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Paul Brest*

Professor Fiss' agenda is set by the current ferment in legal theory. During the past decade, the self-congratulatory and complacent reign of "legal process" has been under attack from various quarters. The law and economics school seeks to replace the legal process virtues of judgment and statesmanship with the formal algebra of neoclassical economics.[1] This essentially rightist movement is opposed on the left by the relatively small and fragmented critical legal studies movement, which criticizes both the legal process[2] and neoclassical[3] schools. Still other scholars, often aligned with critical legal studies, are examining law from the perspectives of the humanities and interpretive social sciences.[4]

Not since the realist movement in the earlier part of this century has a dominant American legal ideology been the subject of such controversy. And never perhaps has it been challenged from so many sides. Professor Fiss' mission, as I understand it, is to reaffirm the morality of legal process—to reaffirm that adjudication, performed in good faith and according to professional canons, produces outcomes deserving of respect and obedience. His concern is not to counter the new formalism of legal economics, but to combat what he terms the new nihilism of the other movements. In particular, he

* A.B. 1962, Swarthmore College; LL.B. 1965, Harvard Law School. Professor of Law, Stanford University.

1. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977).

2. *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Gabel, Book Review, 91 HARV. L. REV. 302 (1977).

3. *See, e.g.*, Heller, *The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385; Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

4. *See, e.g.*, Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns About Legal Economics and Jurisprudence*, in ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS 183 (D. Rubinfeld ed. 1979); Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 S. CAL. L. REV. 1215 (1980).

seeks to insulate the legal culture against the radical attacks on conventional notions of understanding and interpretation.

Professor Fiss is especially concerned to protect constitutional adjudication, which enjoys a privileged status in his legal scheme. He asserts that a central aim of constitutional adjudication is to articulate and apply what he calls "public values." In *The Forms of Justice*, he wrote:

> We have lost our confidence in the existence of the values that underlie the litigation of the 1960's, or, for that matter, in the existence of any public values. All is preference. That seems to be the crucial issue . . . . Only once we reassert our belief in the existence of public values, that values such as equality, liberty, due process, no cruel and unusual punishment, security of the person, or free speech can have a true and important meaning, that must be articulated and implemented—yes, discovered—will the role of the courts in our political system become meaningful, or for that matter even intelligible.[5]

That article deplored in general terms the nation's loss of faith in public values. *Objectivity and Interpretation* is more particularly directed against the heresy of a group he calls the "new nihilists."[6]

Professor Fiss' strategy in defense of the legal process is one of confession and avoidance. He acknowledges that adjudication requires the interpretation of inherently indeterminate materials. He rejects what he calls "textual determinism"—a literalistic approach that achieves apparent certainty only by misunderstanding the nature of language and law. But Professor Fiss argues that objective interpretation is nonetheless possible.

Central to Professor Fiss' argument is the concept of an "interpretive community," put forward by the literary theorist, Stanley Fish.[7] At first glance, Stanley Fish seems an unlikely source of support for the possibility of objective interpretation: Fish aligns himself with a group of post-structuralist literary theorists, including the so-called "deconstructionists," who—to oversimplify but not understate—regard interpretation more as a process of fabrication than of discov-

5. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 16–17 (1979).

6. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 *passim* (1982). He refers explicitly to Sanford Levinson and me. *Id.* at 740 n.3; *cf.* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 43–72 (1980) (attacking adjudication based on fundamental values).

7. *See* S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

ery. But Professor Fiss removes Fish's concept from its destabilizing surroundings and fashions it into a bulwark.

Professor Fiss argues that judges are, perforce, members of a legal "interpretive community." This community adheres to disciplining rules that constrain any judge's interpretation of the "judicial text."[8] Granting the inevitability of disagreements over interpretations, and occasionally over the disciplining rules themselves, Fiss asserts that these rules nevertheless impose meaningful constraints: They are supported by a broad consensus, and procedures exist for resolving whatever internal disputes arise. Within the federal judicial system, for example, the Supreme Court has the final say.

I agree with Professor Fiss' observation that interpretation is a central feature of adjudication of any sort, and certainly of constitutional adjudication. One aspect of his description of the interpretive enterprise puzzles me, however, and I am skeptical about the normative implications he draws from an interpretive theory of adjudication.

I am puzzled by the sources or materials that Fiss would allow a court to use for constitutional interpretation. His judge must "read the legal text, not morality or public opinion, not, if you will, the moral or social texts."[9] This does not seem an entirely accurate description of the extant "disciplining rules" of the legal interpretive community. And, as a prescription, it seems in some tension with Professor Fiss' own approach to legal interpretation.

The Court has commonly interpreted social morality—or what might be called the "social text"—in articulating public values.[10] For example, it has written that the cruel and unusual punishment clause of the eighth amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice,"[11] and that the clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[12] With respect to the equal protection clause, the Court has written:

In determining what lines are unconstitutionally discriminatory,

8. Fiss, *supra* note 5, at 745–50.

9. *Id.* at 740.

10. Social morality may be treated as a kind of text analogue. Professor Fiss notes at the outset of his paper that "[t]he idea of a written text, the standard object of legal or literary interpretation, has been expanded to embrace human action and situations, which are sometimes called text-analogues." Id. at 739.

11. Weems v. United States, 217 U.S. 349, 378 (1910).

12. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

> we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection clause *do* change.[13]

And, of course, in the *School Desegregation Cases*, Chief Justice Warren wrote: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[14]

Although a literalist or intentionalist interpreter would regard these as damning admissions,[15] Professor Fiss accepts these broad readings of the Constitution. His Court does not apply the equal protection clause by discovering whether members of the 39th Congress intended it to apply to segregation or particular forms of discrimination in their time, but rather by "grasp[ing] the constitutional ideal of equality."[16] His Court's task is to articulate "public values," and our "understanding of such values—equality, liberty, property, due process, cruel and unusual punishment—is necessarily shaped by the prevailing morality."[17]

How can a court perform the essential constitutional task without interpreting the social as well as the written text? Perhaps Professor Fiss means that the social text, while inevitably and even appropriately present, ought not be the *conscious* object of interpretation. But if the social text plays a significant role in fact—and I agree with Professor Fiss that it must—judges would do well to bring it to the surface, to understand how it interacts with the written text, and to confront it directly. Suppressing consciousness of social values, far from constraining the judges' discretion, gives them free rein—unchecked by self-scrutiny and the criticism of others.

Alternatively, Professor Fiss may be alluding to something like Ronald Dworkin's distinction between constitutional "concepts" and "conceptions."[18] The Court would discover abstract, timeless consti-

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13. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966) (citation omitted) (emphasis in original).

14. Brown v. Board of Educ., 347 U.S. 483, 492 (1954).

15. *See, e.g.*, Justice Black's dissent in Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (equal protection) and his special concurrence in McGautha v. California, 402 U.S. 183, 225 (1971) (cruel and unusual punishment); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing that the "original intention" of the framers is binding on the Court).

16. Fiss, *supra* note 5, at 748.

17. *Id.* at 753.

18. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

> [W]e must take what I have been calling 'vague' constitutional clauses as represent-

tutional ideals by interpreting the document, and refer to the more protean social text to apply the concept to particular situations at particular times. Although the distinction is heuristic, both elements seem essential to the process of constitutional interpretation. In legal as in moral discourse, concepts and conceptions interact to produce what John Rawls has called a "reflective equilibrium."[19] "Situational" judgments not linked to broader principles are impoverished and indefensible. Ideals not examined and tested through particular applications tend to be vacuous.

I have labored this issue because the sources and methods of legal interpretation are intrinsically important, and because it highlights the other aspect of Professor Fiss' essay that troubles me—the normative implications of acknowledging the indeterminacies that pervade constitutional adjudication. Constitutional interpretation is fraught with indeterminacies of two sorts. First, even when we have a general notion of the aims of a constitutional provision—the conditions it seeks to bring about or the mischiefs it seeks to remedy—we confront uncertainties about the appropriate *level of generality* on which to articulate those aims. Does the equal protection clause of the fourteenth amendment only prohibit discrimination against blacks, does it protect minorities other than blacks, does it prohibit race discrimination against whites, does it prohibit unfair discriminations based on characteristics besides race? Second, our texts, histories and traditions are seldom univocal, but often include competing and conflicting values. Consider, for example, the different values implicit in the characterizations "affirmative action" and "reverse discrimination."

Such indeterminacies inhere in any interpretive enterprise. They pervade constitutional adjudication: The issues are brought before courts precisely because the written text is not determinative and the social text is ambiguous—because society, and its individual members, are conflicted. Consider, for example, the issues in *Bakke* and in litigation over the death penalty and abortions.

These and other social conflicts are the stuff of literature and the

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ing appeals to the *concepts* they employ, like legality, equality, and cruelty. The Supreme Court may soon decide, for example, whether capital punishment is 'cruel' within the meaning of the constitutional clause that prohibits 'cruel and unusual punishment'. It would be a mistake for the Court to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned. That would be decisive if the framers of the clause had meant to lay down a particular *conception* of cruelty . . . .

Id. at 135 (emphasis added).

19. J. RAWLS, A THEORY OF JUSTICE 48 (1971).

social sciences as well as the law. Adjudication is nonetheless significantly different. Interpretation in the humanities is essentially concerned with exposing and illuminating ambiguity; it exalts indeterminacy. Legal interpretation seeks to resolve ambiguity. A court faced with a constitutional challenge to an anti-abortion law may not stop after it has identified our moral, social, or psychoanalytic conflicts around the issue. It must decide the case. This is not to say that a court is obliged to find certainty where none exists (though there are strong institutional pressures to do so). Sometimes indeterminacy is reason enough to leave the matter for decision by others—legislatures, officials, or citizens. Whatever judgment the court renders, however, is a definitive resolution of the issue. Even a finding of indeterminacy is, in effect, a final judgment delineating the bounds of what is and is not (legally) known.

Furthermore, the court's judgment is authoritative and binding. Of course, the views of humanist interpreters can also achieve a de facto sort of bindingness. The collective views of an "interpretive community" may control curriculums and the work of graduate students, the hiring and promotion of faculty, access to journals, and other professional rewards. At certain times in certain places, interpretive orthodoxies have had the force of legal judgments. Yet, at least in our time, the differences are noticeable. If E.D. Hirsch is Chief Justice of the Virginia Court of Literary Appeals,[20] Yale has its own court[21]—and there exists no higher court with jurisdiction to adjudicate between their decisions.

The institution of constitutional interpretation is comparatively monolithic. This is neither to say that the Constitution means what the judges say it means, nor to concur in Professor Fiss' assumption that there is widespread agreement about the proper methods of constitutional interpretation. Rather, as Robert Dahl observed, "the Supreme Court is inevitably a part of the dominant national alliance,"[22] and its judgments carry a special clout. No other interpretive community shares the Court's ability to coerce compliance with its interpretations.

When combined with the authoritativeness of legal interpretation, the demographic composition of our "interpretive community"

20. *See* E. HIRSCH, VALIDITY IN INTERPRETATION (1967).

21. *See, e.g.*, H. BLOOM, AGON: TOWARDS A THEORY OF REVISIONISM (1982); P. DE MAN, ALLEGORIES OF READING (1979).

22. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957).

presents normative problems in a democratic polity. The members of the legal interpretive community are mostly white, male, professional, and relatively wealthy. However humble their backgrounds, they are members of a ruling elite.

Again, this does not distinguish the legal from, say, the literary community. Whether in New Haven or Charlottesville, academics are pretty well off and arguably part of the ruling alliance.[23] But most literary theorists do not purport to articulate "our" public values; such a claim would be sheer arrogance. By contrast, when Professor Fiss' judges interpret "our" values they speak with an authority that can affect the lives of murderers and victims, of women and their unborn children, of black applicants who benefit from preferential admissions programs and whites who are excluded from them.

This might seem less of a problem if constitutional interpretation were the kind of technical process that determinist commentators assert it should be. But hopes for scientific objectivity in legal interpretation are on a par with the fantasy of a single, objective reading of *Hamlet* or of Balinese culture.[24] Therefore, one must confront the question of the relationship, if any, between the composition of the dominant legal interpretive community and the outcomes of its interpretations.

Do the backgrounds or status of members of this community affect their interpretations? Of course they do—especially if constitutional adjudication calls for the interpretation of a social as well as the written text and for the resolution rather than acknowledgement of the ambiguities of those texts. "[B]y viewing society's values through one's own spectacles," John Ely has written, "one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported."[25] It isn't a matter of good or bad faith. Try as we will, we cannot escape the perspectives that come with our particular backgrounds and experiences.

Indeed, I imagine that not only particular interpretations but the *interpretive rules themselves* respond to our backgrounds and experiences. The very notion of constitutional adjudication as hermeneu-

23. *See* A. GOULDNER, THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS (1979).

24. Supposed strict originalist interpretation can be especially pernicious, for by failing to see the need for, and hence failing to use, alternative strategies of interpretation, it liberates itself entirely from other interpretive constraints.

25. J. ELY, *supra* note 6, at 67.

tics—a notion shared by both Professor Fiss and his commentators—is "sophisticated," not just in the sense of being complex, but in what the Random House dictionary gives as the first definition: "altered by education, experience, etc. so as to be worldly-wise."[26] My guess is that most nonlawyers conceive of constitutional interpretation the way Justice Roberts did when he said that the Court's only duty is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[27] They believe—if only because they wish to believe—that the text and original history of the Constitution constrain the Justices far more than the Justices understand themselves to be constrained.

In purely materialistic terms, "sophisticated" decisions do not correlate in any plausible way with the interests of the elite. *Dred Scott*[28] is one of the most unsophisticated and determinist decisions in the *United States Reports*. The *School Desegregation Cases*[29]—especially the Court's wildly anachronistic reading of the fifth amendment due process clause to prohibit segregation in the District of Columbia—are quite sophisticated. I imagine, however, that the very sophistication of our rules perpetuates the tradition of the "mysterious science of the law"[30] by making constitutional law inaccessible to laypersons. This in itself confirms and reinforces the power relationship, while insulating the community's interpretations from external scrutiny.

Professor Fiss regards both the exclusivity of the legal interpretive community and its tendency to impose its values on others as regrettable costs—but costs that nonetheless must be paid to assure the rule of law. Like most other lawyers, I am a member of the same community, or at least on its immediate periphery, and I also value the rule of law. And that's what troubles me. For I wonder whether our commitment to the rule of law, as to other "public values," is not related to our relatively fortunate status within this society. Much of our commitment to *the* rule of law really seems a commitment to the rule of *our* law.

Stanley Fish concludes his lectures on literary interpretation by inquiring into the "practical consequences" of his thesis:

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26. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1358 (unabr. ed. 1971).

27. United States v. Butler, 297 U.S. 1, 62 (1936).

28. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

29. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

30. *See* D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (1941).

> Since it is primarily a literary argument, one wonders what implications it has for the practice of literary criticism. The answer is, none whatsoever. . . . The reason for this is that the position I have been presenting is not one that you (or anyone else) could live by. Its thesis is that whatever seems to you to be obvious and inescapable is only so within some institutional or conventional structure, and that means that you can never operate outside some such structure, even if you are persuaded by the thesis. As soon as you descend from theoretical reasoning about your assumptions, you will once again inhabit them and you will inhabit without any reservations whatsoever . . . .[31]

Most of this seems equally applicable to legal interpretation. Most, but not all—for both the consequences of interpretation and the power of the interpretive communities over nonmembers are vastly different. That is a matter of politics, and the lesson I carry away from contemporary literary and social theory is that the line separating law from politics is not all that distinct and that its very location is a question of politics. I do not think this is nihilism. Rather, I believe that examining "rule of law"—even at the risk of discovering that it is entirely illusory—is a necessary step toward a society that can satisfy the aspirations that make us hold to the concept so tenaciously.

31. S. FISH, *supra* note 7, at 370.