of the fact that law is interpretation should encourage us to enter the fray and compel us to attend to the historical specificity and *significance* of political struggle. It's not the same as it ever was; it never has been, and it never will be.

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