Part of an Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse)

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(A crisp autumn day. On a train bound for anywhere. ROBERT is sitting by the window. Opposite him, across a table, sits CHARLES. Next to him is RACHEL. The rest of the car is sparsely peopled. The journey is scheduled to take about three hours. For the first forty-five minutes, ROBERT has been gazing out of the window; CHARLES has been dozing off after finishing his newspaper; and RACHEL is seemingly immersed in reading a weighty tome.)

ROBERT: (to no one in particular) That scene is pure Vivaldi.

(There is no response. CHARLES awakes rather abruptly but quickly strikes a more dignified pose. RACHEL seems oblivious to ROBERT’s announcement.)

ROBERT: (a couple of minutes later) Pure Vivaldi! Perhaps a hint of Pachelbel. Don’t you think so?

CHARLES: (preceded by a nervous cough) It certainly is a nice sight.

ROBERT: (directed at RACHEL) Don’t you think those trees are sheer poetry?

RACHEL: (after a slight pause) Well, you certainly mix your metaphors. First music, then poetry. Yes, it is a stunning view. But isn’t it all a matter of taste? Vivaldi for you. Maybe Wagner to another. Or Madonna for some.

ROBERT: Hold on. Hold on. You can’t simply lump Vivaldi, Wagner, and Madonna together. That’s to soil the sublime with the ridiculous. Vivaldi managed to capture the harmony and majesty of autumnal nature. He wasn’t simply pandering to adolescent fancies. He captured a slice of the infinite. William Blake knew what he was about:

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To see a World in a Grain of Sand  
And a Heaven in a Wild Flower,  
Hold Infinity in the palm of your hand  
And Eternity in an hour.

First, you glimpse the trees in the music and then you recognize the music in the trees. You have to connect with nature. Separate the profound and the popular. Caviar isn’t pabulum.

RACHEL: Oh, I don’t know. Of course, poetry is powerful and can touch the heart. But its appeal is to the emotional, not the intellectual. It’s more soul-stew than food for thought. The harmony of nature is in our heads, if anywhere.

ROBERT: Oh, come on now.

RACHEL: No, really. You seem to want to create an exclusive club of aesthetes. You want your world to be the only world. That’s subjective.

CHARLES: (with another nervous cough) You know what they say: “Beauty is in the eye of the Beholder.” But, leaving aside poetry, I recently heard a joke—well, a humorous tale really—that your conversation reminds me of. While on a visit to New York, a rich oil sheikh—are there any poor ones?—was given a private performance of a Mahler symphony. At the end of the concert, he was asked if he wished for an encore. Without hesitation, he requested a repeat performance of the first part. The orchestra began to replay the first movement, but the sheikh said “No, no; the first part.” After a while, the distinguished conductor realized that it was the tune-up that he had enjoyed most. There’s no accounting for taste!

(CHARLES effects a hearty, if hollow, laugh; RACHEL and ROBERT smile. RACHEL returns to her book; ROBERT looks back out the window; and CHARLES goes off to get a coffee. ROBERT picks up CHARLES’ newspaper and begins to read it. It is the Toronto Globe and Mail, June 15th, 1985, and is open at the Books section.)
Developments that have in recent years undermined both these theories are the growing sophistication of linguistic and semiotic analysis and, more important, the growing conviction among theorists that all human belief, especially esthetic belief, is socially constructed—that there are no absolute critical standards, only ones that meet the needs of particular communities at particular times. This is particularly well demonstrated in Lyric Poetry: Beyond New Criticism.

Among literary beliefs now suspect are the New Criticism's conviction that unity is essential to art (recent deconstructive criticism sees disunity, contradiction and disjunction as equally powerful); thematic criticism's conviction of the referentiality of literature to the culture in which it was created (many linguistic critics argue that powerful writing gains this power from play among its own elements, from containing subtextual patterns or hypograms, or from self-referentiality); the New Criticism's insistence on the autonomy of the literary work (recent critics often see the work as interacting not only with the history of meaning carried by its individual words but with other texts it invokes or resembles); thematic criticism's faith in literature as individual expression (contemporary Marxist criticism holds that writing, like the individual human being, is socially conditioned, that the self-expression theory is no more than a subfantasy of the bourgeois belief in the free-acting citizen); the New Criticism's assumption of the existence of distinct literary genres (much contemporary criticism holds that genres are arbitrary distinctions that mask the overwhelming similarities all literary works share as fabrications of language, or "writing")

A major disappointment in the book, however, is how uninteresting most of the essays are as texts. Despite their espousal of "new new" critical theory, few of them transcend the discursive conventions of earlier criticisms. Given the collapse of genre theory, assumed at least by semiotic and Marxist criticism, distinctions between criticism and fiction, poetry and drama can no longer hold. Not only is each work of criticism in part "fictive" and in part "poetic," it is obliged to compete with poetry, fiction, drama and biography as writing. Its claim to be read can no longer be based on its referentiality to other work; it must be based on its materiality, on the power of its intrinsic qualities as text. In their sequential arguments and dependence on the texts, the majority of these essays—like most book reviews, including this one—are old criticism.

ROBERT puts the newspaper down. After another few minutes, CHARLES returns.)
CHARLES: It's getting very warm and stuffy in here. Would anyone mind if I opened the window? The windows are drenched with condensation.

(RACHEL and ROBERT make agreeable gestures.)

CHARLES: Now that's interesting. Look at that window.

(The window on the other side of the compartment is covered with condensation. There are, however, small patches of glass that remain relatively dry.)

ROBERT: (summoning up some interest) Hm, it seems to spell "SON." At least, if you look at it with a sympathetic eye.

CHARLES: I suppose it does. I wonder why someone would have written that there.

(RACHEL looks up from her book and snatches a quick glance at the window.)

RACHEL: Well, maybe you're a bit quick to jump to conclusions? There are lots of ways to look at things other than in our own self-image.

ROBERT: (indignantly) What do you mean?

CHARLES: (defensively) Yes, the word is there for all to see.

RACHEL: There's no there, there until you put there there.

ROBERT: Very cute.

RACHEL: It might not be an English word. It could be French or Swedish or Welsh. It might not be a word at all. After all, it's just a set of traces that we recognize as an alphabetical notation.

CHARLES: Maybe you have a point there. It might be some special code used by a secret sect. Decoding is encoding, and all that. Chinese and Arabic are nothing more than scribble to me. I wouldn't be able to tell a Chinese proverb from modern art. (CHARLES laughs.) I remember Jabberwocky:

'Twas brillig, and the slithy toves
    Did gyre and gimble in the wabe:
    All mimsy were the borogoves,
    And the mome raths outgrabe.

ROBERT: Well, even so, we can settle any dispute by reference to its origin. Surely, the real meaning of any sign is determined by the sign-maker?
RACHEL: I'm not so sure. In your cherished world of classical music, the best interpretation is not necessarily the one intended by the composer.

CHARLES: Some self-styled purists hanker after some mystical recreation of the composer's mental performance. But most musical buffs seem happy to agree to disagree on the best interpretation of a work.

RACHEL: Some relish the idiosyncratic arrangement, let alone interpretation.

CHARLES: Yes, what about Glenn Gould's rendition of the Goldberg Variations by Bach?

ROBERT: (a little fazed) Well, that's as may be, but he still plays the same notes. But language is quite different. Its quality is more fixed.

CHARLES: Oh, I don't know. I've seen renditions of Shakespeare's Richard III which bear only a passing resemblance to each other even though the words are the same. Delivery and nuance are crucial.

RACHEL: What you see as the word on the window might not be written by a human hand. The markings might be coincidental.

ROBERT: (sarcastically) A subtle combination of meteorological elements and technological artifacts leaving residual traces of dryness on a pool of moisture which miraculously arrange themselves to sketch the word "SON," no doubt?

RACHEL: I suppose you could say the invisible, but literate and English hand of nature.

CHARLES: (preceded by a nervous laugh) It might have been done by a baby or some insect wending its haphazard way across the window. Who knows? I've often scribbled cryptic notes for myself and, then, when I go back to read them, I can't remember what I meant.

ROBERT: Sure, but isn't all of this a little farfetched? In a rare instance, those fanciful explanations may be true. But in a run-of-the-mill situation, it's obvious from the context what those "markings," as you put it, mean. When you see a sign at the foot of an escalator saying Dogs Must Be Carried, you don't run off and look for a dog to carry.

CHARLES: And if you choose to sit in a smoking compartment on a train, you don't have to spend the whole journey puffing on a cigarette.

(They all laugh.)
POWER AND INTERPRETATION

RACHEL: Perhaps. But doesn't your comment make the point? It's our understandings and expectations that give a situation meaning. One might attribute all kinds of mystical significance to those particular words in that particular setting. Freud said something like "In the beginning, words and magic were one and the same thing."

CHARLES: If he did, it's probably one of the few magic things that the psycho-babbler did say.

ROBERT: Let me ask you then; is there anyone or anything that does warrant your approval?

RACHEL: Well . . .

CHARLES: (interjecting) Look. Since we opened the window, the condensation has cleared. The "word" (CHARLES makes the customary gesticulations) has disappeared. Our discussion seems to have become purely academic. Of course, not that being academic is completely useless.

RACHEL: (laughingly) Perhaps not entirely useless. Ornaments, not props of society. Anyway, the clear window may still hold a message for us. An empty space can be full of meaning.

CHARLES: Yes. I know that I could feel the lack of a tooth when I had it extracted.

RACHEL: See. It all depends on your expectations. Or, at least, the society's expectations. To a computer a blank signal is an important feature of its instructional alphabet.

CHARLES: A blank sheet of paper can speak volumes, especially if you put a picture frame around it and place it in an art gallery.

(CHARLES gives another hearty laugh.)

ROBERT: But that's as ridiculous as your Madonna stuff. Even if some trendy people wish to group Madonna with Vivaldi or an empty sheet of paper with a Van Gogh landscape, there is no reason for the rest of us to accept such ephemeral standards. It's simply bad art. Next you'll be telling me that John Cage's 4'33" is a musical composition of the highest quality. In that magnificent opus, there were precisely four minutes and thirty-three seconds of pure silence. Cage was generous enough to suggest that our minds and our environment would provide the music.
CHARLES: That's a good one. But I'm not so sure that there isn't something to the idea that silence can be meaningful. In one of Arthur Conan Doyle's tales, Inspector Gregory asks Sherlock Holmes whether there is anything Holmes wishes to mention. Holmes refers to the curious incident of the dog in the night. "But the dog did nothing," a surprised Inspector Gregory replies. With characteristic understatement, Holmes delivers the punch line, "That was the curious incident."

(This exchange of views is followed by a considerable, and perhaps fitting, period of silence. RACHEL returns to her tome; ROBERT falls asleep; and CHARLES removes a book from his case, opens it at the bookmark, and begins to read it. The book is John Fowles' Mantissa.

. . . tapping one extended forefinger with the other.

"Serious modern fiction has only one subject: the difficulty of writing serious modern fiction. First, it has fully accepted that it is only fiction, can only be fiction, will never be anything but fiction, and therefore has no business at all tampering with real life or reality. Right?"

He waits. She nods meekly.

"Second. The natural consequence of this is that writing about fiction has become a far more important matter than writing fiction itself. It's one of the best ways you can tell the true novelist nowadays. He's not going to waste his time over the messy garage-mechanic drudge of assembling stories and characters on paper."

She looks up. "But—"

"Yes, all right. Obviously he has at some point to write something, just to show how irrelevant and unnecessary the actual writing part of it is. But that's all." He starts tying his tie. "I'm putting this in the simplest terms for you. Are you with me so far?"

She nods. He ties his tie.

"Third, and most important. At the creative level there is in any case no connection whatever between author and text. They are two entirely separate things. Nothing, but nothing, is to be inferred or deduced from one to the other, and in either direction. The deconstructivists have proved that beyond a shadow of doubt. The author's role is purely fortuitous and agential. He has no more significant a status than the bookshop assistant or the librarian who hands the text qua object to the reader."
"Why do writers still put their names on the title page, Miles?" She looks timidly up. "I'm only asking."

"Because most of them are like you. Quite incredibly behind the times. And hair-raisingly vain. Most of them are still under the positively medieval illusion that they write their own books."

"I honestly didn't realize."

"If you want story, character, suspense, description, all that antiquated nonsense from pre-modernist times, then go to the cinema. Or read comics. You do not come to a serious modern writer. Like me."

"No, Miles."

He realizes something has gone wrong with the knot of his tie; and rather irritatedly pulls it apart, then starts the tying again.

"Our one priority now is mode of discourse, function of discourse, status of discourse. Its metaphoricality, its disconnectedness, its totally ateleological self-containedness."

"Yes, Miles."

"I know you thought you were half teasing just now, but I consider it symptomatic of your ridiculously . . ."

CHARLES puts his book down and gazes into the middle distance for a couple of minutes.)

CHARLES: You know, one thing my experience in law school taught me is that there is always a happy medium, if you'll excuse the pun. (CHARLES laughs.) We used to say that you only get run over in the middle of the road. I think that words have a central core of meaning, even if they are a little fuzzy around the edges. Whatever else it might mean, the word "SON" applies to someone's male child. Sure, there'll be an ongoing disagreement over whether it includes illegitimate, adopted, stepchildren or the like, but these are peripheral questions.

ROBERT: (sleepily) What about a daughter who has a sex change? Is he then a son, daughter, both or neither?

CHARLES: Good point. I suppose it depends on why a decision is needed. And, of course, on changing social mores.

RACHEL: You don't give up easily on the idea that there must be some kernel of objective truth, do you? Anyway, in legalese, I'm sure it's possible for "SON" to include women as well?

CHARLES: Well, actually, it does. If I remember correctly, the Interpretation Act stipulates that "male" includes "female," unless there's some contrary intention.
RACHEL: Women become equal only by being treated as men. The whole of our language forces us into a male way of thinking.

CHARLES: It's a man-made language!

RACHEL: I know it's a cliché, but we are such prisoners of our language. Our horizons are so limited. We're so myopic. So resigned. We go through life in dark glasses.

ROBERT: Spare us the angst. I now know who you do approve of. You're a Humpty Dumpty academic—"words are what you want them to mean." Or, at least, you'd like words to be what you choose them to mean. Nursery rhymes are not your style, though. James Joyce is more your style: "And wordloosed over seven seas crowdblast in cellellen eteuto slavezendlatinsoundscript." Such pretension. Stream of consciousness. Tell me about it.

CHARLES: What you say sounds refined and sophisticated, but isn't it all hot air? Give me some specifics.

RACHEL: Take that so-called word "SON." Try to imagine a world where the division between men and women is abandoned. There, giving birth will not be women's work.

CHARLES: I suppose we already have the technological means to revolutionize the whole way we conceive children. More's the pity.

RACHEL: And think about raising children. Imagine parenting as a general social responsibility. The word "SON" might become meaningless or, at least its usage would have to be radically transformed. Your kernel of truth would disintegrate.

ROBERT: Now, that is scary. You'll have us all spouting Orwell's "Newspeak" soon. Ignorance is Strength, War is Peace. All that totalitarian gibberish.

RACHEL: But isn't our language—"Oldspeak"—just as distorted by our present values and beliefs? The whole notion of "children" is a fairly modern idea. Up until the past couple of hundred years, people were just adults or infants. The word and idea of children brought into play a whole set of duties and responsibilities that previously didn't exist. And . . .
CHARLES: Quite a speech. But I'm a man—sorry, person—of this world—here and now, not there and then. I have to dirty my hands, as it were, and operate in the daily hurly-burly of people's affairs. Isn't your cynicism a luxury? To me, it sounds like a counsel of despair. We need standards. Without some certainty, we'd have anarchy and tyranny. Words, at least, offer us some solid foundation in a shifting world. A port in the storm.

(Before RACHEL can answer, several youths enter the compartment and sit across from RACHEL, ROBERT and CHARLES. They have a large radio with them, playing at full blast. The music fills the compartment and their senses.)
... impossible to write anything that cannot be misread. Writing is a risky business. To write about writing is doubly jeopardous. So to write about Stanley Fish's writing is simply asking for trouble. Yet anyone who wishes to make a serious and honest contribution to the current "interpretation debate" in jurisprudence must confront Fish's arguments and ideas. After about two decades spent honing and refining his critical project and argumentative techniques on the literary front, he has exploded onto the legal scene like an intellectual firecracker. With irrepressible and mischievous wit, Fish forcefully reminds lawyers that to ask about meaning is to ask about everything.

His critical project is a potent demonstration that there can be no position of theoretical innocence. For Fish, both the theoretical and practical components of the interpretive act have an indivisible political and historical dimension. Both text and reader are products of interpretive practice. In effect, Fish gives a subtle and significant twist to Marx's famous thesis: in interpreting the world, philosophers also change it. Indeed, Fish elevates the critic from "humble servant of texts" to their proud and primary producer. Although he insists that interpretation is and must be anchored in its social setting, his hermeneutic account is stubbornly apolitical and ahistorical in content and illustration. By downplaying the crucial historical relation between power and interpretation, Fish has managed to divert jurisprudence down a "conventional" cul-de-sac. In so doing, he has led its practitioners further out of earshot of history's subversive sounds. To locate his theory within concrete his-

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105 K. Marx, Thesen über Feuerbach XI (1888) ("Die Philosophen haben die Welt nur verschieden interpretiert, es Könnt drauf an, sie zu veröndern.").
106 S. Fish, Is There a Text in This Class? 368 (1980).
torical situations is to reveal that, despite his radical posturing, Fish has produced a profoundly conservative theory of interpretation.

As a privileged type of story about our lives and our history, law (or, more accurately, legal theorizing) is a special form of worldmaking. Like any tale, legal stories gain meaning from selective emphasis of certain features of our always complex and frequently ambiguous experience. Also, like any narrative, legal stories favor some aspects of our experience at the expense of others, thereby empowering some individuals and disenfranchising others. Most importantly, it is the stories themselves that come to comprise the reality of our experience. In this sense, our stories mediate our engagement in the world and with others. Further, they provide the possibilities and parameters for our own self-definition and understanding.

Lawyers typically fall prey to the hegemonic impulse to treat their stories as either the only story or, at least, the story of stories. The legal raconteurs claim an authority and objectivity for their tales that effectively overwhelms and trivializes other stories about the social world. A radically hermeneutical account of the "law" and "jurisprudential stories" can be a partial and liberating antidote to this arrogance by exhibiting the relations of power that these stories sustain, dictate and benefit. The objective of this essay is to reroute jurisprudence so that history's disturbing messages can be heard loud and clear. In so doing, this essay will also attempt to demonstrate the need to debunk these elite fables and to democratize the crucial responsibility of storytelling and worldmaking.

VI

In the last few years, many legal theorists have turned their attention from the inquiry into what the law means to the puzzle of how law

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108 See text accompanying notes 210-12 infra.

109 It will be obvious to many that this essay has been strongly influenced by the work of Michel Foucault. However, I hesitate to say that I offer a Foucauldian analysis. In the spirit of Foucault himself, I have assembled some ideas that a reading of his books have suggested to me: "They are, in the final analysis, just fragments, and it is up to you or me to see what we can make of them." M. Foucault, Power/Knowledge 79 (1980) [hereinafter M. Foucault, Power/Knowledge]. I make no claim that these ideas represent a "true" or "accurate" interpretation. To rely on a Foucauldian arrogance:

I am no doubt not the only one who writes in order to have no face. Do not ask who I am and do not ask me to remain the same: leave it to our bureaucrats and our police to see that our papers are in order. At least spare us their morality when we write. M. Foucault, The Archaeology of Knowledge 17 (1972).
means.\textsuperscript{110} It is not that the earlier inquiry has been satisfactorily resolved, but rather that the theorists seem to have exhausted the possibilities for substantive consensus. Indeed, it was a perception of the polysemous quality of jurisprudential discourse that prompted an expedient retreat to the more abstract yet foundational domain of hermeneutics. Theorists who effected this shift had a twofold hope: to deflect attention from the substantive disarray, especially in constitutional doctrine, that threatened to drown out entirely the voice of scholarly enterprise, and to establish some minimal, shared interpretive ground from which the substantive debate might proceed anew. It was a forlorn hope. Fragmented discourse persists, only its locus has changed. Further, theorists began to realize that political questions cannot be divorced from questions about what can count as knowledge. Legal epistemology is the continuation of ideological warfare by other, more esoteric means.

The contemporary interpretive debate has taken place largely on the turf of literary theory. Ronald Dworkin suggested the possible terms for a future engagement in 1977,\textsuperscript{111} but a full-scale debate did not take place until the spring of 1982 with the publication in the \textit{Texas Law Review} of a series of polemical essays grappling with the interlocking and contested issues of the autonomy and determinacy of the text, the relevance of authorial intent, and the freedom of the reader.\textsuperscript{112} Sanford Levinson fired the opening salvo with his relentless account of radical textual indeterminacy.\textsuperscript{113} The main antagonists, however, have been Ronald Dworkin, Owen Fiss, and Stanley Fish. They have taken part in a robust exchange in which each is loath to give the others the last word. The central bone of contention has been the continued validity of textual positivism: to what extent, if any, does the text constrain the interpretation to be placed


\textsuperscript{112} Symposium: Law and Literature, supra note 110.

\textsuperscript{113} Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982). Professor Levinson claims that "[t]here are as many plausible readings of the United States Constitution as there are versions of \textit{Hamlet}.") Id. at 391. The other essays in the \textit{Texas Law Review} Symposium are responses to Professor Levinson's thesis.
Although Dworkin and Fiss disagree on many matters, they have similar beliefs about the appropriate ambition of any theory of legal interpretation and its necessary theoretical foundations. They reject both a crude textualism in which the text speaks with a clear and single voice and a textual nihilism that celebrates the multiple, anarchic voices of the text. In short, they want to resist any deification of the text without slipping into solipsism. Both Dworkin and Fiss propose interpretive devices that mediate and constrain the encounter between text and reader. Dworkin relies on an artistic analogue to his "soundest theory of law": "[A]n interpretation of a [text] attempts to show which way of reading . . . the text reveals it as the best work of art." He compares adjudication with the enterprise of writing a chain novel: the accumulation of preceding chapters or earlier cases narrows the available choices of a bona fide participant. For Fiss, adjudicative legitimacy is not based on the
substantive correctness of a decision, but on a bounded objectivity achieved through the use of the extant interpretive rules.

Much legal and literary theoretical practice still lingers in the discredited shadow of the New Criticism, the positivistic view in which the text is a self-contained, organic whole whose meaning and unity can be identified and grasped without reference to history or biography. The central thrust of Fish’s critique is that any brand of textual positivism, even Levinson’s radical version, is misconceived. In Fish’s view, lawyers have been allowed to indulge in the general tendency to turn documents into monuments. Indeed, Fish objects strenuously to the questions Levinson, Dworkin, and Fiss address because they rest on the very presuppositions about the independent nature of the text that Fish is most concerned to overturn. He insists that the text does not announce or present itself, but emerges in the course of interpretive practice: “[L]inguistic and textual facts, rather than being the objects of interpretation, are its products.”

Moreover, Fish argues that this does not make him vulnerable to charges that he embraces the nihilistic bogey of unbridled interpretation. Like the text, the reader does not exist outside a conventional network of interpretive strategies and norms. Both text and reader are always and already situated within a social milieu. Accordingly, meaning is neither the property of a text nor brought to a text by the reader, but is defined by prevailing communal conventions. Given that there is no transcendent algorithm or disinterested rationality, there can only be interested attempts to negotiate and to establish the dominant interpretive strategies. For Fish, meaning is a matter of persuasion, not demonstration. Interpretive knowledge is historically and politically based:

[Int]erpretation is the only game in town . . . . [T]here are no moves that are not moves in the game . . . even the move by which one claims not to be a player . . . . [O]ne can neither disrupt the game nor get away from it . . . . [T]he stakes are much higher in a persua-

ultimately the viability of the American constitutional democracy.” Id. at 869. He concludes by making an ill-fated attempt to draw a distinction between the more and the less indeterminate parts of the Constitution, suggesting that the interpretive methods used in the latter might be employed to resolve the former. Id. at 855-65.

120 S. Fish, supra note 106, at 21-67.
121 Id. at 9.
123 Id. at 1336-37. See also Fish, Consequences, 11 Critical Inquiry 433, 438-39 (1985) [hereinafter Fish, Critical Inquiry].
sion than in a demonstration model, since they include nothing less than the very conditions under which the game in all of its moves . . . will be played . . . . [R]ather than being merely a player in the game, [the critic] is a maker and unmaker of its rules.124

Shifting his sights more directly to Dworkin and Fiss, Fish charges that, despite their disavowals, they both remain dazzled by the enticing illusion of textual positivism: their sophistication lies only in offering a pluralistic version of it.125 They persist in believing that the text has some independent, objective, and uninterpreted existence outside its community of interpreters. In short, Fish maintains that Dworkin and Fiss are chasing their own hermeneutical tails, because whatever they are looking for has always been in place and could never not be.126

The Fish-Dworkin exchange has developed into a self-styled spat between the "incompetent"127 and the "confused."128 Although they vigorously reaffirm their own views, their positions seem to be too close for each other's comfort—or, at least, they seem to share much more than they contest. Much like the confrontation between the Big-Endians and the Small-Endians of Lilliput over the correct way to crack an egg, the Dworkin-Fish "dispute" is a trivial disagreement blown up out of all proportion into a massive and unnecessary falling-out.129 In contrast, the exchange between Fish and Fiss has been much more good-natured. Fish demonstrates how interpretive rules are unconstraining since they themselves demand interpretation. Consequently, meaning is "a kind of knowledge that informs rules rather than follows from them."130 Fiss scores some telling points in his rejoinder, however, emphasizing the interactive nature of rules and practice and showing how Fish trivializes

125 Fish, supra note 122, at 1334 (discussing Fiss); Fish, Wrong Again, 62 Tex. L. Rev. 299, 309 (1983) [hereinafter Fish, Wrong Again] (discussing Dworkin).
126 Or, in Fish-talk:

[A] sentence does not ask to be read in a particular way because it is a particular kind of sentence; rather, it is only in particular sets of circumstances that sentences are encountered at all, and the properties that sentences display are always a function of those circumstances. . . . [This] applies equally, mutatis mutandis, to texts.

Fish, supra note 122, at 1335.
128 Fish, Wrong Again, supra note 125, at 310 (labeling Dworkin).
129 Although writing from a very different perspective, Judith Schelly concludes that for Dworkin and Fish "[i]t is not enough for each to convince the other. Each appears to want to exercise the very possibility of the other's position." Comment, Interpretation in Law, 73 Calif. L. Rev. 158, 161 (1985). Schelly maintains that they simply offer different compatible perspectives from within the same interpretive paradigm. Dworkin, writing from a "judicial" perspective, and Fish, from a "lawyer's" standpoint, represent nothing more than "two different moments in [the same] process." Id. at 169.
130 Fish, supra note 122, at 1330.
and devalues "the self-conscious and reflective moments" of judicial decisionmaking.131

Fish's "conventional" theory is sophisticated and seductive because it presents itself as perfectly self-sufficient and self-serving. By denying the possibility of any metatheory capable of transcending his theory, Fish tries to prevent the grounding of any external critique, and thereby to achieve for his theory that privileged status of transcendent certainty he consistently denies to his adversaries.

In effect, Fish aspires to trap his critics in a hermeneutical "Catch-22." As all interpretation is convention-bound, especially the debate over the interpretive conventions themselves, individuals can never escape to some nonconventional ground from which to map the conventional terrain.132 Moreover, individuals cannot choose to have or not to have interpretive beliefs. They are the very things that make our engagement in and understanding of the world possible. Enmeshed in a claustrophobic web of interpretive beliefs, Fishian readers can neither know themselves nor put sufficient distance between themselves and their communal contexts to reflect on the prevailing conventions. Even misinterpretation is a form of interpretation. All of this, of course, Fish claims as a matter not of truth, but of "conventional" wisdom.

In his most recent essays, Fish has sought to develop some of the central arguments upon which his thesis depends, as well as to anticipate and deflect criticism.133 He has concentrated on the process by which changes occur within interpretive practices, specifically the manner in which interpretive beliefs are acquired, discarded, and evaluated.134 The development of these arguments both fills out Fish's conventional theory of interpretation and exposes the limitations of that theory. His efforts to erect impregnable defenses have been bought at much too high a price.

VII

"Can we actually 'know' the universe? My God, it's hard enough finding your way around Chinatown."135

131 Fiss, Conventionalism, 58 S. Cal. L. Rev. 177, 191 (1985). However, Fiss insists on the text's constrained independence and continues to shadow box with nihilistic spectres. See id.
132 A legal example will help illustrate Fish's argument. H.L.A. Hart explains that the unavoidable penumbral qualities of vagueness, imprecision, and open texture exist outside the core of settled meaning. H.L.A. Hart, The Concept of Law 124-25 (1961). Fish would respond that this realm of uncertainty is itself fully produced and controlled by the relevant interpretive conventions.
133 See, e.g., Fish, Critical Inquiry, supra note 123.
134 Fish, Change (undated) (unpublished manuscript) (on file at New York University Law Review).
The "interpretive turn" in modern theorizing has obliged scholars to confront a persistent and profound puzzle: "[N]othing is more habitual or customary than our ways of speech, and nothing is more continuously invaded by change."\textsuperscript{136} We are worked upon and made by history and language, yet by our interaction with them we create language and shape history. We live in history, but history repays the privilege (or exacts its revenge) by living in us. Articulation of this enigmatic symbiosis is so commonplace as to be almost clichéd. Efforts to understand it, however, constitute the ever-present task of social theory.\textsuperscript{137}

Influenced by the French savants, critical theory has dislodged the individual consciousness from its traditional role as the primary source of knowledge and the privileged affixer of meaning.\textsuperscript{138} In so far as the individual consciousness needs to become articulate, it must do so within the public domain of language. Accordingly, we can only express ourselves intelligibly within a preexisting framework of conceptual relations and social practices. It is in this sense that language must be recognized as both the prize of political conflict and the arena in which that conflict takes place. As language and imagination are inextricably linked, the interface between individual consciousness and public systems of meaning is the crucial phase of political engagement. It is at this stage that the elemental struggle to control meaning is won and lost: "Power is a form of explanation and explanation a kind of power."\textsuperscript{139}

Although Fish never addresses these arguments, he does try to explain the nature of change in interpretive communities. His solution is, however, as predictable as it is incomplete and unconvincing. Fish insists that "change [or its recognition] is an interpretive fact."\textsuperscript{140} Even the most revolutionary onslaught on the status quo must be envisaged and in a sense even sanctioned by the prevailing norms, else it would be literally "unintelligible."\textsuperscript{141} Hence, each interpretive community contains "a

\textsuperscript{136} M. Oakeshott, Rationalism in Politics 64-65 (1962).
\textsuperscript{137} See, e.g., P. Abrams, Historical Sociology at x, xiii (1982).
\textsuperscript{138} See Philosophy in France Today (A. Montefiore ed. 1983). Significant trends in twentieth century continental theorizing stand in stark contrast to main currents in Anglo-American philosophy. This has made the recent infiltration of continental theory into the Anglo-American tradition all the more jarring and perplexing for many. In short, Anglo-American philosophers have preferred positivistic explication to phenomenological critique. Leading continental theorists have been more concerned with evaluating the social dimensions and significance of knowledge, intelligence, and rationality. Anglo-Americans devote their critical energies to answering the question "Is it true?" Continentalists, by contrast, focus on the questions "How do social patterns affect our ways of thinking?" and "What are the social effects of our habits of thinking?" For a good introductory comparison, see Gutting, Continental Philosophy of Science, in Current Research in Philosophy of Science 94, 94-117 (P. Asquith & H. Kyburg ed. 1979).
\textsuperscript{139} P. Sederberg, The Politics of Meaning at x (1984).
\textsuperscript{140} Fish, supra note 134, at 27.
\textsuperscript{141} S. Fish, supra note 106, at 355.
mechanism for its own transformation.” Further, in a quintessentially “Fishy” move, he argues that nothing “turns on” his or anyone else’s account of the relevant interpretive conventions. Theory, as a generalized scheme to guide or reform practice, is superfluous, for it is always and already “the helpless plaything of the practice it claimed to inform.” For Fish, all attempts to construct theories, even purportedly antitheoretical ones, necessarily arise in concrete political settings. Any theory, therefore, “cannot help but borrow its terms and its content from that which it claims to transcend, the mutable world of practice, belief, assumptions, points of view and so forth.”

With disarming directness, he underscores the practical impotence of theory by advising anyone who wants to know about the law not to consult Fish, but rather Fiss, who understands better the prevailing legal interpretive norms and practices. But, of course, as Fish does not hesitate to remind us, rightness is internally constructed, not externally given. Fiss’s advice would be no more “right” (or “wrong”) than his own; it would simply be more conventionally informed and, therefore, conventionally acceptable. Accordingly, Fish’s reassuring and thoroughly conservative conclusion is that we should stop worrying about legal epistemology and proceed with “business as usual”—especially as it would be impossible to do anything else anyway.

With characteristic assurance, Fish announces the “conventional” death of the individual. He categorically rejects a naive humanism that holds that individuals are the authors of their own historical fate. Instead, he depicts the self as a “social construct whose operations are delimited by the systems of intelligibility that inform it.”

Fish’s posting of the individual’s obituary, however, is premature and greatly exaggerated. If individuals were exclusively and fully deter-

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142 Fish, supra note 134, at 7.
143 Fish, supra note 122, at 1347.
144 Fish, Critical Inquiry, supra note 123, at 452. See also Knapp & Michaels, Against Theory, 8 Critical Inquiry 723, 741-42 (1982). For a critical discussion of Knapp and Michaels's arguments, see Critical Response: For and Against Theory, 9 Critical Inquiry 725 (1983). For me, this attempt to establish the ontological priority of practice over theory is misconceived. It involves an impossible and unnecessary bifurcation; each implicates the other in a dialectical interplay. In theorizing about practice, we practice theory. Theory can never free itself from practice nor practice escape theory. At rock bottom, there is nothing beyond interpretation but more interpretation. For extended and excellent analyses of how legal scholarship relies on but is undermined by this bifurcating tendency, see Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 U. Pa. L. Rev. 685 (1985); Peller, The Metaphysics of Law, 73 Calif. L. Rev. 1151 (1985).
145 Fish, Critical Inquiry, supra note 123, at 438.
146 Fish, supra note 122, at 1347.
147 Id.
149 S. Fish, supra note 106, at 335.
mined by their community's conventions and, therefore, nothing more than amanuenses for History's script, their conversation would be superfluous. All individuals would be interpretive clones; there would be no need to communicate. Anything and everything that could be said would already have been heard; anything and everything that could be heard would already have been said. As E.M. Forster so succinctly put it, "a perfectly adjusted organism would be silent."  

Without the resisting individual, there would be no history. Of course, Fish would rightly label this challenge to his argument as ridiculous, but, in doing so, must concede that the "conventional" death of individuals has never occurred. Although this concession may seem trivial, it represents the Achilles heel of Fish's critical project.

Despite his aim to legislate individuals out of epistemological existence by drowning them in a medium of communal conventions, Fish has paradoxically given them a new lease on epistemological life and facilitated their hermeneutical rehabilitation. His theory only makes sense if individuals are given vast discretion and autonomy. Yet this conclusion not only contradicts the epistemological foundations and aspirations of Fish's project, it runs counter to the dominant stories of our social history. In short, Fish has overlooked the dynamic and formative role of power in creating that history. Fish has replaced the discredited reification of the text with the deification of his own vaunted interpretive conventions. Although he insists on the historical roots of interpretive practice, Fish seems to have devised one more idealistic machine for the suppression of history. He craves divine simplicity where there is only historical complexity.

VIII

In fortifying his theory and attempting to explain change, Fish has first stretched his defenses so thin and then made them so elaborate that they collapse under their own weight. Indeed, he admits that the mass of conventions comprises "a rather ramshackle structure with little coherence among its various parts." Fish not only concedes that communal conventions combine to function as "an engine of change," he goes so far as to make change his theory's critical motif:

[E]ven though it is fully articulated and underwritten by a full-fledged philosophy of life complete with an ontology and an epistemology, the code [of interpretive conventions] is not monolithic and self-confirm-

150 E.M. Forster, A Passage to India 133 (1924).
151 See text accompanying notes 38-40.
152 Fish, supra note 134, at 10 (quoting with approval T. Kuhn, The Structure of Scientific Revolutions 49 (2d ed. 1970)).
153 Id. at 15.
ing; it is an entirely flexible instrument for organizing contingent experience in a way that does not preclude but renders inevitable its own modification.\textsuperscript{154}

Yet in making this concession, Fish has cast the interpretive net so wide that it ceases to place any meaningful constraints on the interpretive acts of those supposedly trapped within it.

Insofar as the communal code of norms "renders \textit{inevitable} its own modification,"\textsuperscript{155} the precise nature of the interpretive constraints is elusive and enigmatic. A prison that contains the whole world is no prison at all. A society's confinement in a particular cell at any given time is illusory and, to that extent, self-imposed. The walls will sooner or later be dismantled and rebuilt elsewhere. Indeed, for Fish, this dismantling and rebuilding is "inevitable." Consequently, although communal conventions circumscribe the available options for interpretive practice, Fish leaves it to individuals to decide on the actual pattern (or chaos) of choices. Far from burying individuals, Fish has reinstated them in their role as the prime and privileged makers of meaning and history. Posing as a radical determinist, he stands revealed as a closet humanist.

An example from literary theory—deconstruction—and an example from legal doctrine—the development of tort law—will help to illustrate and underline these critical objections. The bête noire of modern literary theory is deconstruction. Although defanged by its American practitioners, deconstruction seeks to undermine the entire literary-critical project by revealing how the attempt to fix words and texts with meaning is a futile exercise.\textsuperscript{156} In its relentless challenge to the metaphysical and epistemological assumptions that underpin the traditional task of literary criticism, "[d]econstruction is the active antithesis of everything that \textit{traditional} criticism ought to be."\textsuperscript{157} Yet Fish dismisses this radical movement as "a programmatic and tendentious focusing of ways of thinking and working that have already come to be regarded as commonplace and orthodox."\textsuperscript{158} Again, Fish's critique is thoroughly ahistorical.

\textsuperscript{154} Id. at 17.

\textsuperscript{155} Id. (emphasis added).

\textsuperscript{156} See Hutchinson, From Cultural Construction To Historical Deconstruction (Book Review), 94 Yale L.J. 209, 229-35 (1984).

\textsuperscript{157} C. Norris, Deconstruction: Theory and Practice at xii (1982).

\textsuperscript{158} Fish, supra note 134, at 21.

As other critics seek to come to terms with deconstruction, they have sought to deradicalize it by simply locating it at one extreme of the textual positivistic/modernistic spectrum. Unable to imagine anything other than individuals as the privileged affixers of meaning, these critics view deconstruction as one more interpretive tactic in the liberal strategy. See, e.g., Sherry, Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction, 73 Geo. L.J. 89, 100 (1984) ("In other words, are not all plausible [alternative interpretations] equally acceptable? The deconstructionist would claim that they are, and the critical legal scholar would maintain that the choice is made solely on the basis of the judge's
In spite of his embracing a "conventional" determinism theoretically capable of explaining why deconstruction surfaced and gained prominence when it did, Fish offers no reason to think that deconstruction could not have surfaced at any time. When taken to its logical (and absurd) conclusion, Fish's theory seems to commit him to the startling view that, if history had unfolded differently, the first literary critics might have been deconstructionists. However, without something constructed, deconstruction would be extremely difficult. In short, Fish's "historical" account lacks any historical substance or credibility.

Another way of illustrating the weaknesses in Fish's theory is to consider the development of legal doctrine. The common law of tort is allegedly organized to optimize the deterrence of harmful activities and the compensation of victims. Each stage of its doctrinal history has been a fragile and makeshift accommodation of two bundles of competing arguments. One set of arguments is grounded in the belief that as between two blameless individuals, the one who caused the damage should pay. The other is rooted in the view that it is unfair to impose liability when there is no wrongdoing. Although one set of arguments has tended, at different times, to dominate as the other set of arguments has been pushed aside, the counterarguments have never been expunged. In short, the doctrine contains and has never dispossessed itself of the resources for its own reorganization into its own contradictory self-image. This supports the view that doctrinal patterns are a result of contingent choice rather than objective necessity.

Although Fish might not express it in the same way, his theory leads to an interpretation of tort doctrine that closely resembles this "deconstructive" reading of tort history. Although judges claim to be constrained by the extant legal norms, they must negotiate results from among radically contradictory visions of social life. Yet, Fish offers no explanation for the actual choices made. Although legal argument is indeterminate, judicial decisionmaking exhibits an identifiable pattern. In crude terms, legal decisions tend to preserve the status quo and insulate

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own values and preferences.

159 See, e.g., W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts 1-32 (5th ed. 1984). (deconstruction "is little more than absolute freedom to create a metaphysics of justice fashioned out of a private vision of moral reality").

160 For an extended explanation of the theoretical indeterminacy, but practical predictability, of legal doctrine, see Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 9-25 (1984).

161 See generally Hutchinson & Morgan, The Canengusian Connection: The Kaleidoscope of Tort Theory, 22 Osgoode Hall L.J. 69 (1984); Hutchinson, supra note 156. For similar but more extended deconstructive readings of legal doctrine, see Frug, The Ideology of Bureacracy in American Law, 97 Harv. L. Rev. 1276 (1984); Dalton, supra note 107.
the existing (mal)distribution of power.\textsuperscript{162} Without some account of the dynamics of power and its capacity to channel and constrain individual choice, Fish's project misrepresents the nature and history of interpretive practice. The challenge is to explain the distinct historical ways in which law, language, and power interact to constitute social experience and the individual agents within it.\textsuperscript{163}

IX

In making these criticisms, I do not intend to fall back into the beckoning arms of a naive humanism, which perceives individuals as autonomous agents. On the contrary, I maintain that we are constituted thoroughly by our historical and political stories. Notwithstanding these constraints, we do not become the "helpless playthings" of historical caprice. Although we cannot move to a narrative ground above or beyond history and politics, the challenge is to salvage a space within which individuals can contribute to the constantly changing community stories and participate in the continual social process of worldmaking.

We need not surrender or resign ourselves to the past's oppression. "Law stories" and other stories have ill-defined edges. Although they often overlap, there are pockets and folds in which the story line is faint or garbled. Traditional theorizing tries to paper over these endemic cracks and contradictions. In contrast, we must seek out and inhabit the wrinkles between history's and language's past and their future unfolding. This is essential for the success of any radical restructuring of social and intellectual life.

All stories, and especially legal tales, constitute a language of power.\textsuperscript{164} Within the contingent space between their customary accent and its evolving dialect, people might be better able to engage their history dialectically and to actualize their imaginative potential. Of course, by their contingent nature, the sites of these narrative pockets and opportunities for storytelling will be constantly shifting. Those who take advantage of these discursive fissures must always be on guard against

\textsuperscript{162} Of course, this does not mean that every decision is dictated by the needs of established interests. The process is much more complex and subtle. See Hutchinson, The Rise and Ruse of Administrative Law and Scholarship, 48 Mod. L. Rev. 293 (1985).


\textsuperscript{164} See sources cited in note 107 supra. For an interesting account of reading legal theory as narrative, see West, Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory, 60 N.Y.U. L. Rev. 145 (1985). West does, however, downplay the role of politics and history. She posits an imaginative freedom for legal theorists that itself seems utopian and sets up a dubious distinction between legal theorizing and politics: "[L]egal theory and narrative, unlike politics and law, ultimately are forms of artistic play." Id. at 211. Nevertheless, West's denial of "truth" as a metewand for the worlds envisioned by legal theorists and her insistence that their theories are not \textit{about} the world, but of the world is to be applauded. Id. at 210.
converting their own conversational contributions into still more dialogic cell-blocks for themselves and others. In this sense, the future is open and dangerous; it is not that we have nothing to lose but our chains and a world to win, but that, in winning that world, we might forge new chains. Hope and hazard, potential and peril are fellow travelers.

We must cultivate a voice that can give expression to the inarticulate speech of the heart. Already heard, but stifled and emarginated, the language of communal virtue and the story of democratic egalitarianism must be nurtured.1 An idiom of popular power could be developed, along with an accessible thesaurus of public empowerment to replace the elite lexicon of law. Yet, to achieve this state of affairs, we must not only enhance and extend the constitutional conversation, we must also quiet certain voices. For instance, lawyers will have to adopt a more humble tone and speak *sotto voce*; they will have to learn the unfamiliar skill of being good listeners.1

To summarize the difference between my position and Fish’s, it is important neither to exaggerate nor to trivialize our disagreement. I have tried to show how Fish’s critical project begins by promising to demonstrate how individuals are trapped within and constituted by social conventions, but ends by revealing how those conventions allow (and oblige) individuals to control the whole pace and pattern of historical development. On the other hand, my critical ambition, like Marx’s, is to show that, although individuals are not free to write their own history, neither are they hopelessly locked into some indelible historical script: “[People] make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given, and transmitted from the past.”1 The struggle to control meaning and, therefore, the conditions for collective life is fought anew every day. Yet that struggle is rigged by the extant protocols of power. Existing practices are sustained to the extent that they are reinforced through regular use. Individuals are reduced from protagonists to puppets. The most urgent undertaking of theorizing is to contribute to the democratization of this hermeneutical struggle. It can do this by chronicling the historical operation of power and enabling us to lessen “the pervasive presence of the status quo in our thoughts, hopes, and actions.”1

Fish’s response to such suggestions is predictable. He criticizes both the political “right” and “left” for their futile and “antiprofessional” ef-

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165 See, e.g., Singer, supra note 160, at 66-70.
168 Frug, supra note 161, at 1388.
forts to locate and rely upon some stripped-down, ahistorical world of essences, a reality independent of convention. In particular, he chastises Duncan Kennedy and Robert Gordon for groping for and defending "a form of life—free, independent, acontextual—that cannot be lived." For Fish, the individual self is an asset, completely owned and operated by the community. Yet, Fish offers nothing by way of supporting evidence except the disputed authority and accuracy of his own conventional theory of interpretation. He provides no substantiating historical material for his allegedly historically situated theory: he thus offers nothing but a blatantly bootstrap argument. Moreover, despite his ambition to kill off the individual, Fish's theory succeeds in exaggerating the interpretive performance of the individual in history.

A rigorous account of power can take up the historical slack left by Fish's arguments. Such an analysis must examine the determinate meaning actually assigned in interpretive practice, suggest the historical determinants of that meaning, and, most importantly, uncover the relations of power that produce and benefit from this interpretive knowledge. How does the legal regime of truth and discourse shape the conditions and status of the powerless (and the powerful)? How does the extension of legal discursive practices colonize recalcitrant sectors of social life? The effect (or design) of Fish's project is to suppress or displace power. Yet the analysis of power is the key to the interpretive lock. "When discourse is responsible for reality and not merely a reflection of it, then whose discourse prevails makes all the difference."

In what follows I will outline the inadequacies of traditional analyses of power and suggest a more fruitful approach towards understanding the nature and workings of power.

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169 See Fish, supra note 148, at 98; Fish, Profession Despise Thyself, 10 Critical Inquiry 349 (1983). In a characteristic move, Fish sets up a loaded and unusual distinction between "professionalism" and "antiprofessionalism." Whereas the latter is held to stand for such thoroughly discredited notions as the disinterested pursuit of lasting truths, the former is associated at bottom with Fish's own "conventional" views. Accordingly, to oppose the reliance on some ahistorical notion of truth is to put oneself in the Fish camp; to oppose the "conventional" view is to be consigned to the anachronistic group who persist in believing in universal truths. Further, by using such a dichotomy, Fish manages to present his own ideas as being at the heart of contemporary literary practice. This dichotomy, however, is both incomplete and misleading. One can reject the ideal of "disinterested inquiry" without adopting Fish's alternative, and one can reject Fish's concept of "professionalism" without pursuing that ideal.

170 Fish, supra note 148, at 107. I do not necessarily accept Fish's characterization and criticism of Kennedy and Gordon. Though both admittedly hint at the achievement of some unsituated self, there are clear strands in their writings that suggest a more historically informed depiction of the individual self. See, e.g., Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57 (1984); Kennedy, Toward A Phenomenology of Adjudication, in The Rule of Law (A. Hutchinson & P. Monahan ed. 1986) (forthcoming).

171 Tompkins, An Introduction to Reader-Response Criticism, in Reader-Response Criticism, supra note 114, at xxv.
of power.172

(Three old people enter the compartment. RACHEL is momentarily distracted.)

FIRST PERSON: Is this Wembley?
SECOND PERSON: No, it’s Thursday.
THIRD PERSON: So am I. Let’s go get a drink.

(The three old people leave the compartment. RACHEL goes back to her reading.)

X

The recognition that power is the engineer and engine of history is nothing new. Both political “right” and “left” tend to view power as the ability of persons or organizations to manipulate others in compliance with their will or design.173 Traditional accounts of power emphasize the agent-centered, negative, and programmatic aspects of power’s operation.174 Such a humanistic analytical framework highlights the overt effects of power but obscures its more subtle and pervasive dimensions. Power also functions in an anonymous, positive, and localized manner. It comprises the enabling network within which the agent acts. Whereas the traditional philosophical inquiry analyzes the limits that the discourse of truth places on the rights of power,175 the more concrete and instructive focus is on the rights that “are implemented by the relations of power in the production of discourses of truth.”176 Contrary to the traditional view, power is not only exercised through discursive practices, but also is immanent in them. Language holds us in a grip that is “a more potent tool of repression than force of arms.”177 To think about or interrogate language, we have only language itself to rely on. In this sense, language is both the prize of and the venue for political conflict and the worldmaking enterprise. The acquisition of literacy is a step of immeasurable consequence; to become linguistically competent and to inhabit society’s stories is to take a stand in the world and to accept a


173 The prescriptive challenge of traditional theorizing has been to suggest and justify a fair distribution and exercise of power. See, e.g., B. Ackerman, Social Justice in the Liberal State (1980).

174 See text accompanying notes 181-83 infra.

175 M. Foucault, Power/Knowledge, supra note 109, at 93.

176 Id.

177 Hacking, Michel Foucault’s Immature Science, 13 Nous 39, 47 (1979).
matrix of assumptions and beliefs about that world and our position in it. To talk like a lawyer is to be a lawyer.

A familiar example illustrates this point. Language provides us with images of ourselves and others as men and women. It constructs the "natural" categories of masculinity and femininity. It interposes itself in and structures gender encounters. Discursive practices have established and maintained the hierarchical differentiation between men and women. "Male" is the grammatical and semantical norm that relegates "female" to a deviant and derivative status. As a mere, albeit necessary, foil for masculinity, femininity occupies a secondary status through a subterranean process of exclusion. Moreover, sexist language uses men and women as much as it is used by them. It nurtures and conditions its speakers to their roots and, in the process, persuades them of their autonomy. Inasmuch as language is "man-made," "man" and "woman" are also made by language. 178

The foundations of the prevailing wisdom can be traced to the work of Max Weber, who defined power as "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance." 179 Much modern scholarship amounts to a set of extended footnotes to this definition. 180 The less imaginative works view power as a type of political currency, a negotiable coin of the political realm, to be possessed and passed around at will. 181 In this view, the power relation is characterized by a causal dynamic and can be measured in terms of simple behavioral responses. The more inventive writers have concentrated on the relational and context-specific quality of power. They view power not as a personal attribute or facility, but as a property of particular relations. Unlike money, power is not "a circulating medium" but "has only very limited liquidity." 182 In this view, power can only exist if it is localized and inhabits specific relational apparatus. Yet even relational theorists cling to the need for some individual intention-

178 Although profoundly concerned with sexuality, Foucault fails to address male power as systemic and hegemonic. Men define gender and femininity to such an extent that "women have little choice but to become persons who freely choose women's roles." MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 Signs 515, 542 (1982) (emphasis in original). MacKinnon criticizes Foucault for failing to appreciate gender "as a primary category for comprehending [power]." Id. at 526 n.22. Domination operates not through physical constraints, but by controlling the way women think about their lives and possibilities. See N. Davis, Power and Sexuality (June 1983) (unpublished manuscript).


ity and a repressive affecting.\textsuperscript{183}

Foucault's accounts of power, on the other hand, emphasize power's nonsubjective dimension, productive capacity, and localized operation.\textsuperscript{184} Power is nonprogrammatic and works from the ground up. It consists of a mobile multiplicity of force relations that, continually disaggregating and coalescing, shape themselves into strategic patterns. These matrices help create the individuals who use and are used by power, the needs power feigns to satisfy, and the truth in whose name power claims to speak. In this way, power is an essential enabling force. It sustains itself by establishing discursive economies of truth through which individuals must make and defend their claims. Indeed, intentionality is more discursively manufactured than individually conceived. Moreover, as such discursive regimes do not allow for the existence of objective "interests" exterior to power relations, the traditional idea of repression loses much of its critical bite.

Power constructs reality as well as the individuals who inhabit that reality. Individuals are both subjects that know and objects of knowledge. Moreover, the very notion of the "individual," like that of "law" or "morality," is a cultural artifact.\textsuperscript{185} In order to engage in meaningful activity or self-reflection, individuals must act within the regnant protocols of power. They are as much the signatures of power as its authors. Yet power does not parade itself; its efficacy depends on its own concealment and conservation. Power exists only to perpetuate itself. To understand the stealth with which power works in law, one must appreciate the crucial role of language and discursive practices.

Although many areas of the law continue to articulate power in the anachronistic language of sovereignty, with its invocation of loyal obedience and ritual aggression, this persistence merely serves to obscure the more pervasive and profound disciplinary techniques in which power thrives. Although law does rely on crude coercion and naked authority, it is much more than a "code of organized public violence"\textsuperscript{186} or a barely

\textsuperscript{183} Within this genre, Steven Lukes's work is seminal and radical. Emphasizing the conflictive nature of power, Lukes explores the artful way in which power enables some to make others act against their preferences. For him, "A exercises power over B when A affects B in a manner contrary to B's interests." S. Lukes, Power: A Radical View 34 (1974). Despite its relative sophistication, Lukes's account is trapped within the traditional framework of theorizing about power. He posits preexisting patterns of interests within which human agents act and impact upon others. Although his theory of power is relational, Lukes retains the individual as the crucial catalyst in the power reaction.

\textsuperscript{184} See M. Foucault, Language, Counter-Memory, Practice 205-17 (1977); M. Foucault, The History of Sexuality 92-98 (1978); M. Foucault, Power/Knowledge, supra note 109, at 87-108, 119-40.

\textsuperscript{185} See Hutchinson, supra note 172, at 10-11 (citing M. Foucault, The Order of Things 319 (1970)).

\textsuperscript{186} N. Poulantzas, State, Power, Socialism 77 (1978) (emphasis omitted).
disguised process of ideological inculcation. These claims do not deny or trivialize the extent or experience of "naked force," but serve to illuminate the broader context in which acts of naked force gain their leverage and authority.

XI

Legal language shapes those social encounters that fall within its reach; as disputes move into the magnetic field of law, they are "translated" into the received argot. In this way, legal discourse enforces the canons of relevance and rationality it generates for its self-serving purposes. This encoding process changes and thereby screens out many disputes.\(^{187}\) To partake of law's special privileges and prizes, speakers must become proficient in its idioms and nuances; those who do not are deprived of a voice and are therefore rendered powerless. In this way, power manages to survive by assuming a discourse of justice. To understand law-power and its pervasiveness, it is necessary to engage in a microanalysis of its discursive operations. Its success is premised on its prowess at infiltrating and traumatizing other discursive domains.

One form of legal discourse that has become prominent in recent years is "law and economics."\(^{188}\) Its supporters have sought to replace "mushy" humanistic theorizing with the "hard" analytical framework of economics. Surfacing when objectivity was seemingly slipping from the desperate grasp of judicial theorists,\(^{189}\) law and economics was a timely and welcome voice. Claiming to be "scientific," law and economics profits from the prestige of science, which arises from its idolatrous image as the dispassionate search for timeless truths through objectively valid methods of inquiry.\(^{190}\) Yet science, like any story, has social determinants and functions. The Olympian image of scientists as standing

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187 See Galanter, Reading The Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 18-20 (1983).
alongside nature and grappling with it so as to pin down its secret truths disguises the extent to which scientists are part of and contributors to that nature. In short, the "science story" has no particular epistemological clout.

The law and economics story is a form of worldmaking that has achieved a high and undeserved political status in the world of legal theory. It has become an officially sanctioned conversation stopper. As such, it is not so much wrong as simplistic. Law and economics emphasizes certain aspects of our present social situation—in particular, bargaining over scarce resources in a market-based economy—and forces the rest of our rich and chaotic experience into this model's limited narrative framework.191 Thus, practitioners of the law and economics model claim to render irrelevant or marginal all other legal tales. The model's ambition and appeal lie in its inflated promise to deliver right answers, but this promise merely confers a spurious legitimacy on a very ideological tale.192 For the law and economics fabulist, life is a market, and all human relations consist of commodity exchanges. The law and economics world is populated by rational, risk-neutral, perfectly informed egoists who voluntarily maximize their stable preferences under conditions of relative scarcity. Such heroic figures inhabit only the pages of the Journal of Legal Studies. Even in its more modest incarnation, this "economic creature" represents a narrow facet of our complex selves and social lives. Moreover, this tale ignores completely the extent to which we become the characters of our stories; our preferences do not stand outside the market ideology, but are constructed and installed by it. That is, legal rules premised on a world of profit-maximizers force people to act as the model predicts they would.

Another staple feature of modern legal language is rights-talk.193 The law insists on characterizing and categorizing social interaction as occasions for the exercise or breach of legal rights. When one individual

191 Even Professor (now Judge) Posner concedes that law and economics is unrealistic, but claims that this is an unavoidable consequence of a scientific approach, which "necessarily abstracts from the welter of experience that it is trying to explain." Posner, The Economic Approach to Law, 53 Tex. L. Rev. 757, 773-74 (1975). As an attempt to explain reality, in Posner's view, economics is the science of rational behavior and can be set over against ethics or ideology. Posner, Some Uses and Abuses of Economics in Law, 46 U. Chi. L. Rev. 281, 281-87 (1979). Posner even asserts that his theory's simplicity is a sign of its strength: the less nuanced a theory, the more hypotheses it is likely to yield. Or, in Posner's science-talk, "the power of a scientific explanation can be expressed as the ratio of the different phenomena explained to the number of assumptions in the theory." Id. at 301.


charges another with "breaching" their "contract," their interactions have been forced into a particular linguistic and, therefore, ideological straitjacket. By speaking this form of legalese, they have adopted a very partial idiom and have abandoned other ways of describing their shared experience. For example, what lawyers term a contract may alternatively be experienced as an act of shared trust and commitment, or as an honorable undertaking. Moreover, litigants bring into play a whole paraphernalia of expectations about their future dealings together. In effect, they create for themselves a distinct past and future scenario for their experience. Discourse works a practical and significant exercise of power. Politics is discourse and discourse, especially the legal kind, is political.

A less obvious but more unsettling version of power's insidious operation through legal discourse is the movement to establish a constitutionally entrenched set of welfare rights. This is a continuing episode that highlights the thin or nonexistent line between a genuine concern for others and a coercive interference with their lives. Though the courts have not gone so far as to acknowledge such substantive rights, they have imposed procedural standards for the administration of government-provided benefits. Of course, this offers some much needed relief and protection for the have-nots. The long-term effects of such a trend, however, are less benign: the pastoral pose of the state has a dark and powerful side. Although the "welfare state" relieves people of much of the anxiety and suffering born of the struggle to keep body and soul together, it engenders debilitating feelings of alienation and loss of self-respect in those it supports. As individuals come to rely directly on state charity for their basic sustenance, they become enmeshed even further in the thick web of dependence and power. Rights-talk will have extended its dominion—but in filling the stomach, we eviscerate the person.

This situation points up an important dilemma for and warning to those who want to bring about a radical change in social conditions. Rights-talk is the pervasive conversational idiom of modern society; it is the sophisticated voice of institutional resources. It is difficult not to participate in that conversation in any attempt to challenge existing arrange-

198 This is not to suggest that any form of rights-talk will be counterproductive. See Hutchinson & Monahan, supra note 193, at 1488-91. But an extension of existing rights-talk into the welfare or other settings would be at best a mixed blessing. See Garet, Communality and Existence: The Rights of Groups, 56 S. Cal. L. Rev. 1001 (1983); Michelman, Welfare Rights in a Constitutional Democracy, 1979 Wash. U.L.Q. 659.
ments and improve the lot of people. But to join that conversation poses a grave risk of being coopted and becoming vulnerable to takeover. To speak in the voice of rights is to play the game in the establishment's home park, with its equipment, and in accordance with its rules. Accordingly, traditional rights litigation must comprise a limited strategy for any radical practice of law. The challenge to power must be made on a wider, more popular front.

XII

Power operates not only through discursive practices, of course, but also through roles assigned and assumed in social practices. In this sense, some of the most important conventions are those that designate the authoritative voices in the interpretive Babel. An obvious example is revealed in the incident that gave rise to the title of Fish's book, Is There a Text in This Class? As Fish recounts the tale, a student asked the teacher on the first day of classes, "Is there a text in this class?" The teacher responded by naming the set textbook. But the student was not satisfied: "No, no . . . I mean in this class do we believe in poems and things, or is it just us?" Fish uses this as a colorful peg on which to hang his account of the pervasive and conventional nature of interpretive practice. But, although he glimpses them, he fails (or refuses) to acknowledge the relations of power that comprise the platform on which the student-teacher exchange takes place. Or, more accurately, he does not explain why this particular convention arises and persists in preference to others, especially its counterconventional twin, which would channel power in the opposite direction.

The need for the student to ask such a question offers a glimpse into the hierarchical and institutional framework in which student and teacher interact. Yet, in his description of the student-teacher exchange, Fish argues that the student and the teacher were ultimately able

199 For example, Professor Gilligan has characterized rights-based language as a male-created idiolect inimical to feminist ambitions. See C. Gilligan, In a Different Voice 128-50 (1982).
202 S. Fish, supra note 106.
203 Id. at 305.
204 In criticizing a fellow literary critic, Wayne Booth, Fish notes parenthetically that "students always know what they are expected to believe." Id. at 347. In this casual remark, he momentarily brings to light the "power-full" conventions that animate and organize interpretive practice.
to communicate meaningfully because of "their shared understanding of what could possibly be at stake in a classroom situation." Though these conventions are clearly shared, they are not consensual: they arise from an unconscionable bargain struck between agents with unequal contracting force and information. Fish fails to explain why student and teacher do not share a perfectly converse counterconvention. As he fails to recognize the pervasive workings of power, Fish must put his faith in some divine invisible hand. At best, he has hidden rather than done away with individuals. Also, it is often forgotten that even though the teacher enjoys "power over" students, she herself is controlled and manipulated by the teacher-student relation. However much she strives to reduce the hierarchical relation, she will always be operating within it; the reduction of hierarchy is itself an act of hierarchy.

A glance at life in the law schools reinforces this "interpretation" of the hierarchical dynamic at work in the educational process. In subtle and not-so-subtle ways, the competing groups of faculty, bar, and students have "established a modus vivendi which suits their respective needs." There has come to exist a sophisticated protocol of power. Indeed, legal education consists largely of exercises to acquire and accept this potent political etiquette. In a perverse way, "radical" law professors, by virtue of their participation in this system, confer some legitimacy on present arrangements.

During the first year at law school, students experience a crucial shift in allegiance from the outsider's nonprofessional attitude toward law to the insider's professional understanding of the lexicon. This real sense of disorientation is exacerbated by the fact that the teaching experience is rarely uniform; significantly different interpretive norms can be operative in each class. Many, but not all, students soon come to recognize the authoritative voices and to appreciate the benefit of deferring to and, in time, mimicking those voices. Those who never make the transition fall by the legal wayside; those that make it, but who refuse to conform, lead a precarious life in the law school shadows. This transition phase marks a crucial moment in the ideological tuning-up of lawyers

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205 Id. at 320. At the end of the book, Fish adds an interesting and revealing postscript to the story. The teacher replied: "Yes, there is a text in this class; what's more, it has meanings; and I am going to tell you what they are." Id. at 371 (emphasis added in part).

206 As Gary Peller observes, the roles of teacher and student form a structure or grammar for their relations that transcend any particular acting out of these roles. Peller, supra note 144, at 1278-89.

207 The already classic exposition of the politics of legal education is D. Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (1983).

and is orchestrated through the prevailing relations of power.\textsuperscript{209} The law school experience is an example of a more general phenomenon. Legal discourse empowers certain speakers by granting them a license to establish meaning. In this sense, power protects itself by rendering its aspiring usurpers mute or, when it allows them to speak, by putting words in their mouths and depriving their words of significance. Most speakers whistle into the wind, but a small few are privileged to speak with the wind at their backs. For instance, the force and meaning of the statement "You have broken the contract" is far from self-evident. It depends on the appreciation of and immersion in a whole sociohistorical context. Much will depend on the identity of the speaker: a statement's "truth value" will increase proportionately with the speaker's authoritative status. In contemporary circumstances, its meaning will change and gain in communal strength depending on whether the speaker is an interested party, an officious bystander, a fledgling lawyer, a local politician, a law professor, a trial judge, an enacting legislator, or a Supreme Court justice.

The familiar likening of the law to a quasi-religious force, a mystical process replete with arcane incantations, ritual performances and priestly devotees is acutely drawn.\textsuperscript{210} The similarity of the potent imagery evoked by the courtroom and the church is not coincidental. When Owen Fiss concludes that "the judge . . . speaks with the authority of the Pope,"\textsuperscript{211} he gives the whole game away. The struggle to establish meaning is all about power, divine or otherwise. In the babble of competing idiolects, power ensures that its accent is heard and heeded. As Justice Jackson recognized, "[w]e are not final because we are infallible, but we are infallible only because we are final."\textsuperscript{212}

XIII

As usual, Fish downplays the radical significance of these examples and critical claims about power. He scoffs at attempts to develop a radical theory explaining power, insisting that theory has no consequences for interpretive practice but only rationalizes changes that have already occurred. A change in substantive beliefs may produce a change in pro-

\textsuperscript{209} Furthermore, the law school experience serves to highlight another weakness in Fish's theory. Fish contends that there is no interpretive occasion on which one can believe nothing. S. Fish, supra note 106, at 319. Indeed, he is right to note that one cannot be in a state of absolute nonbelief, for indifferance is a form of belief. Having no belief would only be possible if one could escape one's social milieu which is, of course, impossible. But, at times, individuals have more interpretive beliefs than they can possibly deal with; they are in fact meaningful. This experience will be painfully familiar to most law students.


\textsuperscript{211} Fiss, supra note 118, at 755.

\textsuperscript{212} Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).
cedural beliefs: "[T]heory is not so much the consequential agent of a change as it is the passive object of an appropriation." Yet Fish concedes that a declaration of theoretical allegiance—for example, a judge declaring herself to be a "noninterpretivist" or a Marxist—might have strategic ramifications in political debate.

Once again, however, Fish has glimpsed an insight but failed to follow through on its full force and meaning. Indeed, with typical irony, he opines that, with exposure of theory's lack of theoretical consequences, "nothing whatsoever will have been gained, and we will have lost any sense that theory is special." But this loss and its revelation would have massive significance for the legal and governmental process: there may be no supreme court of literary criticism, but there is a Supreme Court. The constitutional authority and prestige of the judiciary depends on the continuing theoretical belief by the American citizenry and the legal community, including judges, that judges are not simply ideologues-at-large but are, in some significant sense, constrained by the appropriate legal materials. Fish's critical project exposes that belief as so much pious and wishful thinking.

The main thrust of Fish's argument is that those very constraining materials are not given, but are themselves the products of interpretive practice. Moreover, interpretive practice comprises the interpretive beliefs of its practitioners. According to Fish's theory, judges are not an anarchical gang of subjective interpreters because they are always situated within a community of shared interpretive norms. Yet, the communal code of interpretive directives allows a considerable range of practical movement. Furthermore, judges are conventionally authorized to dictate and change the identity of the prevailing substantive norms of interpretation. In this way, judges rely extensively on theory to preserve, disguise, and enhance their political power. Without some justificatory theoretical apparel, they would stand naked. It is as bespoke tailors to the judicial Emperors that academics have proved most useful. Despite the inventiveness of master couturiers such as Dworkin and Fiss, the at-

213 Fish, Critical Inquiry, supra note 123, at 451.
214 Id. at 446-47.
215 Id. at 443.
218 The most celebrated account of flexibility in traditional axioms for interpreting statutes is by Karl Llewellyn. K. Llewellyn, The Common Law Tradition 521-35 (1960).
219 Judges, of course, are not entirely autonomous agents in performing this task; they are necessarily situated within and shaped by the existing patterns of power. See text accompanying notes 159-62 supra.
tempt to stitch together an entire wardrobe of coordinated and voguish garments has failed. By declining to acknowledge the strength of theory's political consequences, Fish has designed and added his own diaphanous raiment to the Imperial collection.

XIV

Notwithstanding Fish's argument, radicals are not left out in the cold, to resign themselves to being forever integral but bit players in the establishment's crushing script. They can constantly remind and impress upon individuals that things need not remain the same nor change in the same way. The categories of "necessary change" and "natural situation" are abstract concepts that have been falsely concretized in various historical forms. They are discursive artifacts held in place by the counterfeit necessity of prevailing canons of rationality. Consequently, when we grasp that these artifacts "have been made, they can be unmade, as long as we know how it was that they were made."220 Society must be opened up and sensitized to the subversive sounds of historical contingency. People must be made to feel the weight of the past; it has hitherto not been a burden, as we have never known what it is not to carry it. With a stronger sense of history and its contingent possibilities, we might be better able to author our own stories in our own chosen voices and contribute to history's future development. Moreover, our experience might be grasped as something more than "a mobile army of metaphors, metonyms, and anthropomorphisms"221 marching to the beat of Fish's "conventional" drum. Truth is that, but it is much more as well:

[T]ruth is pain and effort and dirt and sweat and blood as well. Wince if you will, object if you will, make a point or two if you will. Truth isn't an argument or a correct phrase, that's all words, that's lawyer's truth—and who knows a greater liar than a lawyer? There's city truth and there's country truth. There's lawyer's truth and there's human truth. Thought-up truth and lived truth.222

Fish's lightning strikes into the jurisprudential heartland have placed its resident experts in a bad light. His critical project has justly exposed the foundational weakness of their continuing dalliance with textual positivism. Yet, for all Fish's pyrotechnics, his arguments have tended to impress as much by their rhetorical dazzle as by their intellectual illumination. Along with his adversaries, real and imagined, Fish's "conventional" hermeneutic shares a similar ideological failing: it does

220 Raulet, Structuralism and Post-Structuralism: An Interview with Michel Foucault, Telos, Spring 1983, at 195, 206.
not acknowledge the pivotal role of power in the interpretive enterprise or give an adequate account of its historical workings. Fish’s vaunted moral and epistemological skepticism is almost plausible in the ivory towers of the university, but is difficult to sustain on the streets of history with its real-life victims and losers.

This essay has sought to outline the legal protocols of power that establish texts and their interpretive personnel in their own self-image and self-interest. In so doing, it has reversed Dworkin’s hopeful conclusion: politics, art, and law are not so much united in philosophy as art, law, and philosophy are united in politics. It is only by uncovering the hidden systems and rituals of power that determine our most habitual behavior that individuals can hope to alter the prevailing discourse of truth and justice. Without an understanding and analysis of power, jurisprudence is destined to remain “a darkling plain . . . where ignorant armies clash by night.” And, in their encounter, innocent victims will continue to be unintentionally sacrificed at the altar of rationality and rights, needless hostages to intellectual fortune.

(RACHEL puts down her tome. The train has pulled into a station. She notices a man writing on the outside of the window. She catches the attention of ROBERT and CHARLES. With some effort, they are able to read it.)

\[223\] Dworkin, supra note 117, at 550.
\[224\] M. Arnold, Dover Beach, in Arnold: Poetical Works 212 (1950).