

1984

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Recommended Citation

Richard H. Weisberg, *A Response to Fish and White*, 5 Mississippi College Law Review 57 (1984).

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A RESPONSE TO FISH AND WHITE

Richard Weisberg*

[T]he relation between the speaker and what is spoken points to a dynamic process that does not have a firm basis in either member of the relation. (H.G. Gadamer, *Philosophical Hermeneutics*).

I serve a dual function as respondent to these fine papers: first, to find some common ground between them, then to connect them with the announced topic involving the relationship of legal hermeneutics to the southern-based New Critical School. I have posited this dual responsibility out of an allegiance to my role as a kind of broker between the audience's expectations and the speaker's remarks.

It is the role as mediator between two separate entities which Heidegger and student Hans-Georg Gadamer emphasize in their discussions of legal and literary hermeneutics.¹ Both Heidegger and Gadamer posit the equal integrity of the text and its reader. The act of interpretation mediates between these two entities; the reader cannot (and should not) remain ignorant of his own biological and biographical "thrown-ness"² (this avoids positivism); nor, however, should he or she disregard certain demands which the text makes from all readers (arguably in any generation and from whatever background).³

It may be the text's demands which Owen Fiss has, over the

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1. See generally HEIDEGGER, BEING AND TIME, § 32, *Understanding and Interpretation* (1962); GADAMER, TRUTH AND METHOD 36-37, 225-40, 274-305; GADAMER, PHILOSOPHICAL HERMENEUTICS 44-58 (1976).

2. The German word is "Geworfenheit." Together with the concept of "Vorhabe" (fore-having), thrownness imagines the inevitable meeting of text and reader along the spiral of the reader's idiosyncratic biographical movement. It is unclear, however, whether Heidegger views the text (or even) in the same dynamic terms; he does speak in terms of the "Dasein" (manner-of-being) of the text. Although this "Dasein" can be uncovered only through a meeting, along the line of a reader's ever-changing thrown-ness, with the text, allowance seems to be made for the intrinsic, objective qualities of the text itself. See HEIDEGGER, *supra* note 1, at 191-92; GADAMER, TRUTH AND METHOD 232.

3. Hence, Heidegger: "[T]he way in which the entity we are interpreting is to be conceived can be drawn from the entity itself, or the interpretation can force the entity into concepts to which it is opposed in its manner of Being," HEIDEGGER, *supra* note 1, at 191. And Gadamer:

All correct interpretation must be on guard against arbitrary fancies and the limitations imposed by imperceptible habits of thought and direct its gaze "on the things themselves" (which, in the case of the literary critic, are meaningful texts, which themselves are concerned with objects). It is clear that to let the object take over this way is not a matter for the interpreter of a single decision, but is "the first, last and constant task." For it is necessary to keep one's gaze fixed on the thing throughout all the distractions that the interpreter will constantly experience in the process and which originate in himself.

GADAMER, TRUTH AND METHOD 236.

past year or so, asked Stanley Fish and others to keep in mind, particularly those of his favorite text, the U.S. Constitution.⁴ To ignore its inherent qualities — and here Fiss goes a step further than Heidegger, for “qualities” (or properties) are not “demands” — is, for Fiss, to risk idiosyncrasy and even nihilism in constitutional interpretation.

Fish has responded neither as a “nihilist,”⁵ nor a Heideggerian,⁶ and certainly not as a positivist. He denies a text any particular inherent “substance” which could be “drained” (Fiss’ word) by a misinterpretation, but neither does he believe that any interpreter can do what he wishes with the text. “Not to worry,” he says to people like Fiss: a “largely tacit” understanding “of the enterprise’s general purpose” will keep the interpreter from excessive subjectivity. “The judge who has learned to read in a way that avoids crises” (as all Judges, he claims, have) cannot move beyond certain discursive norms called for by his craft, any more than a trained basketball player (unless, I suppose, he is on the Harlem Globetrotters) would try to kick the ball into the basket or climb on the referee’s shoulders to block an opponent’s shot.

Fish thus to some extent gets to the place Fiss urged him to attain, and it turns out even his methods are the same. Fiss, like many traditional legal interpreters, needs to find certain “disciplining” rules which somehow are not subject to interpretation in order to constrain the interpreter from nihilism. Fish convincingly points out the fallacy of those “rules”: they, too, are of course open to interpretation, politics and change both in law and literary criticism. Yet what else is Fish’s own “largely tacit enterprise understanding” or “know how” — let’s call it “professionalism” or Fish’s “the agent is always and already situated” (the factor that guaran-

4. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

5. *Id.* at 746 n.17.

6. But Fish often resounds in the Heideggerian tradition. *Compare*:

Finally, however, you are left only with yourself and with the impossible enterprise of understanding understanding; impossible because it is endless, endless because to have reached an end is to have performed an operation that once again extends it beyond your reach. In short, this way lacks the satisfaction of a closed system of demonstration and is unable ever to prove anything, although, paradoxically, this makes rigor and precision more, not less, necessary; but these very deficiencies are the reverse side of its greatest virtue (in both the modern and Renaissance sense): the recognition that meaning is human.

FISH, *IS THERE A TEXT IN THIS CLASS?* 96 (1980).

But understanding achieves its full potentiality only when the fore-meanings that it uses are not arbitrary. Thus it is quite right for the interpreter not to approach the text directly, relying solely on the fore-meaning at once available to him, but rather to examine explicitly the legitimacy, i.e., the origin and validity, of the foremeanings present within him.

GADAMER, *TRUTH AND METHOD* 237. Ultimately, it may be hazarded that what sets Fish (to date) apart from Heidegger and Gadamer is his reluctance to leap from the reader’s self-investigation (to which all parties attend) to the separate entity of the text itself (which Fish denies). This leap entails, for the Heideggerian, a “loss of self” (*PHILOSOPHICAL HERMENEUTICS* 51), and it is understandable perhaps that an American critical work, produced during the 1970’s, would prefer not to risk it.

tees the orderliness of all acts of interpretation) — that an *a priori* assumption? How else than by some overriding assumption can we say “a judge always knows in general what to do” unless we can posit some Fissian “virtue” in that judge which rides over or precedes the act of interpretation? And if we posit such *a priori*, have we not entered into the slippery slope leading towards textual positivism?

The irony deepens when we reiterate Fish’s conclusion “that readers and texts are never in the state of independence that would require them to be ‘disciplined’ by some external rule.” He elaborates by stating that “professional training” absolutely preconditions judges to “avoid interpretive crises” just as it preconditions literary critics to create such crises.

This brings us to White. For while he might agree with Fish that *education* (meaning hierarchy and praxis as well as law school or graduate school) largely eliminates the radical fringes of interpretive discourse, he sees the ends of legal education as precisely opposed to Fish’s vision of the complexity-averse judge. White sees the creation of complexity as the aim of judicial activity and thus specifically compares it to poetry and (at least implicitly) to literary criticism.⁸ White would, it seems to me, challenge the notion that Fish takes as axiomatic. Ordinarily this would be pleasing to Fish, for it proves the point he was trying to make to Fiss (i.e. that one man’s “disciplining rule” is another’s basketball — or at least football); but White’s theory tends to negate Fish’s comforting sense that no one in the “enterprise” of adjudication would ever really reduce the Constitution to his own purely subjective vision. If the aim of legal education is to create a poetic (i.e. a complexity-prone) judge, why should such an imaginative adjudicator be bound by any interpretive restraint?

Does this make White the nihilist in our midst? By elegantly harmonizing the ends, as well as the means, of law and literature, is he suggesting that complexity and uncertainty in interpretation are all we can be sure of? I think not. Having pleurably followed White’s poetics over the past decade, I know him to believe, with Fiss and Fish, in certain truths about legal culture. All agree, as I have said, that education and praxis usually bring a lawyer or judge into a general discursive mode which, almost always, controls interpretation and subsequent utterance. All be-

7. Owen Fiss also questions this phrase in his *Conventionalism*, 58 S. CAL. L. REV. 177, 197 (1985).

8. See WHITE, *THE LEGAL IMAGINATION* xxiv (1973) where he early makes “the claim implicit here that the activities of the literary critic, his distinctions and concerns, may have significance for the professional lives of practical people.” See also Weisberg, Book Review, 74 COL. L. REV. 327, 332-37 (1974) (reviewing *THE LEGAL IMAGINATION*).

lieve that context, in other words, largely controls meanings. But White seems to feel that the context of the judicial enterprise is a kind of poetry, not dispute resolution, a rendering complex, not a making clear. White defines judicial "excellence not in terms of votes or 'results' but in terms of the 'composition.'" He sees the judicial opinion at its best as a "heteroglossia," as "writing two ways at once." Complexity-creation is, for White, the essence of judicial culture.

Far from embodying nihilist or deconstructionist tendencies, White's way of making the claim that each judicial opinion is a poem, a complex linguistic reconstruction of the then available culture, has placed him well within the New Critical tradition. As James B. Meriwether observed of Faulkner criticisms (to take a contextually mandated example): "The new critical tools of close reading by the sensitive, sophisticated well-read critic [yield] most satisfactory results when applied to Faulkner's carefully wrought complexities."⁹ White wants the same mesh in law, of subtle reading and complex texts or situations. But I notice in today's paper, too, a salutary progression in White beyond an already provocative stance. Here, for the first time, he calls for more than close readings of individual texts:

What is needed here is . . . a responsible way of paying attention to what is before us: to the social and cultural context of the text, in as much fullness and detail as we can manage; to the "unsaid" that can render a simple statement complex, or a superficially complex one foolish; to the nature, in short, of the relation between text and world.¹⁰

White here moves beyond New Criticism into a stance perhaps best understood in the context of our recent "law and literature" movement.¹¹ Hermeticism, we argue, is appropriate to neither of our great narrative disciplines. Both must strive to integrate into their professional discourse an awareness grounded in linguistic sophistication but ready to move beyond, at least occasionally, into a trained and mature intuition about the surrounding culture.¹² (That White here recognizes the primary risk of mere complexity-creation — that "the voice . . . in every sense simple" may be over-

9. See J. MERIWETHER, *THE LITERARY CAREER OF WILLIAM FAULKNER: A BIBLIOGRAPHICAL STUDY* (1971).

10. White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 5 MISS. C.L. REV. 25 (1984).

11. See, e.g., Page & Weisberg, *Foreword: The Law and Southern Literature*, 4 MISS. C. L. REV. 165 (1983); Weisberg and Szulkin, *Editor's Preface: Symposium on Terror in the Modern Age: The Vision of Literature*, 5 HUM. RTS. Q. 109 (1983); 1 LAW AND HUM. INST. MEDIATOR 1 (1981) (for representative perspectives on "Law and Literature").

12. See, e.g., S. FISH, *supra* note 6, for a wonderful passage about Roman Jakobson insisting against "the reduction of language to a formal system unattached to human purposes and values."

looked and the narrative system thus impoverished and distorted¹³ — perhaps indicates best the moral potential behind this theoretical advance.)

The idea that the legal, like the poetic, text is intertwined with the larger culture and its crises may seem risky from a purely New Critical perspective. Recalling Heidegger, we may be consoled. The most careful readings are those which test the reader's "thrown-ness," his personal and cultural awareness, against another entity, which is the text. The Heideggerian tradition counsels,¹⁴ as a professional methodology, the lifelong inquiry into the interpreter's subjective place in the real world of power, prejudice and passion.

For Stanley Fish, too, "sentences never appear in any but an already contextualized form." Fish, by rejecting Fiss' dichotomy of judicial power and judicial virtue, emphasizes "the priorities, agreed upon needs, long and short term goals, etc. of an ongoing political project." Although Fish speaks in terms of politics and White prefers the term "cultural context," the significant point is that both here agree: external factors inevitably color professional pursuits. We would be disingenuous to deny the culturally-linked aspects of our literary or legal lives and better advised to emphasize them.

The remaining conflict between White and Fish is, however, more portentous than that between Fish and Fiss, for it tests not so much the methods of adjudication (which are presumed by both to be professionally bounded speech acts) as its aims. For White, the judge is a poet, one who seeks less to reach individual decisions as to contribute to the open-ended discursive community of his culture. For Fish (at least today), the judge is a dispute resolver, one who by inclination seeks closure and clarity. And once we recognize that White may be right and Fish wrong as to the ends of the judicial enterprise, all bets are off as to the predictability of judicial behavior. Instead, we may find ourselves in a theoretical dilemma, requiring for the perceived treat of idiosyncratic linguistic expression¹⁵ or creative misreadings of the

13. For literary texts embodying this pervasive narrative theme about law, see H. MELVILLE, *BILLY BUDD, SAILOR* (1924); A. CAMUS, *THE STRANGER* (1942); R. WRIGHT, *NATIVE SON* (1940). For the view that complex legal systems self-interestedly move toward narrative formalism and away from the more direct modes of simpler values and speech patterns, see WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984).

14. See, e.g., *supra* notes 2, 3 and 6. See also HEIDEGGER, *BEING AND TIME*, *supra* note 2 at 192: "If, when one is endangered in a particular concrete kind of interpretation, one likes to appeal [beruft] to what 'stands there,' then one finds that what 'stands there,' in the first instance is nothing other than the obvious undiscussed assumption [vormeining] of the person who does the interpreting."

15. The domain itself of the poet.

legal text¹⁶ a set of immutable Fissian disciplinary rules (“Fissiplins”?) or — much better — a richer and more value-laden education into the scope of literary lawyering.¹⁷

16. One of the domains of the interpreter, be he critic, poet or judge. See H. BLOOM, *THE ANXIETY OF INFLUENCE* (1973).

17. See Smith, *The Coming Renaissance in Law and Literature*, 7 U. MD. L. F. 84 (1977).