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THE JURISPRUDENCE [?] OF STANLEY FISH

Owen M. Fiss

FROM the outside, the law seems to be flourishing. Students flock to law schools; courts render decision after decision; new appointments to the bench are made.

Sometimes bad appointments are made, and the courts embark on a course of decisions that brings out the worst in us rather than the best. The political system reacts in a fairly predictable way: It seeks to change administrations as a way of registering disapproval of past appointments and controlling future ones. The hope is that this will change the decisions; if not, there is the possibility of amending the Constitution or enacting new statutes. Academics, on the other hand, react in a strange way: They attack the institution itself and begin to doubt that law is possible. They begin to gnaw at law from the inside.

The past term of the Supreme Court was an especially poor one. It has been the subject of a great deal of attention from the press, but in truth the pattern of decisions is not new: It is simply the culmination of a decade of what I have on other occasions referred to as the Rehnquist Court—an institution dedicated to repudiating the legacy of the Warren Court and to implementing a program that I find to be at odds with a proper understanding of the Constitution (Fiss and Krauthammer). This perception is shared by many—I would even say most—legal academics, yet it has triggered widely divergent responses. I am prepared to condemn the decisions of the present Court as mistakes, but others have moved to a critique so radical that it calls into question the law itself.

The radical critique that I am referring to goes by the name Critical Legal Studies (CLS). It arose in the seventies, paralleling the rise of the Rehnquist Court, and has become a visible and influential force in the academy. At a CLS conference held two years ago, almost six hundred persons attended. The leaders of CLS are tenured faculty members at elite law schools such as Harvard and Stanford. CLS was even the subject of an article by Calvin Trillin in the *New Yorker* (though, I must admit, he made the Harvard Law School sound more like a regional restaurant than like a highly improbable nest of radicalism).[1]

The CLS position has taken many forms, but the one that engaged me and that is most relevant for ADE is premised on a theory of interpretation that exalts the freedom of the reader, who in this case is a judge. This freedom is said to arise from the generality of the texts the judge must construe. A particularly striking instance is the equal protection clause, which was the basis for much of the Warren Court's reform program and yet says only that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The supporters of CLS have insisted that no distinctly legal standards constrain the judge in interpreting this clause and that, as a consequence, the judge will inevitably read into it (or for that matter any other legal text) his or her view of what is good or bad. I may happen to share Earl Warren's vision of the good and for that reason prefer his decisions over those of William Rehnquist; I may like Warren's politics and not Rehnquist's; but I cannot claim—so CLS advocates—that Rehnquist's decisions are legally wrong and Warren's legally right. It is all a matter of preference. Law is politics (see Levinson, "Law").

I believe that this criticism of law is unfounded—not that every single case necessarily has one right answer but that some do, even those that are the source of a Court's identity—and that the rule of law is indeed possible. I acknowledge the generality of legal texts yet deny that the judge enjoys the freedom that the adherents of CLS postulate. The equal protection clause is general, to be sure, and thus is capable of a range of possible meanings, but judges are constrained in their reading of this text and of all legal texts by a set of "disciplining rules" that work in much the same way as do the rules of grammar. These rules (or standards or norms) constitute the professional grammar of the law. They prescribe the kind of considerations that a judge could take into consideration, define basic concepts and terms, establish certain procedures the judge must follow, and so on. The disciplining rules are not themselves part of the Constitution but rather receive their authority from a community that in turn is defined and constituted by them. And it is the disciplining rules that provide the standards—the distinctly legal standards—for judging the correctness of judicial decisions (e.g., for explaining why Earl Warren is legally correct and William Rehnquist wrong).

These views were first developed in a lecture I delivered at the Stanford Humanities Center in 1981. They appeared in the *Stanford Law Review* the next year (under the title "Objectivity and Interpretation"), and with the assertiveness that typifies the lawyer, even the academic lawyer, I sent reprints to a number of professors of English. I did this in part because the supporters of CLS invoked their names; in proclaiming the freedom

The author is the Alexander M. Bickel Professor of Public Law at Yale University. This paper was delivered at the 1984 ADE Summer Seminar at Yale University.

of the judge, the supporters of CLS saw themselves as a branch of deconstructionism. I was also moved by the fact (suggested by the role I assigned the professional community in the interpretive process) that I also self-consciously drew on recent developments in literary theory to respond to the CLS critique.

I received two replies worth mentioning. One was from Hillis Miller. He said that he had read the article, and although he found it "interesting," he was duty bound to say that I made an error: I may have got Stanley Fish right, but I got him wrong. I was of course disturbed by that response, but I was even more upset by the next day's mail, which brought, as you might expect, a letter from Stanley Fish. He said that while I may have got Hillis Miller right, I got him wrong. At that point I threw my hands up in despair: When the "experts" disagreed in so peculiar a way, how could a lawyer possibly get it right?

That despair did not last long but instead turned into a more defensive stance, for soon one of my correspondents launched a public and highly visible attack styled "Fish v. Fiss." The first salvo was fired in the spring of 1983, when Fish appeared at a workshop of mine at Yale. (What could be more sensational than to attack the host?) His presentation was indeed a great success, and it was repeated at various workshops over the next year. We even appeared together on a panel of the American Association of Law Schools in January 1984.[2] Fish's criticism is about to be published in one law journal (Stanford), and my response will be published in another (University of Southern California, under the title "Conventionalism"). We are united in denying the freedom of the judge imagined by CLS, but we are divided over the source of constraint. I emphasize norms; for Fish, practice and context are everything.

Fish begins by situating the judge within a practice. His principal purpose is to show that the disciplining rules I spoke of are unnecessary; to do so, Fish emphasizes the process through which judges are initiated into the profession. Judges start their education by reading cases, learning bits and pieces of practice, not by learning general normative propositions. They learn the ropes or acquire a knack. Fish concedes that somewhere along the way judges acquire knowledge of the professional rules, but he argues that these rules play only a secondary role in the decisional process; for by the time judges are fully socialized into the profession and thus in a position to be entrusted with power, they already know what to do. The know-how or tacit knowledge they have acquired tells them what to do, immediately and without reflection. Judging is like playing basketball. Indeed, Fish goes on to argue that individuals can only understand, formulate, or manipulate general norms if they have been socialized into the profession and are already in possession of know-how.

I would concede that know-how plays a significant role in the decisional process, as Fish points out, but I would make a similar claim for generalized norms. "Knowledge that" is not rendered redundant by "knowledge how." Just as one cannot understand or formulate rules unless one is a participant in the practice, so one cannot participate successfully within the practice known as law—or literature, or perhaps even basketball—unless one is able to understand or formulate the rules governing the practice. There is a reciprocal relation between norms and practice, and Fish's account of the judge errs in emphasizing one at the expense of the other.

Another branch of Fish's argument concerns the text, and here too his emphasis is on context. Just as Fish situates the judge within a practice, he also places the Constitution within a practice—meaning simply that the Constitution is always part of a context and is thus an already interpreted object. Fish's purpose in situating the judge was to deny altogether the freedom that my disciplining rules seek to curb; his purpose in situating the text is to deny that the Constitution has many meanings and thus, once again, to render my disciplining rules unnecessary, since the rules were intended to constrain judges in their choice of meaning—he wants to deny that there is a choice. Fish believes he can achieve his purpose by establishing that meaning is a property not of text but of context, and that conclusion is said to follow from the view that all texts are contextualized. Since the equal protection clause is always contextualized and necessarily arrives in an interpreted shape, it is wrong to say—so Fish argues—that the equal protection clause has several meanings (or, paradoxically, even that it has one meaning).

I find it difficult to understand how this conclusion of Fish's follows from his premise that all texts are contextualized and, even more, how the conclusion might render the disciplining rules redundant. Even if, as Fish argues, meaning were a property of a context rather than of a text, conflicting interpretations of the Constitution would still be possible, and a choice would still be required, though the choice would have to be among different aspects of context (interpretive assumptions, etc.). Disciplining rules would still be necessary in order to constrain the choice among conflicting interpretations.

Fish is not a member of the CLS movement. He does not believe the judge enjoys the freedom postulated by CLS, but his account of interpretation, like that of CLS, threatens the distinction between law and politics (that is why his name and work are, to his great amazement, sometimes invoked by those critics of law).[3] Because he rejects the disciplining rules—or any general normative standards—he is left without any basis for resolving conflicting interpretations in any principled way. As he puts it, "the entire system is political" ("Fish v. Fiss"). His emphasis on know-how will not give him the standards needed to distinguish law from politics and, in any event, invites a certain thoughtlessness. The emphasis on know-

how tends to trivialize the self-conscious reflective moments of the law, when judges consider the choices before them and the implications of the professional norms for those choices.

In criticizing Fish's jurisprudence, my intent has not been to deny a role in the law for literary theory. On the contrary, I believe that adjudication *is* interpretation and that literary theory has an important role to play in understanding the law and in equipping students to participate in the profession. Fish has made an enormous contribution to my understanding of interpretation, and I sense that many of my colleagues share this sentiment. Rather, my purpose in involving you in the details of our disagreement and in trying to locate the debate within a larger set of professional concerns is to give you a concrete sense of the collaborative process now going on between law and literature. I want to use the story of our disagreement to suggest that what should be entailed in interdisciplinary work is, not a "borrowing," but rather—to use a term I first heard from Geoffrey Hartman and a student of mine, Martin Stone—a "boundary crossing."

"Borrowing" suggests that the lawyer picks up an idea or a development in another field and appropriates it (for some period of time). The lawyer takes the teapot as it is and uses it for his own brew. "Boundary crossing" entails a much more complicated and dynamic set of relations. For one thing, it sees interdisciplinary inquiry as exploratory. The exploration will no doubt be prompted by one's own immediate professional concerns; it was a development in the law—the shift of power on the Supreme Court and the emergence of a radical movement in the law schools—that led me to literary theory. But as in any exploration, it is difficult to predict where inquiries, once undertaken, will ultimately lead or even that anything useful will be found. I had no fixed ideas about what I would find; even after I stumbled across something that seemed promising—say the idea of an interpretive community—I knew it had to be reconceived in order to be useful in an account of the law. The terms may be similar, but the concepts are different. Interpretive community is for Fish a source of shared understandings or know-how; for me the community is the source of authority for norms (no wonder I was criticized by both Fish and Miller).

Boundary crossing also underscores the dialogic quality of interdisciplinary work; it points to the need for a process of exchange that is continuous and two-sided. I ventured into literary theory; Fish claimed a reciprocal right with respect to the law and within the last year or two has become a major figure in jurisprudential debates. I spoke with some self-indulgence, for which I apologize, about the exchange of ideas known as "Fish v. Fiss," but in fact Fish has taken on almost every legal academic who dared to talk about literary theory.[4] He has also occasionally taught a seminar at the University of Maryland Law School, and word has it that he has spent the last year auditing law courses at Columbia. In all this Fish was no doubt drawn by his personality—he loves to disagree, immediately and without reflection. But even so, his willingness to participate in lawyers' debates, to take seriously the concerns of lawyers, and to develop a jurisprudence (of sorts) seems exemplary. It was a diversion from his own immediate professional concerns and yet essential to a truly interdisciplinary understanding of the problematics of interpretation.

Further, boundary crossing requires an explicit recognition of the equality of each discipline. It disavows the imperial ambition. Professors of English and professors of law share similar concerns and have a great deal to learn from one another, but they can do so only by recognizing their disciplines as equals. The equality I have in mind, like that which exists among sovereign nations, demands an appreciation of differences, neither a leveling nor an assimilation. My account of interpretation and my explanation of the dynamic that makes objectivity possible are addressed to the law and the special character of that profession. I make no claim for literature, and it may be that the institutional configuration of that discipline—for example, the freedom of a reader to leave one community and to join another—is incompatible with the kind of constraints that make one reading more authoritative than another. I might note, however, that Fish makes a claim for both law and literature and that his errors may be equally unbounded. I have tried to explain why Fish's theory fails as an account of the law—because of his preoccupation with know-how, because of his denial of a role for abstract or general norms, and because of his insistence that meaning is a property of a context rather than of a text—but these shortcomings may be equally present when one tries to apply his theory to literature. Indeed, as Stone has suggested, there may be a strange reversal in Fish's work. The emphasis on practice (understood as a concrete cooperative enterprise defined and bounded by a unique set of standards) may be more appropriate for a profession such as law than it is for literature, which seems, at least to an outsider, to celebrate a more radical and creative spirit.

Finally, the idea of boundary crossing suggests that the true measure of interdisciplinary work is found not in the particular propositions propounded or dilemmas solved but in the impact this work has on the disciplines. When the crossings are frequent enough and rich enough, boundaries tend to disappear. Fish's venture into legal theory or my venture into literary theory may leave CLS as vibrant as ever and the problems of the law exactly where we found them, but even so, the hope is that our exchanges have changed the relations between the two disciplines—mutual access to each has been enhanced. Fish's jurisprudence may be mistaken in its particulars—so I have labored to suggest; I would urge you, however, not to focus on the details but to see this

debate as part of a general intellectual movement that has opened the boundaries of both law and literature.[5]

The law journals now regularly feature articles on the relation of law and literature. Workshops, symposia, and conferences are frequently held on the subject; this past spring there were two such conferences—one at the University of Virginia, another at the University of Southern California—and I hope my presence at the ADE seminar is evidence of the increasing curiosity in literature departments about what is going on in law schools. In addition, the catalogs of law schools (even those outside New Haven) now announce courses on literary theory; I suspect that today more students at the Yale Law School have read Fish on interpretation than Corbin on contracts. And at the risk of reinforcing your worst fears about the academic lawyer, let me close by pointing to what might be the most compelling evidence of this new relationship between law and literature—a footnote.

The footnote is number 63. The paper in which it appears was written in the spring of 1984, three or four years after the debates I described in my comments began, and after boundary crossings between law and literature had become commonplace. The author, Iver Kern, did graduate work in English at Berkeley and now practices law in Boston. The paper was written in Kern's last year at the Yale Law School. It is on Robert Bork and the First Amendment and ends with a moving quotation from William Empson on the special appeal of *Paradise Lost* (interestingly, Fish's preferred text before he turned to the Constitution). Then comes this most remarkable footnote:

> 63. W. Empson, Milton's God (2d Ed. 1981) at 277. I find it especially fitting to end with this quotation because this paper is the last piece of written work I will submit as a student at The Yale Law School. When I entered three years ago the Dean of that school gave a welcoming speech in which he suggested that although the school encourages a variety of intellectual approaches to the study of law, there would be some students who would feel out of place. He suggested the following self-diagnosis: if after six weeks of law school you would still rather be reading Milton, you are probably one of those students, and should consider entering another discipline. It is possible that this is a good test from the standpoint of the law school; the present paper may be evidence of its accuracy. But I have felt from the beginning and continue to feel that the Dean got it exactly backwards: that if the study of the law didn't after six weeks make you want to consult Milton—or other writers who confront mammoth questions of value—or if the study of the law made you lose your taste for this sort of writer, it was time to think of leaving.

NOTES

[1]There are two general collections of the writings of CLS: *Critical Legal Studies Symposium* and Kairys.

[2]Fiss et al. The session is available from the AALS on tape.

[3]In a classic opening, Fish writes: "Although I am pleased to be cited by Professor Levinson as a source for his argument, I believe that our positions are at odds . . ." ("Interpretation" 495).

[4]In addition to answering Levinson and, to a lesser extent, James White (in "Interpretation"), Fish has criticized Ronald Dworkin's foray into literary theory in "Working on the Chain Gang"; Dworkin's rejoinder is contained in the same volume.

[5]Levinson reviews the "turn to interpretation" in "On Dworkin, Kennedy, and Ely."

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