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LAW AS A REFLECTIVE PRACTICE: A COMMENT ON STONE'S "THEORY, PRACTICE AND UBIQUITOUS INTERPRETATION"

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SUMMARY: I. *Preliminaries* II. *Interpretive Communities and Normativity.* III. *Fish and Wittgenstein.*

In Theory, *Practice and Ubiquitous Interpretation: The Basics*, professor Martin Stone accomplishes something rare for an analytic legal philosopher. He takes Stanley Fish seriously. This is not an easy thing to do, as Fish's caustic style and literary flair often obscure the depth of his argument. Not only has Stone taken Fish seriously, he has managed to say something deeply illuminating about Fish's project.

Stone advances two criticism of Fish's work, one small, one big. The small criticism is only small by comparison, because it is nothing less than a challenge to Fish's central claim—that interpretive communities are the source of the standards by which interpretations are properly judged. While the small criticism addresses Fish's solution to the task he sets himself, the bigger criticism calls the task into question. According to Stone, if Fish understood the full implications of his own arguments, he would never ask the question which leads him to the interpretive community view in the first place.

This comment explores Stone's criticisms of Fish's work. I shall suggest that both criticisms fall short of their marks, that Fish's project can withstand them. However, this should not obscure the importance of the contribution that Stone's essay makes. It deeply illuminates the nature of Fish's project and its weak points.

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I. PRELIMINARIES

Before we can assess Stone's criticisms of Fish, we need first to understand the views that are under attack. I shall present only a short summary here due to the thorough job that Stone does in his essay. As Stone tells us, Fish rejects both *foundationalism* and *skepticism*. Foundationalism here is the idea that it is possible to supply or construct a theory of what makes judgments in a given domain correct that is independent of those judgments. In this essay, we will be most concerned with judgments about meaning. The skepticism Fish is concerned with denies that it is possible to speak of getting things correct and counsels instead focusing on what people *take to be correct*.

All this is quite arid, so an illustration is in order. Suppose Aaron has an interpretation of *Hamlet* on which the protagonist is paralyzed by indecision (originality is not Aaron's forte). How do we know whether Aaron's interpretation is correct? Well we might think that we should compare Aaron's interpretation to the text of *Hamlet* to see if he has got things right. But for a variety of reasons we do not have the space to explore here, Fish says we cannot do this. We cannot consult the text to see if an interpretation is correct, because our only access to the text is through interpreting it (at least according to Fish). If the text of *Hamlet* cannot be consulted to determine the validity of an interpretation of *Hamlet*, it might seem that there is nothing to be consulted which could provide assurance that an interpretation of the play is a good one. Indeed, this is just what the skeptic concludes. The skeptic concludes that no interpretations of *Hamlet* are *really* correct or incorrect; some are just taken to be correct. But Fish rejects this skeptical view of things as well.

One of the important contributions of Stone's paper is to clarify just what it is that foundationalism and skepticism share in common, and hence just what it is that Fish is rejecting. Stone identifies the following premise lurking behind foundationalism and skepticism:

(P): Our entitlement to see one of two conflicting judgments as objectively correct requires some means, independent of those judgments, for validating one or another of them as correct.

Foundationalists think that judgment-independent means of verification are available; skeptics, while agreeing that such means are necessary to validate judgments as correct, deny that that they are available.

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Fish thinks that he can provide an alternative account of the correctness of our judgments. Although he rejects foundationalism, he aims to avoid skepticism. His solution is that interpretive communities determine whether an interpretation is correct or incorrect, successful or unsuccessful. So in order to know whether Aaron's interpretation of Hamlet is correct, in Fish's view, we do not ask whether it matches the text of Hamlet, we ask instead whether Aaron's interpretation is accepted by the community as correct.

Now notice that this method of determining the correctness of judgments is not judgment-independent. Whether a judgment is correct depends on whether the community accepts the judgment as correct. This, of course, depends on what judgments the community makes. Thus, the interpretive community view allows us to speak of correctness and incorrectness where someone who accepted (P) would not. The view is neither foundationalist (because it does not posit a judgment-independent test of correctness), nor skeptical (because it preserves a notion of correctness). This is the view that Stone's small criticism is targeted at.

II. Interpretive Communities and Normativity

Stone's small criticism consists of three objections to the interpretive community view. Stone's first objection to the interpretive community view is that from the perspective of an agent engaged with a text, the primary question always has to be what the text means and not what people think the text means. In Stone's view, it simply does not make sense to wonder about what people think a text means unless someone out there is wondering about what the text means.

Now as Stone notes, Fish is not apt to consider this an objection, because he will say that people simply internalize the community's perspective. They will of course speak as if they are addressing the hands-on question of what the text means, even though the standard for correctness is what the community thinks it means. I think that Stone is right that Fish will not count this as an objection, and I want to sharpen just why he will not. According to Fish, interpreters share strategies for *writing* not *reading* texts.[1] Now this is an odd metaphysical view, but

[1] "Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties." Stanley Fish, is there a text in this class: *The Authority of Interpretive Communities*, p. 327, 1980.

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it is Fish's. Because of it, he is likely to say that people address the hands-on question of what a text means only after the text has been constituted by communal interpretation.

Stone's second objection is much deeper. Stone argues that in Fish's picture there is no normativity for communities. There is no such thing as the community getting *Hamlet* right or wrong. Whatever the community accepts as a correct interpretation of *Hamlet* just is correct on Fish's view. As Stone points out, this makes it impossible to distinguish a community which agrees on the meaning of a text from one which is, perhaps, merely pretending to agree.

Stone is correct to suggest that there is no normativity at the community-level on Fish's view, but once again Fish is unlikely to see this as an objection. After all, what Fish is concerned with is normativity for individuals. That is, he wants to explain how individuals can get things right or wrong, and he may see no need to tarry over the fact that his answer obviates any sense in which an entire community could be right or wrong. After all, Fish might fairly ask why it is important to maintain an ability to distinguish between a community which accepts that Hamlet is paralyzed by indecision and a community which merely pretends to accept it. Such a distinction seems quite foreign to our literary practice.

Stone's most serious objection is that there is no normativity at the level of individuals in Fish's picture either. If Stone is right about this, then Fish will be defeated, after all it is just this sort of normativity that Fish aims to account for. Stone's argument is simple. He says one will not be entitled to say, "this text means *X*", once one understands that whether this claim is true does not depend on facts about the text, but rather on whether the claim is regarded by the community as true. That is, Aaron cannot maintain that his interpretation that shows Hamlet as paralyzed by indecision is correct, once he understands that to be correct in this case is merely to be regarded by the community as correct.

While Stone's final objection would be decisive if successful, I think it fails. Consider the following analogous case. Imagine a group of people who believe that any rule requires whatever God regards it as requiring (which should not be too much of a stretch). On this picture, there is no normativity for God; God cannot be wrong about what a rule requires, because it requires whatever God believes that it does. But for individuals within the group, there can be normativity. They can be right

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or wrong about what a rule requires (the test of whether they are right or wrong is simply whether their belief about what the rule requires matches God's). Now if we substitute "the community" for "God" in this story, we end up with Fish's picture of how interpretive communities provide normativity for their members.

I see no reason to accept Stone's assertion that normativity disappears as soon as people learn that the test for correctness is conformance to the community's view. As long as it makes sense to talk of correctness and incorrectness, there is genuine normativity in the picture. I am inclined to agree with Stone, however, that Fish's interpretive community view fails, but on different grounds than Stone suggests. I think the real flaw is that the view fails to provide a plausible account of disagreement within communities. I have developed this argument elsewhere,[2] but it is unnecessary to explore it here. Doing so would merely delay getting to Stone's bigger, more important criticism of Fish's project.

III. Fish and Wittgenstein

According to Stone, the deepest problem with Fish's project is that that the interpretive community view is offered as a "philosophical account" of meaning. A philosophical account of meaning, in Stone's terminology, is one that "seeks to explain how the meaning of a sign gets fixed from *among all the possibilities*". Stone does not believe that we can have such an account, and indeed, the most provocative part of his essay is his suggestion that should stop seeking philosophical accounts.

In Stone's view, everyday explanations of meaning are "directed towards removing or averting such doubts as, under the circumstances, actually arise". Fish's interpretive community view, on the other hand, purports to be a general explanation of how meaning is fixed. It purports to secure meaning against all possible doubts, not just the ones we actually have. In Stone's view, Fish would have been better off if he had simply rested on his rejection of (P), his denial that judgment-independent means of verification are required in order to be entitled to claims of correctness of judgment. Fish's view fails, according to Stone, because like foundationalism before it, it seeks to do too much.

[2] Hershovitz, Scott, Jud*ging Interpretations*, pp. 54-58, 2001 (unpublished D.Phil. thesis, University of Oxford) (on file with author).

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Stone's critique of Fish draws heavily on the work of the later Wittgenstein. Space does not permit a full exploration of Wittgenstein's views, but we need a cursory examination in order to place in context the worry that I shall raise about Stone's invitation to stop seeking philosophical accounts of meaning.[3]

The relevant portions of Wittgenstein's writings appear mostly in the *Philosophical Investigations*;[4] they are sometimes known as the rule-following remarks. Wittgenstein is investigating, among other things, how we know what actions accord with rules, and he focuses on rules of mathematics and language. He is concerned to show that one does not always need to interpret language in order to understand it. By "interpretation", Wittgenstein means something a bit idiosyncratic: replacing one expression of a rule with another.[5] Sometimes interpretation of this sort is called for, Wittgenstein admits, but it cannot be the case that we always need to interpret to understand, because interpretations themselves are just further bits of language. If we could not at some point understand language without interpreting it, we could never understand language at all; we would be stuck in a endless regress, needing to interpret our interpretations. Clearly we can understand language, and so it must be possible to understand without interpretation.

As Stone explains, Fish's rampant interpretivism (to use Stone's phrase) is in part a consequence of his view that one can always raise doubts about the meaning of a text.[6] The interpretive community view is meant to explain how meaning gets fixed from among all the possibilities. But Wittgenstein rejects the idea that "secure understanding is only

[3] For a detailed account of Wittgenstein's rule-following remarks and their relevance to law, see Hershovitz, Scott, "Wittgenstein on Rules: The Phantom Menace", *Oxford J. Legal Stud.*, 22, 619, 2002.

[4] Wittgenstein, Ludwig, *Philosophical Investigations*, 3rd. ed., G. E. M. Anscombe trans., Blackwell, 1998.

[5] Wittgenstein, Ludwig, *op. cit.*, footnote 4, p. 201. This is not what we mean by "interpretation" generally. When we interpret a painting, we do not replace one expression of the painting with another. Similarly, interpreting a law need not involve replacing on expression of the law with another, though it may. The idiosyncratic use of "interpretation" is another cause for concern in extending Wittgenstein's arguments about interpretation and language beyond their intended scope.

[6] And in this way, Fish shares a lot in common with the skeptic Saul Kripke sees in Wittgenstein's writings. Kripke's skeptic also exploits that fact that, on some interpretation of a rule, any action can be made out to accord with it. *See* Kripke, Saul, *Wittgenstein on Rules and Private Language: an Elementary Exposition*, 1982.

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possible if we first doubt everything that *can* be doubted, and then remove all those doubts".[7] Explanations of meaning, he says, "remove or avert a misunderstanding... that would occur but for the explanation; not every one that I can imagine".[8] In the normal case, we understand without an explanation of meaning. Importantly, we may not be able to give an explanation of meaning if called upon to do so. According to Wittgenstein, we often follow rules or use language without being able to provide reasons to justify what we do. We might say that, in this way, our use of the rules of language is *unreflective*.

I shall not take issue with the Wittgensteinian picture of language that Stone draws upon. Rather I want to grant that it is true of language in general, but question whether it teaches us anything about law or literature, the two areas Fish is most interested in. I shall argue that it does not, and moreover, that we cannot take up Stone's invitation to stop seeking philosophical accounts of meaning within literature and law, even if we might be able to do so for language in general.

Even if Wittgenstein's picture of rule-following within language and mathematics is correct, it is not necessarily true of all rules, not even all rules within language or mathematics. Colin McGinn, in outlining Wittgenstein's position, writes

> ...where the bringing to bear of reasons *is* appropriate the possibility of doubt is correspondingly real. For when reasons are appropriately brought to bear we are dealing with beliefs and actions which are *reflective*, with respect to which reasons may be weighed and evaluated; and where the question of the goodness of a reason is appropriately raised it will be appropriate to entertain doubts about the quality of the reasons one has. But when an activity is as undeliberative as using language is it lies outside the sphere of the reason based and doubt ridden.[9]

Our question is what do Wittgenstein's remarks about rules tell us about law and literature? If McGinn is right, and I think he is, they tell us almost nothing about law and literature. Both are among our most reflective activities.

7 Wittgenstein, Ludwig, *op. cit.*, footnote 4, p. 87.
8 *Idem*.
9 McGinn, Colin, *Wittgenstein on Meaning*, pp. 22 and 23, 1984.

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Consider the lawyerly activity of distinguishing one case from another. Faced with a rule in a prior case adverse to one's client, a lawyer seeks to distinguish the prior case from the one at hand. In a case I recently worked on, the following question arose: is an admission made in the course of a summary judgment proceeding binding on a litigant? Multiple authorities stated clearly that such admissions were binding in the jurisdiction. However, the inquiry could not stop there. I had to anticipate how opposing counsel might distinguish the prior cases so as not to be bound. One difference jumped out—the previous decisions were all made *during* summary judgment proceedings; none of the cases addressed whether or not the admissions were binding in subsequent phases of litigation. But then, none indicated that admissions would not be binding in subsequent phases either. To convince a judge, we would have to be prepared to offer arguments for applying the rule so as to bind litigants in all proceedings, rather than only in summary judgment proceedings.

The practice of distinguishing cases demands that lawyers offer reasons for applying a rule one way rather than another. This sets law apart from our normal use of language. To see this, think of the skeptic Saul Kripke sees Wittgenstein's writings. Kripke's skeptic is engaged in a practice of distinguishing much like the lawyer's practice. Faced with the problem 68+57, the skeptic tries to distinguish the instant case of addition from all previous cases in order to convince us that the answer is 5 rather than 125. He tells us that these numbers are larger than we have faced before, and that with such large numbers, the correct answer is always 5. He challenges us to give a reason for thinking that the answer is 125, and the force of the skeptic's argument is our inability to do so.

Our short patience with Kripke's skeptic comes, I think, from his attempt to distinguish one case from another when doing so does not make sense because it has no place in the practice. The Wittgensteinian reply to the skeptic is that we do not need reasons; it is enough that we apply rules in the way we find natural given our training. In law, however, distinguishing one case from another and giving reasons for going on in a particular way are central parts of the practice. Our inability to give reasons for the way we apply rules in language or mathematics need not trouble us, but a lawyer who cannot give reasons for the way she recommends applying a legal rule is inviting trouble. Law is, to use McGinn's words, reason based and doubt ridden.

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One last thought experiment will help us to see that the wittgenstenian picture of language has limited applicability to law. Wittgenstein explains that underlying our ability to use language is the fortunate fact that we all find it natural to go on in the same way despite our inability to justify how we go on. He writes:

> Disputes do not break out (among mathematicians, say) over the question whether a rule has been obeyed or not. People don't come to blows over it, for example. This is part of the framework on which the working of our language is based ...[10]

As an experiment, let's rework this passage.

> Disputes do not break out (among *lawyers*, say) over the question whether a rule has been obeyed or not. People don't come to blows over it, for example. This is part of the framework on which the working of our *law* is based ...

The rewritten passage is absurd. Not only do disputes break out among lawyers over whether rules have been obeyed or not, these disputes are central to the working of law.

The point of this long digression into the applicability of Wittgenstein's picture of language to law is to suggest that the strategy Stone adopts to critique Fish's project has limited appeal. Even if Stone is right that we cannot and need not seek philosophical accounts of meaning in general, he may not be right about law. When it comes to language, we may not need an account which explains how meaning gets fixed from among all the possibilities; such a thing may not even be possible. But Fish's search for a means of verifying judgments may make sense for law, given law's status as a reflective practice, as a practice in which reason-giving and doubt have a central role.

Fish intends his interpretive community view to apply generally, to be an account of meaning not just within law and literature, but everywhere. But given a more modest scope, Fish's project can survive the objection Stone offers. In the end, Stone's major contribution is demonstrating that Fish has overextended himself, that he has strayed too far from his roots in law and literature.

[10] Wittgenstein, Ludwig, *op. cit.*, footnote 4, p. 240.

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