ARTICLES

CONTRACT AS TEXT: INTERPRETIVE OVERLAP IN LAW AND LITERATURE

MICHAEL L. BOYER*

[L]egal practice is an exercise in interpretation. . . . [W]e can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly literature.†

Law is inextricably bound to language. Contracts and statutes are recorded in written form in order to capture the intent of the parties or legislative body in a concrete medium—words. The path that intentions travel on from the human mind to the written word is dark and winding. The final document sometimes fails to contain all the terms the parties intended. Some intentions are lost in the subtlety of language itself, others are misdirected by poor drafting, and many are either overlooked by the reader or not fully contemplated by the writer. Often words, or "signifiers," carry with them excess baggage, i.e., more than is necessary for the sole communicative purpose for which parties employ them.[1] Even seemingly self-explanatory terms, such as "Grade A Chicken," can carry this excess baggage.[2] Whether we ask what the terms in a contract or statute mean, what the intentions of the author were at the time, or whether extrinsic evidence may supplement the document, the answer inevitably includes interpretation.

Interpretive acts have always been present in legal discourse, and various authorities have subjected legal interpretation to different

* B.L.A., University of Alaska, Southeast; J.D., University of Oregon; Assistant Professor of Law Sciences, University of Alaska, Southeast.

† Ronald Dworkin, *Law as Interpretation,* 60 TEX. L. REV. 527, 527 (1982).

[1] *See* RICHARD POSNER, LAW AND LITERATURE 212 (1998) (explaining the orthodox language theory).

[2] In *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, Judge Friendly noted "Grade A Chicken" carried a host of meanings: broiler, roaster, capon, stag, hen, and cock. 190 F. Supp. 116, 120 (S.D.N.Y. 1960). *See also* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965) (noting that the *Frigaliment* case is "well suited for use in illustrating the process of interpretation").

intellectual regimes.[3] In this way, legal interpretation resembles a colonial island that has been battled for, conquered, relinquished, and renamed, but never abandoned (nor fully explored, as we shall see). A popular term for legal interpretation has been "construction," apparently implying that the text is being "worked on" or construed, but not fundamentally changed by way of interpretation.[4] Labels that describe interpretive strategies have a range of legalistic monikers: strict constructionism, (new) textualism, plain meaning approach, modern approach, etc. There are also written rules for legal interpretation called "canons." At least one scholar has distinguished these canons from interpretation because they fill gaps relating to matters which the parties had no intention or contemplation.[5] For every canonical maxim there is an equal and opposite maxim that makes the former of limited use.[6]

The more worthwhile inquiry is into the act of interpretation itself. In fact, neither the Restatements nor case law have offered much "beyond the invocation of ordinary good sense in dealing with the vagaries of language."[7] Legal colonists who frequent the isle of interpretation, to continue the metaphor, have not examined the rich culture of the land they claim. Most lawyers, judges, and even scholars use a term such as "interpretation" and proceed to engage in the act without a full realization that behind the word is a rich background and an entire field of textual study formally in existence since 390 B.C.[8]

In 1982, the *Texas Law Review* devoted an entire volume to exploring the implications that literary interpretation could have on legal interpretation.[9] This was considered an abstract contribution to the debate about judicial decision-making, and the fragmentation of the Court in

---

[3] *See* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation,* 87 GEO. L.J. 195, 200–06 (1998) (discussing the Corbin/Llewellyn regime that favored allowing extrinsic evidence to supplement contracts, a view which prevailed over the Willistonian conception that held such evidence should be barred). This relaxed version of the parol evidence rule, inspired by Corbin/Llewellyn, is evident today in the RESTATEMENT (SECOND) OF CONTRACTS § 212, as well as § 2-202 of the U.C.C.

[4] *See, e.g.*, James Boyd White, *Law as Language*, 60 TEX. L. REV. 415, 444 (1982), stating:

> Much of what I say about interpretation, for example, is already built into the ways lawyers have for centuries used their own special word for reading statutes and wills and constitutions: 'construction.' From one point of view, my aim has been to make somewhat more conscious what we already know about what we do and who we are.

Contra Corbin, *supra* note 2 (asserting interpretation and construction are not alike).

[5] *See* ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS § 534 (1960).

[6] *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules of Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395 (1950).

[7] MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 80 (1998).

[8] *See generally* Plato, *Ion, in* CRITICAL THEORY SINCE PLATO 11 (Hazard Adams ed., 1992) (discussing interpretation and the limited nature of a textual and artistic representation of "forms"). Composed about 390 B.C., it is a masterful work that begins many texts on literary criticism.

[9] *See* Symposium, *Law & Literature*, 60 TEX. L. REV. 373 (1982).

University of California Regents v. Bakke influenced the inquiry.[10] Jurists had always employed divergent interpretive methods, but the divergences in *Bakke* were so extreme that the Court's position was ambiguous. Different Justices each employed different interpretative methods, leading, inevitably, to different results. Moreover, the divergence in interpretive method was highlighted in *Bakke* because the repercussions were felt in every legal institution in the country. In short, because legal interpretation is a major part of the judicial decision-making process, how judges made their decisions and what sources they relied upon became topics of great interest.

One commentator and appellate judge, Richard Posner, posits that the topic of interpretation has "cooled" and exhausted itself because the whole enterprise "comes down to two propositions."[11] One proposition is that interpretation is always relative and governed by purpose.[12] For instance, whether the purpose of interpreting contracts is to "recreate the intentions of the parties or to encourage contracting parties to embody their agreement in a clearly written, comprehensive document" governs the interpretive outcome.[13] The second proposition is that "interpretation is not much, and maybe not at all, improved by being made self-conscious, just as one does not become a better reader by studying linguistics."[14] Further, Posner asserts that these propositions suggest interpretation is "unlikely to be improved by being made a subject of theory or reflection."[15]

Other scholars voice the opposite sentiment. Ronald Dworkin avers that lawyers should study literary interpretation because, if nothing else, the thorough debates of hermeneutic theories in the literary context could spark similar debates in law.[16] James Boyd White goes even further in stating: "[t]he lawyer and the literary critic, as readers of texts, face difficulties and enjoy opportunities that are far more alike than may at first seem the case:

---

[10] 438 U.S. 265 (1978). Justice Powell announced the Court's judgment in *Bakke* and filed a plurality opinion expressing his views; Justice White joined in Parts I, IV-A, and V-C; Justices Brennan, Marshall, and Blackmun joined Parts I and V-C; Justices Brennan, White, Marshall, and Blackmun filed a judgment concurring in part, and each filed a separate opinion dissenting in part; Justice Stevens filed an opinion concurring in the judgment in part and dissenting in part, in which Justice Burger, Chief Justice Stewart, and Justice Rehnquist joined. *See generally id.* The 156 page opinion contains references to hundreds of cases, cites legislative history, strong policy arguments, legal tests, and even a four page appendix on the Harvard College Admissions Program. *See id.* at 321. It was obvious everyone was not on the same page.

[11] POSNER, *supra* note 1, at 209–11.

[12] *Id.*

[13] *Id.* at 210–11.

[14] *Id*. at 211.

[15] *Id*.

[16] *See* Dworkin, *supra* note †, at 529–30.

in a deep sense, I believe, they are truly the same."[17] Stanley Fish addresses Posner's position and acknowledges that "literary and legal interpretation are distinct," but Fish also offers a number of similarities.[18] As a pragmatic concern, a lawyer should not "go to a novelist for legal instruction," yet this only highlights a superficial distinction between legal and literary interpretive enterprises.[19]

On a more philosophical level, with which Fish is concerned, both legal and literary texts analyze past statements made in a different and often unstable background context that is difficult to recreate. For example, both face the crucible of authorial intent. Most importantly for Fish, both recognize that as "situated member[s] of interpretive communities," lawyers and literary scholars have been trained to interpret texts in a given way, and to read and even write in a manner that has special meaning to others in their respective communities.[20] In short, legal and literary texts, and the words that compose them, may mean different things to different people or groups.

An example in literature is evident in Jonathan Culler's concept of "literary competence," which explains how a reader's knowledge of literary conventions allows her to understand a text's symbolism, metaphor, allegory, or theme.[21] A reader of literature is initiated into the interpretive community of like readers through experience with and understanding (competence) of certain signs and symbols, references, and allusions that may not immediately be apparent to the layperson. In the legal community, a clear example is evidenced by the American Bar Association's prescribed first year curriculum.[22] This ensures an interpretive community fluent in legal terms, such as what constitutes an offer and an acceptance (words with independent legal significance), the elements of negligence (a word that suddenly blossoms into a four part litany: duty, breach, causation, and damages), and the rights inherent in fee simple title (full bundle of sticks). In addition, there are readings in casebooks so common that two complete strangers, each having a law degree, could meet on an airplane, whisper to one another "*Marbury*," and shake their heads in agreement as if they share some intimate secret. There is even a law dictionary each first year student buys so he or she may gain fluency in the language of the legal community,

---

[17] White, *supra* note 4, at 415.

[18] STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 294 (1989) (examining the mutual exclusivity, or lack thereof, of legal and literary interpretation).

[19] *Id*. at 305.

[20] *Id*. at 303.

[21] *See generally* JONATHAN CULLER, STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS, AND THE STUDY OF LITERATURE (1975).

[22] *See* FISH, *supra* note 18, at 126.

an odd dialect of English.[23] As the mantra goes, "law students are taught to think like lawyers," and so too are they taught to *speak* and *read* like lawyers, looking not for symbols and metaphors in their texts, but the issue and holding in the case before them. This is part of the phenomenon of the interpretive community, and such a realization is not without practical importance. Law and literature share common ground despite the fact that a poet may be of little help drafting a lease agreement and a tax attorney unable to help with an exegesis of T. S. Eliot's enigmatic poem *The Wasteland*. The interpretive common ground between law and literature is best viewed when law engages society in a concrete example: the written contract.

The most notable circumstance where literary theory might inform legal interpretation is in the misleadingly named parol evidence rule, itself an example of how an interpretive community can use a term in an exclusive manner.[24] The parol evidence rule is characterized by two schools of thought: the mechanical conception of Professor Williston, emphasizing the agreement and its plain meaning, and the modern approach of Professor Corbin, emphasizing the parties' intentions and use of extrinsic evidence to reveal these intentions.[25] At the core of the Williston/Corbin debate is a disagreement over exactly when a judge in a contract dispute should look to evidence outside the written contract to discern the parties' intentions.

Williston believed the intent of parties should be recognized only as "memorialized in the agreement either expressly or impliedly."[26] According to Williston, the judge should give effect to the intent of the parties *as it was written*, and in so doing, the judge should apply the "common," "normal," and plain meaning of the language.[27] A blind faith in language is present in the assumption that the meaning of any language

---

[23] BLACK'S LAW DICTIONARY.

[24] The parol evidence rule is neither a rule of evidence nor is it related to allowing a prisoner to be released from prison. Rather, the rule deals with the use of extrinsic evidence in contract interpretation. It renders prior and contemporaneous oral and written statements, within the scope of a completely integrated contract, inadmissible at trial (unless the judge finds a reasonable person would find the contract ambiguous). Gianni v. R. Russel & Co., 126 A. 791 (Pa. 1924). *But see* Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1966) (Justice Traynor's decision was emblematic of the more modern approach that allows extrinsic evidence of the parties intentions regardless of whether the judge thinks a reasonable person would find the contract ambiguous).

[25] *See* Ross & Tranen, *supra* note 3, at 199–207.

[26] *Id*. at 200.

[27] 4 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 618 (3d ed. 1961).

is ever absolutely plain to all readers.[28] Yet Williston made an even further leap of faith when he placed the linguistic discretion to declare language ambiguous or the agreement incomplete entirely in the hands of judges, arguably an interpretive community removed from society at large. As for completeness, "long," "detailed" documents with "unconditional language, cover[ing] many contingencies . . . and contain[ing] . . . clause[s], such as a merger clause, which says the contract is complete," while not definitive, are all objective indications the courts could employ.[29] Ambiguity, however, is more subjective. The Willistonian view holds that if no ambiguity is found in the plain meaning of the language (evidence of local or trade usage could be employed in this analysis) the judge's own sense of "ordinary usage" prevails.[30] The judge, then, excludes extrinsic evidence of parties' intent and relies on his own conception of what a reasonable third party would regard as ambiguous. The power to impose one's own conception of what is or is not an "ordinary use" of language and the power to make the sole determination regarding ambiguity are suspect and open to criticism.

Corbin, on the other hand, advocates an agnostic view toward language. He strongly favors extrinsic evidence over a court's equitable discretion in arriving at the intentions of contract parties.[31] His view

---

[28] *See generally* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 142–44 (1994). Fish debunks the legal assumption that language can be beyond interpretation:

> Formalism is the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one—no matter what his or her situation or point of view—can ignore; it is the thesis that one can devise procedures that are self-executing in the sense that their unfolding is independent of the differences between the agents [readers] who might set them in motion . . . [H]owever much the law wishes to have a formal existence, it cannot succeed in doing so, because—at any level from the most highly abstract to the most particular and detailed—any specification of what the law is will already be infected by interpretation and will therefore be challengeable.

Id.

[29] Eric Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation,* 146 PENN L. REV. 533, 535 (1998).

[30] Ross & Tranen, *supra* note 25, at 201.

[31] Corbin, *supra* note 2, at 170–71:

> The interpretation of a contract is the process of determining the thoughts that the use of the words therein intended to convey to each other. A court is never justified in altering or perverting the language in order to produce a result that it regards as more just and equitable. Extrinsic evidence is admissible to aid in the process of interpretation as above defined, to determine the meaning of language that the parties actually gave to it, to expound and enforce the contract that the parties actually intended to make . . . . Whether the parties have, or have not, assented to such a writing is a question of fact; and the meaning and intention that the parties used the written words to convey to each other is also a question of fact, although often it is one that is to be resolved by the court and not by the jury.

ultimately prevails in the *Restatement (Second) of Contracts*.[32] The *Uniform Commercial Code* also bears Corbin's stamp in § 2-202, a liberalized parol evidence rule.[33] Moreover, a "new . . . but continuing trend" is to reject the plain meaning rule and allow the admission of extrinsic evidence "relating to context" to demonstrate whether ambiguity exists.[34] The category of admissible extrinsic evidence includes "circumstances surrounding the . . . agreement," such as the "object, nature, and subject matter of the writing," which allows the court to "place itself in the same situation in which the parties found themselves at the time of contracting."[35]

Simply stated, Corbin's interpretive focus is on the author(s) of the document (text). He believes that the arbiter's role is to give effect to the parties' intent, even if the language of the resulting document fails to convey these intentions completely. This approach results in better observance of the parties' wishes. This view sharply contrasts with the philosophy of Williston, who focuses on the text, opting for the certainty of the written word. Williston contends that looking to uncertain party intentions leaves parties vulnerable to fraud, and he suggests that one should look to the text to protect expectations and expeditiously settle interpretive matters even at the possible cost of not fully honoring the intentions of the parties.

A very similar parol evidence debate arose in the literary context as "New Critics" began to decry the use of extrinsic evidence in interpreting poetry and literature. New Criticism's rise coincided with the development of English departments as an institution in America, and its goals were not unrelated to pedagogical and identity issues within the discipline.[36] New

---

[32] *See* Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts,* 81 COLUM. L. REV. 13, 14 (1981) (stating the most significant change from the original Restatement is an increased emphasis on the context in which a contract is made and on the meaning attached by the parties to their words and conduct, i.e., parol evidence).

[33] *See* U.C.C. § 2-202 (2002).

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement . . . may not be contradicted by evidence of any prior agreement or of a contemporary oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade . . .
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended as . . . complete and exclusive . . . .

Id. (emphasis added).

[34] Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality As Opposed to Virtual Reality,* 74 OR. L. REV. 643, 643 (1995).

[35] Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 645 (Cal. 1966).

[36] POSNER, *supra* note 1, at 220–21.

> The term "New Criticism" denotes a specific school of American literary criticism that arose in the 1920s, achieved great influence in American universities in the 1940s and 1950s, and

Critics adopted as their manifesto the primacy of the text.[37] Close reading was the modus operandi by which the reader unlocked the poem or novel, even though the specter of authorial intent still loomed.[38] New Criticism hurdled the issue of authorial intent in a central essay entitled *The Intentional Fallacy*, which argued that the author's original intent was irrelevant in judging the text.[39] The essay's argument was that the text, once authored, has an independent existence, which may be discovered if read closely and studied. Therefore, one need not look at authorial intent specifically because the author's plan or intent should be entirely evident in the text itself. Additionally, the poem or story may take on new meanings the author may not have intended, thus, freeing the text from one restrictive meaning.

The New Critics' rigorous focus on the "four corners" of literary texts was designed to prevent any one definitive interpretation, largely because of pedagogical problems.[40] However, in the legal realm, Williston's focus on the written contract terms (text) was designed to arrive at a single, definitive interpretation, even to the point of compromising the parties' intentions. Despite these different goals, New Criticism and the Willistonian conception of the parol evidence rule share striking

---

> then faded. . . . The New Critics were committed to the close reading of works of literature viewed as more or less self-contained artifacts . . . .

Id.

[37] *See, e.g.*, STEVEN LYNN, TEXTS & CONTEXTS 21-43 (1998). A literal black letter reference to literary criticism, Lynn outlines the basic tenets and major writers in New Criticism (as well as other schools of criticism). Lynn notes in the book's front cover the "Assumptions" in New Criticism include a focus on the work itself and not the author's intention nor the reader's response. *See generally id.*

[38] Noteworthy is the fact that most works of literature are authored by one person, so the literary issue of intention diverges somewhat from contract law, where the intent of two parties converges in a meeting of the minds in one text.

[39] W. K. Wimsatt & Monroe Beardsley, *The Intentional Fallacy*, *in* THE VERBAL ICON 3–18 (1954). In *The Intentional Fallacy,* the issue is laid out well:

> There is a difference between internal and external evidence for the meaning of a poem. And the paradox is only verbal and superficial that what is (1) internal is also public: it is discovered through the semantics and syntax of a poem, though habitual knowledge of the language, through grammars, dictionaries . . . . [W]hile what is (2) external is private or idiosyncratic; not a part of the work as a linguistic fact: it consists of revelations (in journals, for example, or letters or reported conversation) about how or why the poet wrote the poem . . . .

Id. at 10.

The essay concludes by positing that external evidence is inferior to internal evidence as a mode of critical inquiry. The authors explore the notion of dead writers brought back to life to comment on their works and how that would be less worthwhile than a careful analysis of the text itself because all the signals and clues to the meaning are present if the reader looks closely enough to discover them.

[40] If one definitive rendition of a poem existed, a prospective English professor would have little to do in the classroom but convey the interpretation. *See also* CLEANTH BROOKS, THE WELL WROUGHT URN (1975), in which his essay *The Heresy of Paraphrase* denounces paraphrasing a poem's core because the paraphrase is a creation of the interpreter, which strips the poem of its form and content.

similarities. Both place the judge or critic as an arbiter centrally focused on the text and the internal evidence within it. They both begin their interpretive acts with an eye towards coherence, the court favoring contracts as beneficial (and thus more apt to find coherence) and New Critics contending that all texts make sense and cohere if read carefully enough.[41] With respect to authorial intent, both New Criticism and the Willistonian view attempt to give effect to intent as it is expressed *in the document*, rather than from an external source. While Williston does not go so far as to say the author is irrelevant, the practical effect under his conception of this rule is the same if the judge makes the initial determination that the document's plain meaning bears no ambiguity. Thus, we might safely say that a judge utilizing the plain meaning approach and finding no ambiguity is exercising an interpretive strategy very similar to New Criticism.

Law and literature had, in fact, been moving in interpretive tandem from approximately 1920 to 1950—the period when the Willistonian (law) and New Critical (literature) bias against outside evidence in aid of interpretation truly took hold.[42] By the mid to late 1950s, New Criticism began to encounter attacks, most notably within its ranks.[43] Similarly, the American legal system was on the precipice of a dramatic change in how it dealt with interpretation. In 1950, a schoolteacher from Kansas (who excelled at Yale Law School) wrote what has been described "as the greatest law book ever written."[44] His name was Arthur Corbin and the book's title was *Corbin on Contracts*. In it he rejects the notion that the contract itself could be the sole evidence of parties' intent to have the document represent their bargain, and he posits that a court should admit all relevant evidence when determining whether the contract is completely

---

[41] *See* LYNN, *supra* note 37, at 21–43.

[42] New Criticism began around 1917–1919 with T. S. Eliot's essays, *Tradition and the Individual Talent* (1917) and *Hamlet and His Problems* (1919). The movement rose in the 1920s and 30s, reaching its apogee in 1947 with one of the most widely read new critical pieces, *The Well Wrought Urn* by Cleanth Brooks. The dominant mode of interpretation in the era was to exclude extrinsic evidence of meaning and focus on the poetic language of the written work.

Similarly, law in this period, largely though SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (1920), also authorized and followed an interpretive theory focused on the written text. The position is exemplified in *Gianni v. R. Russel & Co*., 126 A. 791 (Pa. 1924). The court in the case did not allow Gianni's witness to testify about an oral agreement regarding the exclusive right to sell soda because normally one would include it in the written contract. Thus the court favored the close reading of the text, one it considered complete, over other outside evidence that might reveal the meaning of the agreement.

[43] In *The Languages of Criticism and the Structure of Poetry* (1953), R. S. Crane argues against the New Critical emphasis on language and he suggests that the questions one asks of the text may determine the answers. More criticism from numerous sources followed, and by the mid-1950s, New Critical Theory had those involving extra-textual sources, such as Northrip Frye's focus on literature as expressing the ideals or archetypes of man in *Anatomy of Criticism* (1957).

[44] GRANT GILMORE, THE DEATH OF A CONTRACT 57 (1974).

integrated.[45] In so doing, he takes aim at the Willistonian position that a judge has the power to decide if a "reasonable person" would find ambiguity in the document. Interestingly enough, New Critical Theory also relies upon an "ideal reader," capable of making sense out of a text with only his or her deft interpretive skills and the words. So both the Willistonian and New Critical techniques share a common flaw, reliance on that which does not exist—the ideal reader or reasonable person. Nonetheless, these ideal notions survive to some degree in law and in literature. So perhaps the reason for the contemporaneous changes in legal and literary interpretive frameworks is best observed by what was to come.

The 1960s saw a steady progression of change and the beginning of a new era in interpretation. In 1965, Corbin convincingly outlined his position that relevant extrinsic evidence might be offered for three distinct purposes,[46] a position the California Supreme Court adopted three years later in a landmark case, *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co*.[47] Corbin's interpretive position had begun to take hold: extrinsic evidence was on the way in, and a judge's own education and experience on the way out. On the literary front in 1966, at a conference at the Johns Hopkins University "designed to introduce structuralist thought to the American literary academy," Jacques Derrida delivered an influential paper, *Structure, Sign and Play in the Discourse of the Human Sciences*. This was the genesis of the most radical and skeptical theoretical movement to date—deconstructionism.[48] Gone forever was the alleged "elitism, privilege, and closure" that resulted from the New Critical belief in the autonomy of the text.[49] Deconstruction focused on the arbitrary nature of language and how language subverts itself. While it also entailed a close reading of the text, the end result was incoherence not coherence. Thus it cuts against New Critical notions of learned English scholars defining meanings from the text alone. Likewise, one could argue

---

[45] 3 CORBIN, *supra* note 5, § 583, at 465.

[46] Corbin, *supra* note 2, at 173:

> Extrinsic evidence (parol or otherwise) may be offered by a litigant for three quite distinct purposes: (1) To convince the court that the written words were adopted and assented to with a specific meaning that is favorable to himself. This is process of *interpretation of the written words*. (2) To convince the court that the written words were not assented to as the complete and exclusive integration of the terms actually agreed upon. This is not a process of interpretation of the written words. (3) To convince the court that the parties had mutually agreed upon specific terms, had tried to express them in the written words and had failed. Here the issue is not one as to interpretation of the written words. It may not even be argued that they are ambiguous. This is the case that is commonly described as one involving fraud, accident, or mistake.

[47] 442 P.2d 641 (Cal. 1968).

[48] HAZARD ADAMS & LEROY SEARLE, CRITICAL THEORY SINCE 1965, at 8, 17 (1986).

[49] *Id.* at 13.

that the application of Corbin's view created some uncertainty in contract law where there had once been certainty, albeit judicially imposed. Still, the goal of a liberalized parol evidence rule was not incoherence.

Subsequent developments in literary interpretation in the 1970s (Reader Response Criticism) and the 1980s (New Historicism) looked outside the words of the written text and provided useful tools for contract interpretation. Reader Response Criticism is an interpretive technique that focuses on reader impressions of the text, and New Historicism is an interpretive technique that focuses on the context, beliefs, customs, practices, and conditions in which the text is written. Both views favor outside evidence and are Corbinian at core with New Historicism perhaps being the most analogous. Noteworthy of the parallels between legal and literary interpretation is the fact that law and literature *have* tacitly used the same techniques in analyzing written documents; they share common interpretive ground. It follows that they could eventually employ these techniques in a more open and conscious manner. Courts can gain even more flexibility by employing different interpretive strategies, depending on the situation. A certain interpretive strategy may be better suited for the facts and circumstances of one case than another. For example, a judge hearing a case involving a "standardized mass contract" and a "gross inequality [in] bargaining position[s]" may choose to focus on what "an ordinary layman would realize" he is bargaining for, and in so doing, the judge is exercising a Reader Response Strategy by focusing on the reader and not the text or the author.[50] Similarly, in a case where a court faces "provisions in a dispute . . . susceptible to two interpretations," the court may choose to focus on the "relationship between the parties," if it is a common one, and decide accordingly.[51] This falls along the lines of a New Historical approach in which the judge looks outside the text and focuses on the customs and practices in the industry, as well the relationship that gives rise to the contract in question.

Although employing the most apt interpretive strategy yields the most appropriate result, exercising the least apt strategy may result in injustice. For example, cases have criticized a strict adherence to a plain meaning/New Critical interpretive approach for yielding inequitable results.[52] A judge looking beyond the text may achieve a better result through interpretive flexibility. This is not judicial activism because the

---

[50] Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

[51] Peacock Constr. Co. v. Modern Air Conditioning, Inc., 353 So. 2d 840 (Fla. 1977).

[52] *See* Stewart v. McChesney, 444 A.2d 659, 665 (Pa. 1982) (Roberts, J., dissenting) (criticizing a result he called the "height of unfairness" that occurred due to the judge's blind adherence to the plain meaning approach regarding a right of first refusal).

judge still only considers the facts and industry customs of each case.[53] Unconscionable contracts would be enforced but for the judges' willingness to scrutinize the circumstances of the contracts and the documents for instances where they do not cohere with public policy—both a deconstructive (looking for incoherence) and New Historic Approach (acknowledging extra-textual social policy).

Yet some still object to the notion of more than one interpretive position. Judge Kozinski, in his *Trident Center v. Connecticut General Life Insurance Co.* opinion, rails against Californian detractors of the plain meaning approach.[54] His argument is indicative of a Manichaean view of legal interpretation where one either follows the plain meaning of words or falls into a void of arbitrariness. This duality, however, need not exist. The plain meaning approach uses only one person, the judge, with one interpretive strategy. Conversely, a Corbinian consideration of extrinsic evidence relies on the interpretive strategies of twelve different jurors, all of whom are likely to have different levels of education and diverse experiences.

Still, for all its faults, the plain meaning approach should not be abolished. Indeed, there may be situations in which a merger clause and careful drafting indicate that the written document should be adhered to strictly. Predictability and legitimacy should not fall victim to multiple interpretive strategies. Multiple strategies should be widely understood and available to lawyers and judges. Already certain situations require particular interpretive techniques and rules. For example, insurance contracts are interpretive *contra proferentum*, in which ambiguity is resolved against the author. Other such interpretive strategies are part of the legal system, e.g., *Expressio Unius est Exclusio Alterius*, *Ejusdem Generis*, and even more interpretive options should be available.

This paper began by analyzing the relationship between legal and literary interpretation. At the two ends of the spectrum are Judge Posner, a judge turned literary critic, and Stanley Fish, a literary critic turned legal scholar. This is ironic because if all judges and lawyers knew half as much as Posner about the options literary interpretation presents, then there would be no need to study interpretation because it would be a moot topic already well discussed and explored. Likewise, if every literary critic knew as much about law and legal interpretation as Fish, then literary criticism

---

[53] *See* Wood v. Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917).

[54] Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 568–69 (9th Cir. 1988). *See also* Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995) (asserting that even some California courts are deciding cases in conflict with *Pacific Gas* by and thus still clinging to the plain meaning approach, often in favor of economically superior parties).

would have already infused itself largely into legal scholarship and would have begun to influence judicial opinions. The divergence between legal scholarship and literary criticism, however, may actually highlight the closeness of the mutual interpretive enterprises in law and literature. The analyses of Fish and Posner are the most resounding and profound in the field and possess similar literary and legal characteristics. Ronald Dworkin argues, "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 . . . ."[55] As such, multiple interpretive strategies would be useful to achieving a fair outcome. And these would develop from an extensive study of interpretive options in other fields of textual study, primarily literature.

[55] Dworkin, *supra* note †, at 543–44 (stating "[t]his characterization is itself an interpretation, of course, but allowable now because relatively neutral").