

*Carlos Pérez Vázquez**

10. Interpretation, Poetry and Law

SUMMARY: I. Introduction. II. Dialogue and Rational Construction as Features of the Interpretive Task. III. Law, Literature and Interpretation. IV. Conclusion. V. Bibliography.

I. Introduction

This article discusses legal interpretation and poetic interpretation as instances of speculative reasoning. Their similarities are based on the common use of analogical reasoning. Both reading a poem and solving a concrete legal dispute by using what lawyers call analogy, are examples of what Cass R. Sunstein has called an incomplete way of thinking.¹ Poetic interpretation is based on the assumption that no truth can be uncovered from a poem's meaning; since it aims at reaching persuasive conclusions. In my view, legal interpretation, especially the one Dworkin calls into play to solve so-called "hard cases",² fits a similar description. Quite often legal interpreters do not reach the truth scientifically, but aim at reaching persuasive conclusions to solve concrete legal cases. The fundamental difference between poetry and law is the system of sovereign right which makes legal interpretation enforceable. This article explores the interpretive relation between poetry and the law. There are strong reasons to believe that analogical thinking plays a fundamental role in this connection.

How can a poem be evaluated? How can we discriminate a good poem from a bad one? Is it a matter of personal taste, of personal preference? Is there a reliable method to follow to reach a sound conclusion from a poem's meaning? Is there a path to follow when faced with an ambiguous, unintelligible text which claims to be a poem? Is it possible to read something that we cannot understand no matter how determined we are to understand it?

Is it really that important to aesthetically evaluate a poem as a work of art? Is it possible to find similarities between the work of a poet seen as a writer and the work of any legal professional also seen as a writer? These are the basic questions that are explored below.

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¹ Cass R. Sunstein, *On Analogical Reasoning*, 3 HARV. L. REV. 741, 791 (1993).

² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harvard University Press, 1978).

II. Dialogue and Rational Construction as Features of the Interpretive Task

I understand interpretation to be a rational activity, an instance of rational dialogue. H. G. Gadamer says there is at least one obvious explanation of the proximity between composition and interpretation: they “have something in common. Both take place in the medium of language”.³

This work is based on a basic assumption: any common conversation can show us that language is a constructive process which implies an ability to articulate, but mainly a disposition to surrender one’s convictions and beliefs to another, to the speaker. In other words, reading is like listening. When someone reads another’s writings, her epistemic horizon opens up and can therefore be changed. Neither writing nor reading is possible beyond the realms of language and human rationality.

Umberto Eco explains how abduction links scientific investigation to metaphoric interpretation:

*In both scientific models and metaphoric interpretation, some distinctive features are selected as the base on which the work will be deployed. Such features are chosen following some linguistic conventions. The relation between metaphors and models should be seen from an analogical perspective [...] In a sense, metaphoric interpretation is similar to a new scientific paradigm [...] This can be considered as a significant contribution we owe to modern metaphorology.*⁴

Eco’s explanation of this idea supports the premise of this article:

It can be claimed that scientific abduction states a hypothetical law. It does so to build up a theoretical framework which can be used to solve a particular event. From there, scientific abduction proceeds to prove the law through experimental validation (if the law is right, then so and so must happen). On the other hand, metaphoric interpretation, which builds-up a theoretical framework as well, is not aimed at stating a universal law. Rather, it is interested in building-up an interpretation which justifies both itself and the context in which such interpretation happens (a sentence can be taken metaphorically when context justifies the interpretation). In other words, while metaphoric interpretation hunts out valid laws to explain discursive contexts, scientific enquiry does so to explain worlds. From here it can be claimed that metaphoric interpretation allows readers to choose. If I agree with Bohr’s analogy I am obliged to see

³ H. G. Gadamer, *Composition and Interpretation*, in THE RELEVANCE OF THE BEAUTIFUL AND OTHER ESSAYS 105 (Cambridge University Press, 1986).

⁴ UMBERTO ECO, LOS LÍMITES DE LA INTERPRETACIÓN 174 (Lumen, 1998) [English version: THE LIMITS OF INTERPRETATION (Indiana University Press, 1994)].

*atoms as if they were solar systems. If I agree with the Canticle of Canticles' analogy, I am obliged to see the girl's smile as if they were a herd of goats just in such text.*⁵

According to Eco, an adequate definition of abduction can be stated as follows:

Abduction is an inferential process (also known as hypothesis) opposite to deductive reasoning.

...

*In semiotics we face many cases in which Universal Laws are not hunted out, but explanations which can help out to clarify a concrete communicative event... To sum up we can say that abduction is useful to make hard choices when instructions are ambiguous.*⁶

And lastly:

*Metaphoric interpretation works with signs which, in its turn uncover other signs' contents. We are not talking about empiric similarity but of linguistic similarity. Metaphoric interpretation... does not unveil similarities but constructs them up.*⁷

In view of the above, the main argument in this article can be stated as follows:

- a) Poetic interpretation is a type of speculative, constructive thinking.
- b) Since legal interpretation is usually speculative and constructive, it is therefore closer to poetic interpretation than to scientific interpretation.

To fulfill this article's objectives, it is necessary to explore both the differences and similarities between poetry and the law. Different levels of interpretation have long existed in literary studies. We can, for instance, allude to Dante's *Convivio*, in which four levels of interpretation are mentioned: literal, allegorical, moral and theological.⁸ There are at least two similarities that link Dante's concept of interpretation to legal interpretation. On the one hand,

⁵ *Id.* at 175

⁶ *Id.* at 249-250

⁷ *Id.* at 163-164.

⁸ "To convey what this means, it is necessary to know that writings can be understood and ought to be expounded principally in four senses. The first is called the *literal*, and this is the sense that does not go beyond the surface of the letter... The next is called the *allegorical*, and this is the one that... is a truth hidden beneath a beautiful fiction. The third sense is called *moral*, and this is the sense that teachers should intently seek to discover throughout the scriptures, for their own profit and that of their pupils... The fourth sense is called *anagogical*, that is to say, beyond the senses; and this occurs when a scripture is expounded in a spiritual sense which... signifies by means of the things signified a part of the supernal things of eternal glory". DANTE ALIGHIERI, *THE CONVIVIO* (RICHARD LANSING trans., 1998), available at: <http://dante.ilt.columbia.edu/books/convivi/index.html>.

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lawyers, like readers of poetry, understand interpretative tasks as being multi-leveled. On the other hand, when lawyers interpret texts, they aim at retrieving literal meanings from said texts.⁹

However, bearing Dante's classification in mind, there are at least two clear differences between the interpretation of legal texts and of literary ones. On one hand, legal texts do not have allegorical meanings. In other words, legal texts do not hide "truth beneath beautiful fictions". On the other, whereas literary criticism allows disputes between the validity of literal interpretations and of multi-leveled interpretations within a text, these disputes do not exist in the legal arena. Judges' interpretations are obligatory.

No allegorical meanings can be found hidden in the law. Beauty is not a legal objective in itself. The standard definitions of "allegory" are either "a story, play, poem, represented symbolically" or "the use of such symbols".¹⁰

Allegorical interpretation allows me to claim a subtle difference which can be noted between legal and poetic interpretation, a difference derived from the relation between writing and reading. From my point of view, the use of symbols is a subtle difference between poetry and the law. Legal professionals do not always use symbols to write their documents but poets and authors use them as a common creative device.

Legal writing tries to clearly convey rules of conduct. However, sometimes lawmakers and parties to legal contracts do not want to bar future interpretations of a code or contract. That is why I speak of a subtle difference between poetry and the law. Even though it is not explicitly recognized as such, legal documents allow for two or more contesting interpretations.

However, the difference between poetry and the law remains. Even though legal documents may intentionally allow more than one interpretation, they will never allow aesthetic interpretations of any sort to take part in ruling on a dispute.

In my view, this idea supports Kenneth S. Abraham's description of the differences between statutory interpretation (i.e., interpretation of legal texts) and literary studies. In his essay "Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair", Abraham wrote the following:

⁹ Dante explains the importance of literal interpretation as follows: "In this kind of explanation, the literal must always come first, as being the sense in whose meaning the others are enclosed, and without which it would be impossible and illogical to attend to the other senses, and especially the allegorical". *Id.*

¹⁰ THE CONCISE OXFORD DICTIONARY 34 (Oxford, Clarendon Press, 1995).

The differences between statutory and literary interpretation, then, are differences in communities of interpretation. Law and literature are structurally different disciplines, and interpreters within each discipline use different strategies to aid in understanding their texts. These differences, however, are not prescribed by intrinsic differences between statutory and literary language. The court deciding *Riggs v. Palmer*, for example, was authorized to render a final adjudication of the meaning of a statute as it applied to the facts of the case. There is no analogous central authority in the literary world, although the imagination of a Huxley is no longer required to see that this is a possibility.

The Riggs court's conception of its proper relation to the legislature allowed, and in a sense required, that it speak the language of intention in interpreting the applicable statute. That statute was an "intentional object", the product of its author's purposes; because the court's interpretive strategies made it so.¹¹

Abraham then gives an account of these interpretive strategies. In doing so, he targets some concerns which explain the reason for my research:

These strategies are still so forceful that it would be astonishing to find a court today waxing eloquent about the alliterative qualities of the statute, the rich ambiguity of the word person in a phrase such as "[a]ny person may make a will", or the symbolism of the legislature's confrontation with the problems of mortality. It would be equally surprising for a literary critic to suggest that the meaning of the poem "The Tyger" depends on the effect of certain fundamental maxims, for example, that there is a God and that he is benevolent, which no poem may supersede.¹²

However, Abraham's comments do not end there.

Competent, professional interpreters of statutes know that there is no symbolism in statutes. Professional literary critics know that, today at least, poems are not interpreted against background standards of morality in the same way as are statutes. These professionals have been trained in disciplines guided by detailed codes of interpretive behavior. By virtue of conformity of these codes, their interpretations are both more competent than that of the initiate and more reckonable. Indeed, part of their work may well be seen as "teaching" others how to read.¹³

¹¹ SANFORD, LEVINSON & STEVEN MAILLOUX (EDS.), *INTERPRETING LAW AND LITERATURE. A HERMENEUTIC READER* 126 (Northwestern University Press, 1991).

¹² *Id.*

¹³ *Id.*

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Abraham's concerns target the main objective of this article: is it possible to read a poem using legal methods of interpretation? One answer can be as follows: using legal interpretive methods, lawyers can make sensitive readings of poetry. Besides, using legal methods of interpretation, lawyers can give readings of poetry which can be shared by other lawyers. The idea here is not to replace the sophisticated interpretive methods used by literary critics, but to show how legal methods can be used to read poetry. My goal is to show how legal professionals can read poetry by using some of the cognitive mechanisms they commonly use.

The main difference between legal interpretation and literary criticism is clear. There are different approaches to legal interpretation, but the use of creative devices such as analogical reasoning and *a fortiori* reasoning are institutionalized.

It can be argued that certain literary critics might completely oppose the use of creative strategies for interpreting poems and decide not to use them at all. This difference may have a deeper reason which can, in turn, be considered a third difference between legal interpretation and poetic interpretation. In his essay "The Constitution of the United States: Contemporary Ratification", William J. Brennan Jr., a liberal Supreme Court Justice, wrote:

Constitutional interpretation for a federal judge is, for the most part, obligatory. When litigants approach the bar of court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate the full meaning of the Constitution's provisions. Unlike literary critics, judges cannot merely savor the tensions or revel in the ambiguities inhering in the text — judges must resolve them.¹⁴

In general, legal interpreters have the obligation of interpreting the law. Brennan's argument can easily be extended to lawyers and other legal professionals such as prosecutors or arbiters. All of them are obligated to interpret the law.

The difference between the existing interpretive institutions is not the only one separating poetry and law. We can say, for instance, that although many legal documents do contain stories, it is nonetheless obvious that these stories must be narrated clearly and directly, and not allegorically.

According to the basic principles of the Rule of Law, legal documents must be as clear and straightforward as possible. Therefore, the use of symbols is not common in legal documents.¹⁵

¹⁴ *Id.* at 14

¹⁵ Even though the use of symbols in legal documents is not very common, when they appear —mainly as abbreviations— a previous clarification on how these symbols are used is established for each case. This is particularly true of drafting contracts where the legal definitions commonly occupy the first part of the document.

There is yet another difference: the relation between form and content is fundamental. Certain legal actions must fulfill concrete formalities in order for them to be valid. However, the need for clarity in legal documents prevents the use of any sort of sophisticated symbolism. Bearing Dante's classification in mind, it can be said that an obvious consequence of the absence of allegories in legal documents is that lawyers do not interpret legal texts to produce pleasure. Moreover, legal documents cannot allow any sort of lie to exist within them, not even beautiful ones.¹⁶

Perhaps some legal writings are more precise, more accurate or even more elegant than others. So, it can be claimed that a particular ruling is more beautiful than another or that a contract's aesthetic achievements are higher than another's. However, these differences still have no immediate legal relevance from an interpretive point of view. In other words, although the aesthetic irrelevancy of legal texts can say much about an important distinction separating interpretation from writing, it is not important from a strictly interpretive point of view.

Further clarification must be made. The allegorical difference separating poetry and the law is not very solid. It can be established as follows: even though legal documents do not seek to hide truth behind beautiful fictions, the rhetorical devices used to write and interpret legal documents and the rhetorical devices used to write poetry are, basically, the same. As Kathy Eden reminds us in her reading of Aristotle's concept of equity: When the law is either silent or inappropriate before a particular case, the preservers of the law must interpret the intentions of the lawgiver by inferring what he would have legislated in view of the present situation (*Nicomachean Ethics*, 5.10.5).¹⁷

So far, three premises have been used to build the argument supporting the existence of similarities between poetry and the law. First, writing legal documents and writing a poem usually imply the use of similar rhetoric devices. Second, these rhetorical devices can be recognized by the reader or the interpreter of either a legal text or a poem. Finally, the fact that writing and reading are connected can be proved by thinking about how a poet rewrites his work.

Before using these premises to reach a conclusion, further questions need to be answered: if poets and legal writers use similar rhetorical devices in writing, what prevents legal writers from writing allegories? On the other hand, if the similarities between writing and reading link poetry to

¹⁶ The use of rhetorical strategies for persuading listeners is very common in common law where trials are conducted orally. At a trial, lawyers face each other, a judge and sometimes even a jury. The importance of giving seductive performances for favorable resolutions is evident. Such is not the case in Mexico, where trials are conducted in writing.

¹⁷ KATHY EDEN, *POETIC AND LEGAL FICTION IN THE ARISTOTELIAN TRADITION* 44 (Princeton University Press, 1986).

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the law, what prevents legal interpreters from interpreting allegories? The answer to both questions is straightforward: neither legal interpreters nor legal writers have any intention of doing so. In other words, they do not use their rhetorical powers to the fullest. And they do not do so because their professional objectives are not directly concerned with producing beautiful documents, providing pleasure to their readers or writing elegant texts. However, although legal professionals do not pursue aesthetic achievements, it does not follow that they are not able to do so.

Since rewriting can be considered a step of the writing process and can also be understood as an interpretive activity, it can be claimed that writing a text involves at least one interpretation done by the author himself. Therefore, writing and rewriting are united in a practical process known to any author. The important thing, however, is for both a legal writer and a poet to be familiar with this process. Poetry and the law can be seen as activities that share common practices. Thus, writing and interpreting legal documents and writing and interpreting poetry are close to each other from a methodological point of view. As we will see, there are at least a couple of Mexican legal devices of interpretation which can support this claim.

As a matter of fact, legal writers could try to build up allegories simply by using some of the rhetorical devices at hand in their daily work. In my view, traditional legal methods of writing and rewriting—which are also legal methods of interpretation—can be used to write poetry as well.

A second similarity between poetry and the law is based on the fact that legal interpreters do not reject the possibility of interpreting a legal document beyond its literal meaning. In other words, simply because allegorical interpretations of the law do not exist, it does not follow that literal interpretations are the only possible kind that can be used to interpret a legal document. On the contrary, it might be said that there is professional consensus that requires a legal text to be interpreted beyond literal readings.

In order to provide a more complete explanation of this professional consensus, it is important to know that there are different kinds of legal documents. A legal opinion issued by a judge or a court is a particular kind of legal text, which differs from a lawsuit, a code or statute. However, a common feature of these legal documents is the fact that they can be read and, therefore, interpreted by lawyers, judges or even scholars. All legal documents can be interpreted and their interpretation is not necessarily literal. Sometimes, interpretive instructions to decode the law have been institutionalized, as in article 14 of the Mexican Constitution.

Legal documents have more than one literal meaning because they are not always clear enough to provide a single, unchallengeable solution to a legal dispute. Lawyers do their job by contesting another's interpretations of the law because the legal system is not complete; on the

contrary, it is complete through interpretation. A lawyer's job is to interpret the law beyond the literal meanings of codes, statutes and other legal documents.

Latin American lawyers have recently begun to consider the concept of legal interpretation an open-ended activity. From a historical point of view and following Rodolfo Luis Vigo's account, one dogmatic school dominated legal interpretation in the nineteenth century. As Vigo states: "Savigny defines legal interpretation as the reconstruction of the ideas embedded in the law. From Ihering's point of view, since legal interpretation does not create anything new, it can be seen as jurisprudence of a lesser kind. Back then, legislators were considered the true interpreters".¹⁸

Since legal interpretation was not a creative task, it can be said that lawyers were not real interpreters at all. According to this dogmatic approach to interpretation, lawyers have the mechanical job of interpretation achieved by resolving syllogisms derived from a legal text understood as a main premise. However, this situation no longer prevails.

In spite of Vigo's account, professional consensus of the existence of several interpretive layers can be traced throughout history. Kathy Eden explains the multileveled interpretive nature of the law in terms of its fictional nature: "Through an action *fictionia*, the *Praetor* extends the formula of an existing civil law action to a case not strictly under its terms by a direction in the *intentio* to the judge to proceed as if a state of affairs or set of facts existed, whose hypothesized existence for the adjudication in question assures an equitable decision".¹⁹

To speak of the fictional nature of legal interpretation is to speak of the existence of a creative endeavor. Therefore it is not unusual to find Eden quoting Quintilian's *Institutio Oratoria* as follows:

*I think I should also add that arguments are drawn of merely from admitted facts, but from fictitious suppositions... When I speak of fictitious arguments, I mean the proposition of something which, if true, would either solve a problem or contribute to its solution, and secondly the demonstration of the similarity of our hypothesis to the case under consideration.*²⁰

¹⁸ RODOLFO LUIS VIGO, INTERPRETACIÓN JURÍDICA 16 (Rubinzal-Culzoni Editores, 1999).

¹⁹ KATHY EDEN, *supra* note 17 at 46

²⁰ *Id.* at 47-48. Eden draws the argumentative line all the way back to Aristotle: "Like the *Praetor*'s instructions to his *iudex*, then Quintilian's instructions to his orator make explicit the coincidence between making fictions and reaching equitable judgements. In view of the debt of Roman legal philosophy to Aristotelian legal theory, on the one hand, and of Quintilian's *Institutio* to Aristotle's *Rhetoric*, on the other, we should not be surprised to find the analogy in Aristotle's own thinking. Aristotle, as we have seen, considers equity superior to strict justice because it can move more freely between the generality of the law and the details of the individual case". *Id.* at 48.

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The interpreter's task can be then understood as a creative one. That is precisely the idea behind Vigo's claim of the change in the role of a legal interpreter. According to Vigo, legal interpretation is not only a judicial feature. Nowadays, judges, lawyers, lawmakers and even legal scholars are recognized as valid interpreters of the law. As Vigo puts it:

*In dogmatic interpretation, judges deploy the interpretive task. They were merely obligated to define what the legislator's intention was. Therefore, interpretation was seen as the opposite of legal creation and faithful to the legislator's credo. Under such a view, science is responsible for re-constructing the law systematically.*²¹

The role of legal interpreters is no longer exclusively that of judges and courts. In clarifying this change, another explanation arises. In our days, using logical inferences to obtain the meanings of the law can be considered an incomplete enterprise. Comprehensive interpretive work aims at solving the particular case at hand. Vigo puts it as follows:

*Contemporary theory highlights the common nature of legal professionals: whether teaching, consulting, counselling or judging, all of them have to find a solution for individual cases. There is no substantial difference bringing legislators and judges asunder. Their differences are rather quantitative. Legislators issue legal commands to rule on every person and every case. Judges do so for individual persons and individual cases.*²²

But, what are lawyers looking for? What is there beyond the literal meaning of the law? The answer can be as follows: lawyers look for what the law has to say in the particular case at hand or—as Dworkin has put it—the purpose guiding legal interpretation that the interpreter has to construct. If we accept that whatever the law has to say must be looked for in order to sort out every single case, we have to decide whether this “voice” can always be retrieved by means of a literal interpretation. As we will see, the use of analogical thinking as an interpretative device shows that literal interpretation is not always enough.

As a matter of fact, this legal device of interpretation runs against the opinion of some scholars in the sense that legal interpretation can be done by making no reference whatsoever to any external consideration.

As Edward W. Said reminds us, controversies between “literalist” approaches to interpretation and “non-literalist” approaches to interpretation can be tracked back to the disputes

²¹ RODOLFO LUIS VIGO, *supra* note 18 at 25.

²² *Id.* at 25.

held between the Zahirite and Batinist schools on how the Koran was to be interpreted in Andalusia in the eleventh century:

*Batinists held that meaning in language is concealed within the words; meaning is therefore available only as the result of an in word tending exegesis. The Zahirites—their name derives from the Arabic word for clear, apparent, and phenomenal; Batin connotes internal—argues that words had only a surface meaning, one that was anchored to a particular usage, circumstance, historical and religious situation.*²³

According to Said's account of the Arabic interpretive tradition, the Zahirites were opposed to the "excesses of the Batinists, arguing that the very profession of grammar... was an invitation to spinning out private meanings in the otherwise divinely pronounced and hence unchangeably stable, text".²⁴

Kenneth S. Abraham's remarks explain the similarities linking poetry to the law as follows:

The issues that trouble literary theory, however, are strikingly similar to those that have troubled thinking about statutory interpretation...

*Those familiar with only literature or law may be struck by the similarity of the concerns of the disciplines. Both are concerned with the extent to which a text is "self-interpreting", with a meaning in the language of the text itself. Both are also troubled by claims that interpretation is a subjective and even arbitrary process by which individuals impose their prejudices onto texts in the guise of "interpreting" them. Moreover, even proponents of the polar positions are notably in agreement on a crucial point. At both extremes interpretation is seen as the operation of an independent, autonomous force that determines meaning.*²⁵

I have explored the general dimensions of the relationship between law and literature elsewhere.²⁶ These dimensions are based on a concept of law and literature linked by

²³ EDWARD W. SAID, *THE WORLD, THE TEXT AND THE CRITIC* 36 (Harvard University Press, 1983).

²⁴ According to Said, "the Zahirite effort was to restore by rationalization a system of reading a text in which attention was focused on the phenomenal words themselves, in what might be considered their once-and-for-all sense uttered for and during a specific occasion, not on hidden meanings they might later supposed to contain". *Id.* at 36-37.

²⁵ SANFORD, LEVINSON & STEVEN MAILLOUX, *supra* note 11 at 116-117. Abraham's description continues as follows: "For the legal formalist and the New Critic the text is a separate object with meaning that inheres in its language. The meaning is simply discovered by the reader, whose views remain subordinate to the 'plain meaning' of the text. In contrast, for the legal realist and the subjective or 'deconstructive' literary critic, the autonomous individual reader creates the text. For theoretical moderates, interpretation is, in the end, some combination of the two extremes; the text is determinate to a point, prescribing its own meaning, but is otherwise dependent on the creative powers of the interpreter". *Id.* p. 117.

²⁶ Carlos Pérez Vázquez, *Derecho y literatura*, *ISONOMÍA. REVISTA DE FILOSOFÍA Y TEORÍA DEL DERECHO*, April 2004, at 135-153.

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common features. As a summary, from my point of view, there are three dimensions that explain the relationship between law and literature. First, I find an aesthetic dimension which contains all the great works of literature that explore traditional legal topics such as the death penalty, imprisonment, the chaotic way in which judicial systems work and so on, from an artistic perspective. Secondly, both law and literature can be seen as interpretive events. There is an interpretive dimension in which both legal professionals and literary critics are interpreters. Thirdly, there is a written dimension linking law to literature. Legal professionals, literary critics, authors and poets are all writers.

From my point of view, all the similarities linking literature to the law can be used to explain the similarities linking poetry to the law. However, this article aims at exploring the relations between poetry and the law derived from the interpretive dimension and not how poets have explored traditional legal topics.

There are some interesting links found in some of Susan Sontag's famous ideas against interpretation and Zahirist interpretive tradition. It seems to me that these ties can shed some light on the relationships between literary interpretation and legal interpretation. Sontag's influential article "Against Interpretation" gives us a stronger grip on both the differences and similarities between literary and legal interpretation. First, let us deal with the effects of Sontag's ideas on the differences between poetry and the law. At the core of this differentiation, I find a vital assertion on the importance of content within any kind of text, which Susan Sontag expresses it as follows:

The fact is all Western consciousness of and reflection upon art have remained within the confines staked out by the Greek theory of art as mimesis or representation. It is through this theory that art as such —above and beyond given works of art— becomes problematic, in need of defense. And

it is the defense of art which gives birth to the odd vision by which something we have learned to call "content", and to the well-intentioned move which makes content essential and form accessory.

...Whether we conceive of the work of art on the model of a picture (art as a picture of reality) or on the model of a statement (art as the statement of the artist), content still comes first. The content may have changed. It may now be less figurative, less lucidly realistic. But it is still assumed that a work of art is its content. Or, as it is usually put today, that a work of art by definition says something.²⁷

²⁷ Susan Sontag, *Against Interpretation*, AGAINST INTERPRETATION AND OTHER ESSAYS 4 (Picador, 2001).

According to Sontag “the modern style of interpretation excavates, and as it excavates, destroys; it digs ‘behind’ the text, to find a sub-text which is the true one”.²⁸ It can be said that, from Susan Sontag’s point of view, this interpretive style can seem as excessive as the Cordovian Batinist’s was ten centuries ago.

Here again, there is a clear distinction between legal and literary interpretation. Today, no one argues against the idea that the law “says something” which must be retrieved. In other words, no one rejects the idea that the law is filled with content through interpretation.

Sontag’s concerns about the excessive attention literary critics place on content seems to have no importance to legal interpretation. The relationship between form and content in law is an intimate one. At least in the Mexican system, there are some legal events which require clear formalities. Marriage is a good example. The law requires a judge to utter certain words in a particular order for two people to be married. If the judge fails to do so, then the marriage can be declared null and void.

So, a difference between law and literature can be stated as follows: although reading a literary text may allow separation between form and content, reading a legal one cannot rest upon such a separation.

The closeness between form and content in law can be better understood by comparing it to the relationship between writing and interpreting as referred to above. There are many legal documents which must be written a certain way. For instance, the Mexican procedure for protecting fundamental rights (*juicio de amparo*) requires every single plaintiff to follow a particular model to draft a lawsuit. Although it can be said that writing poetry using a rigid metrical scheme is similar to writing a lawsuit, nothing stops poets from writing in free verse. Lawyers that initiate a legal procedure to protect fundamental rights do not have a similar privilege. They cannot write the lawsuit as best suits them.

The similarities linking Sontag’s ideas to the Zahirites views are not only very interesting from a historical point of view. They are also very useful to support similarities between literary and legal interpretations after establishing a subtle differentiation between them. We must recall that Batinists held the view that the Koran’s contents could be retrieved. Therefore, it is possible to claim that the Batinists’ interpretations of the Koran are closer to modern legal interpretation than the Zahirites’, and that modern legal interpretation is closer to the Batinist tradition than Sontag’s proposals.

²⁸ *Id.* at 6.

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The interesting thing however is that Susan Sontag did not completely reject the possibility of interpreting the content of a work of art. This gives us another chance to understand not only the differences, but also the similarities between legal and literary interpretation.

Susan Sontag's complaints about the harmful interference of interpretation in art are brilliantly established in a few lines: "In the most modern instances, interpretation amounts to the philistine refusal to leave the work of art alone. Real art has the capacity to make us nervous. By reducing the work of art to its content and then interpreting *that*, one tames the work of art. Interpretation makes art manageable, conformable".²⁹

Reference to the main difference between law and literature can be drawn from Sontag's argument: the law cannot be left alone. Legal interpreters exist because legal documents need to be interpreted and their meanings need to be perfectly understood, perfectly tamed. Legal interpretation is necessary because there is an objectivist assumption that affects the law. Legal readings of legal documents are used to solve disputes and therefore, it is much more useful to approach them in a way that renders the law "manageable, conformable".

Legal interpreters play a fundamentally creative role. As Rodolfo Luis Vigo points out, "the interpreter has the responsibility of creatively settling from the law as a whole, the unpublished fair solution that will contribute to the case that must be addressed or resolved".³⁰

The reasons behind Sontag's ideas on the Zahirite interpretive position are clear. However, common ground is quite difficult to argue from a legal perspective. Legal professionals need to tame the law because society cannot afford to allow the resolutions of legal disputes to be put aside.

Legal systems exist to provide justice by solving controversies. Legal controversies cannot be solved unless what the law means is at least described or paraphrased. From my point of view, there is a relation between Sontag's concerns and legal interpretation. Sontag wrote of her concerns as follows:

What kind of criticism, of commentary of the arts, is desirable today? For I am not saying that works of art are ineffable, that they cannot be described or paraphrased. They can be. The question is how. What would criticism look like that would serve the work of art, not usurp its place?

What is needed, first, is more attention to form in art. If excessive stress on content provokes the arrogance of interpretation, more extended and more thorough descriptions of form would silence. What is needed is a vocabulary—a descriptive, rather

²⁹ *Id.* at 8.

³⁰ RODOLFO LUIS VIGO, *supra* note 18 at 39.

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*than prescriptive, vocabulary—for forms. The best criticism, and it is uncommon, is of the sort that dissolves considerations of content into those of form.*³¹

I have argued against any attempt to separate legal documents from their content in any way.

I supported the view that legal interpretation can only aim at deciphering the content of a legal document. However, it seems to me that Sontag's concerns can help us improve the general objective of legal interpretation.

A balance between form and content within legal documents strengthens legal interpretations. Furthermore, legal interpretations which give form a more important role in the interpretive process can only be creative ones.

The reasons behind this opinion are based on the relationship between writing and reading which, in turn, is based on the relationship between content and form. Rewriting takes place after a holistic review of form and content. Rewriting will always affect and be affected by content and form.

We have established a connection linking Susan Sontag's ideas to the Zahirite school of interpretation during Arab domination. However, Sontag's ideas can also be linked to a particular school of legal interpretation which still exists today. In American Jurisprudence, there is a clear distinction between those supporting a conservative interpretive position and those supporting a more liberal one regarding the United States Constitution. According to the former, the Constitution of the United States must be interpreted narrowly without any room for any creative interpretation whatsoever. Meanwhile, those supporting a more liberal interpretive position claim that some of the more important rights in American Legal History have been adjudicated by the judges interpreting the Constitution more creatively.

Justice Brennan expressed his opinion on the contesting views on constitutional interpretation as follows:

Because judicial power resides in the authority to give meaning to the Constitution, the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation.

There are those who find legitimacy in fidelity to what they call "the intentions of the Framers". In its most doctrinaire incarnation, this view demands that justices discern

³¹ SUSAN SONTAG, *supra* note 27 at 12

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exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them.

...We current justices read the Constitution in the only way we can: as twentieth-century Americans... Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.³²

In the last twenty years, a conservative turn has dominated American politics and three Republican presidents have nominated conservative judges to the Supreme Court. As a result, a constrained approach has been upheld by the majority of United States' Supreme Court judges over the last decades. However, from my point of view, the interesting thing is the closeness between the conservative approach to constitutional interpretation and Susan Sontag's opposition to interpretation. It is striking to think that both positions are close to each other because of a common reverence to the text.³³

We have said that legal interpreters are obligated to interpret the law. This obligation can also help us clarify possible misunderstandings on legal interpretation in general. Misunderstanding derives from a false analogy between literary criticism and legal interpretation which can be stated as follows: while an author-poem-reader trio that explains the interpretive process from a literary point of view, an equivalent legislator-law-judge trio fittingly explains the legal interpretive process. However, the process of interpretation for ruling on legal disputes is based on a much more complex mechanism. The law can be changed by the interpreter. Revolutionary readings are not initially made by judges. Lawyers play the role of first level interpreters of the law. Besides, once a legal dispute has been solved, it cannot be said that the matter is settled once and for all. On the contrary, almost every legal system has mechanisms to allow judges to modify previous rulings. In other words, the law authorizes certain legal interpreters (lawyers, prosecutors, judges, legal scholars) to modify previous rulings. To do so, a permanent discussion and reinterpretation of already ruled cases is necessary.³⁴

We have mentioned three clear differences separating literature from the law. They can be listed as follows:

³² SANFORD, LEVINSON & STEVEN MAILLOUX, *supra* note 11 at 17-18.

³³ President George W. Bush has recently nominated John Roberts, a young, talented and conservative judge, as Chief Justice of the United States. In his introductory speech, Mr. Bush said his choice was based on Robert's "deep reverence for the Constitution". Available at <http://us.cnn.com/2005/POLITICS/09/05/roberts.nomination/index.html>.

³⁴ In the Mexican system, the interpretation of legal texts may be revived years after a Supreme Court resolution has adjudicated the legal dispute which produced the contested interpretation.

- a) The institutions of legal interpretation are different from those of literary interpretation. When legal institutions rule on legal disputes, they establish authoritative interpretations to be followed by other interpreters.
- b) Legal interpreters are obligated to perform interpretive activities. Literary critics are not.
- c) Aesthetic considerations play no role in legal interpretation. However, nothing prevents lawyers from using these criteria to evaluate their interpretations. As a matter of fact, the relevance of the relationship between form and content in law seems to point to that direction. That being said, the similarities between poetry and the law, in particular those relevant to this article's goals, can be summed up as follows:
- a) Since both legal interpreters and literary critics, in general terms, aim at finding out the purpose of a text, it can be claimed that both perform creative tasks. The differences are not intrinsic to the language used by both. Analogical reasoning is a common cognitive mechanism. It can be used in law and as well as in literary studies.
- b) Poems and legal texts are always open to review. Rewriting and revision imply and are based on interpretation. Therefore, poets and legal writers are at least interpreters of their own works.
- c) Poets and legal writers use analogical reasoning in writing, reading and rewriting texts.

III. Law, Literature and Interpretation

I am indebted to Ronald Dworkin for his insight, which in turn inspired this line of research. In a powerful article, the American philosopher wrote about the so-called "aesthetic-hypothesis":

*An interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art. Different theories or schools of traditions of interpretation disagree on this hypothesis, because they assume significantly different normative theories about what literature is and what it is for and about what makes one work of art better than other.*³⁵

The basic idea behind the theoretical relationship between law and literature as studied by American and British scholars is summed up in the previous paragraph. According to Dworkin, lawyers can learn a lot from literary critics. However, I believe that the interpretation of poetry can also benefit from the application of some of the interpretive methods used to resolve concrete legal controversies in the "real" world of the courts. This article proposes that legal methods of

³⁵ Ronald Dworkin, *How Law is Like Literature*, in A MATTER OF PRINCIPLE 149 (Harvard University Press, 1985).

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interpretation tell us something not only about the way we read poetry, but also about the cognitive mechanisms any author uses to rewrite his work.

From my point of view, there is a common bias concerning the relationship between law and literature, which can be considered profession generated. Many legal scholars are not interested in possible means for interpreting poetry when legal methods of interpretation are used. This is seen in the works of legal philosophers, who strongly debate how seriously lawyers should take literary influences, but do not seem much concerned about the implications of legal interpretation on literature.

Interpreting legal materials by using literary methodologies has generated a lot of research and academic discussion, but the relationship between the disciplines has not been explored the other way around. In short, the ways legal interpretation can help a reader tackle a poem has not been thoroughly analyzed.

It is possible to explain this phenomenon by claiming that the interest of legal academics is not aimed at enhancing the interpretation of literary texts. However, I think it might be interesting for readers of poetry to become familiar with legal interpretive tools and know that legal interpreters can also give perceptive readings of poetry. Therefore, this research points toward attempting to interpret poems by using legal methodologies.

There are some works that try to describe the similarities between legal and poetic interpretation. In my view, the most influential was written by Ronald Dworkin, who has recently written a new essay on interpretation. In it, he explains what he understands as “interpretation”. In a UCL seminar, the American professor endorsed the idea that the interpretation of a poem is a case of collaborative interpretation:

I shall defend a general account of interpretation... Interpretation is indeed a distinct form of inquiry. Its goal is to display its object's value for some purpose. That purpose is given by the interpretive genre itself. Each genre of interpretation is defined by a collective practice; each of these practices has a history and each is assumed by its practitioners to have a point or purpose. Any concrete interpretative claim begins in an assumption, most often hidden and unacknowledged, about what goal or goals should be attributed to the overall practice that constitutes the interpretative genre in which the concrete claim is placed... An interpretation of some object succeeds —it achieves the truth about that object's meaning— when it best realizes, for that object, the purpose properly assigned to the genre. It is often controversial, to a greater or lesser degree, what the purpose of a genre

*should be taken to be; it is therefore controversial, in parallel degree, what best interpretation is, in that genre, of any particular object.*³⁶

Dworkin's recent ideas are fundamental. A general account of interpretation is necessary to explain the use of analogical reasoning to interpret both poetry and legal documents and make such a claim possible. In my view, both legal interpreters and literary critics should ask themselves about the purpose of the legal documents and poems they encounter. A general account of interpretation, according to which every interpretive activity aims at discovering the purpose of the objects to be interpreted, applies to both legal studies and literary studies.

Another important instance of this is found in the magnificent essay "'Sonnet LXV' and the 'Black Ink' of the Framers' Intention" by Charles Fried, a Harvard Law School professor. Professor Fried's work does not analyse Shakespeare's famous poem from a literary point of view, but identifies the most relevant common features shared by the sonnet and the Constitution of the United States of America: their permanence through time.³⁷

However, studies concerning the relationships between law and poetry are not as extensive as those exploring the relationships between law and other literary genres. In fact, Dworkin's famous article has been celebrated for using a chainnovel as an analogy of the way judges do their work in the common law system.³⁸ Dworkin's first ideas on the nature of interpretation do not deal extensively with the implications of his theory within poetic interpretation. The explanation for this is, again, straightforward. Dworkin's approach was philosophical and must be read as a part of his entire jurisprudential system. Legal scholars' interests are focused either on incorporating literature's interpretative methods to the legal system or in denying the plausibility of such an incorporation. Legal scholars are not interested in producing fresh ideas to nourish debates among literary critics.

Dworkin's paragraph presents two very compelling and praise-worthy points. First, one has to read trying to look at the text in its best light. This is a generous approach to textual interpretation and implies a strong trust in the capabilities of human rationality. Even though some of Dworkin's

³⁶ Ronald Dworkin, *Interpretation, Morality and Truth*, paper presented at a UCL Seminar, Winter 2003, p. 8.

³⁷ Charles Fried, *Sonnet LXV and the 'Black Ink' of the Framers' Intention*, in SANFORD, LEVINSON & STEVEN MAILLOUX, *supra* note 11 at 45-51. The argument presented by Charles Fried brings about striking resemblances to ideas proposed earlier by H. G. Gadamer and to a poem written by Eliseo Diego entitled "Responso por Rubén Darío".

³⁸ Dworkin puts it as follows: "Suppose that a group of novelists is engaged for a particular project and that they draw lots to determine the order of play. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number, who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then he sends the two chapters to the next number and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating because each must read all that has gone before in order to establish, in the interpretivist sense, what novel so far created is". Ronald Dworkin, *supra* note 35 at 158.

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jurisprudential ideas can be thought of as extremely original, there is a connection linking his theory of interpretation of the law to some of Gadamer's ideas on truth in poetry:

It seems incontrovertible to me that poetic language enjoys a particular and unique relationship to truth. First, this is shown by the fact that poetic language is not equally appropriate at all times to any content whatsoever, and second, by the fact that when such content is given poetic form in language, it thereby acquires a certain legitimation. It is the art of language that not only decides upon the success or failure of poetry, but also upon its claim to truth.³⁹

According to both Gadamer and Dworkin, reading a poem implies, first of all, recognizing it as such, legitimating it as a work of art of a particular kind. Every single poem presented by its creator deserves a careful reading. The interpreter must point out a poem's achievements and failures from an aesthetic point of view.

A second important point is derived from Dworkin's paragraph: every reading of a poem is supported by a normative theory. Since there is always a normative theory which tells us how to read and guides our readings, the interpreter is not a free agent performing a particular task. An interpreter is influenced by personal taste, competence and aesthetic beliefs.

Joseph Raz has developed ideas on the kind of theories we do use to bear out our readings. These theories can be understood as those Dworkin identifies as "normative": "Interpretation consists in pointing to connections and analogies. The test of a good interpretation is that those connections and interrelations are significant in terms of, or by reference to, some general theory of general truths about people, society or whatever".⁴⁰

Having different theories for different ways of reading might generate philosophical debate. However, both Dworkin and Raz agree that there is no such a thing as casual or accidental readings. Every reading, every interpretation is influenced by the way the reader understands the world.

Can we consider any text a poem? If its author says so, and on a basic level of interpretation, whatever its aesthetic quality may be, we can.

³⁹ H. G. Gadamer, *supra* note 3 at 105.

⁴⁰ Joseph Raz, *Interpretation without Retrieval*, in *LAW AND INTERPRETATION ESSAYS IN LEGAL PHILOSOPHY* 167 (Andrei Marmor ed., Oxford University Press, 1998). Based on Raz's definition of interpretation, one can conclude that interpretation is an application of analogical reasoning. This is important because that specific kind of rationality is a basic feature of poetic interpretation.

This idea looks like an intentionalist notion. However, taking into account a poet's intention is consistent with defending a non-intentionalist approach to interpretation in general. As Joseph Raz has suggested, a distinction between the two levels of interpretation can be established:

I will distinguish two levels of meaning which I will call "deep" and "basic" meaning, though one should not make anything of the choice of these terms. The basic meaning of a work concerns the question of the subjects of the work ("a portrait of Alexander VI") or its literal content ("Is Salomé holding the head of John on a platter?" "What does the words of a poem mean?" and so on. The identification of a work's subject and literal meaning does give rise to interpretive issues and there is an understandable feeling that if nowhere else surely here the author's intention reigns supreme.

Take portraiture: is it not the case that if Giacometti makes a sculpture which he declares to be the portrait of Annette, then a portrait of Annette it is? It is made so by being baptized by him as such, and nothing else counts... I will focus on the deep level of meaning. It is captured by observations such as: "the painting portrays the compassion of the Christian victors towards the vanquished Muslims", "the play contrasts the new sophisticated metropolitan culture with the crudity of the traditional mores of the provinces", "the music is an expression of the passion of love, followed by the depths of despair when it is not requited", and so on... The deep, more than literal meaning is the subject of most discussions of the meaning of works of art.⁴¹

If an author presents his work as poetry, the reader is compelled to read it as such. However, the author's statement must be considered a preliminary clue on how to approach the work of art and nothing more. Therefore, a poet's intention expressed as "this is a poem, so read it as such" must be considered as playing a role similar to that of many artists when assigning titles to their works.⁴²

Some problems are not solved by recognizing nothing more than a preliminary informative statement in the author's declaration. One could think, for instance, of a particular problem that deals with an interesting question: what happens if the author's intention expressly refuses to identify a text with at least one kind of literary genre?⁴³

⁴¹ *Id.* at 156.

⁴² To illustrate how titles are commonly used by authors of a work of art to help interpreters, viewers or listeners understand a work's meaning, it is helpful to recall the way many Cubist painters select titles for their works. In this sense, for example, many of Picasso's paintings would be impossible to understand without a title.

⁴³ This question came to me after reading a recent book by Peruvian writer Jaime Bayley. JAIME BAYLEY, *AQUÍ NO HAY POESÍA* (Anagrama, 2001).

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I think that many of G. E. M. Anscombe's classical ideas and arguments about intention can help us:

But is there not possible another case in which a man is simply not doing what he says? As when I say to my self "now I press Button A" —pressing Button B— a thing which can certainly happen. This I will call the direct falsification of what I say. And here, to use Theophrastus' expression again, the mistake is not one of judgment but of performance. That is, we do not say: What you said was a mistake, because it was supposed to describe what you did and did not describe it, but: What you did was a mistake, because it was not in accordance with what you said.⁴⁴

In my view, a poem's meaning, just as Dworkin and Gadamer have said, can be unveiled trying to read the text in its best light. In other words, reading must be understood as a fair and generous enterprise guided by a constructive attitude.

I have claimed that there are differences that set poetry apart from the law. However, I have also claimed that there are similarities linking the two. The relationship between law and literature in general and between law and poetry in particular can be easily grasped by a common feature: they are both susceptible to being interpreted. According to Gadamer:

We can distinguish two different senses of interpretation: pointing to something and pointing out the meaning of something. Clearly both of these are connected with one another. "Pointing to something" is a kind of "indicating" that functions as a sign. "Pointing out what someone means", on the other hand always refers back to the kind of sign that interprets itself. Thus when we interpret the meaning of something, we actually interpret an interpretation. The attempt to define and establish the limits of our interpretative activity brings us back to the question concerning the nature of interpretation itself. For what is a sign? Is everything a sign in some sense?... Certainly we must often try to read the sign character of things. In this way we attempt to interpret that which at the same time conceals itself, as in the expression of gesture, for example. But even there, the interpretation arises within a self-contained totality and clarifies the direction in which the sign points by eliciting that to which it basically points from that which is itself confused, unclear, and indefinite. This interpreting is not a reading in of some meaning, but clearly a revealing of what the thing itself already points to.⁴⁵

⁴⁴ G. E. M. ANSCOMBE, INTENTION 57 (Harvard University Press, 2000).

⁴⁵ H. G. Gadamer, *supra* note 3 at 68.

Law and literature share the shortcomings and weaknesses of every natural language: they are insufficient and incomplete. However, they are also susceptible to spawning revelation through interpretation. In fact, the ambiguous nature of language requires the exercise of our interpretive skills.

As Gadamer has affirmed, poetry requires the intervention of a third party whenever its meaning is not clear at all.⁴⁶ Although many poems characteristically aspire to meaningfulness, poets sometimes choose not to bare their work to every reader. Anyway, whether the reader faces a transparent poem or a hermetic one, the truth is that interpretive skills are needed. Interpretation is always needed to read a poem. So far, so good, but someone may still ask if it is always possible to interpret a poem. There are poems with dark meanings, poems dark enough to make any attempt at deciphering hopeless and void.

Is obscurity a common feature shared by law and poetry? I do not think so. I have said that the law never intends to be ambiguous, but to be clear.

It is in everyone's best interest to have a reliable system to sort out legal controversies and it is evident that legal certainty is a product of meaningfulness. However, it is often possible to face legal conflicts that do not have a clear answer and in those cases legal interpreters are called to fill in the interpretive gaps in the legal system. Interpretation is as important to legal practice as it is to read a poem or, as Ronald Dworkin has put it, "legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally".⁴⁷ Therefore, at least a desire for intelligibility can be found within both the aims of legal practice and, in some cases, the aims pursued by poetry readers.

According to many respected legal scholars, law and literature are two very different fields and their differences must be always remembered by those lawyers trying to adapt literary interpretive methods to solve legal disputes. Among the most notable critics is Richard Posner, who has argued that:

⁴⁶ "We have only to interpret something when its meaning is not clearly laid down or when it is ambiguous. Let us recall the classical examples of things that require such interpretation: the flights of birds, oracles, dreams, pictorial images, enigmatic writings. In all these cases there are two sides to interpretation: first, a pointing in a certain direction that itself requires interpretation, but also at the same time a certain holding back on the part of what is to be shown in this way. We have only to interpret that which has a multiplicity of meanings... Art demands interpretation because of its inexhaustible ambiguity. It cannot be satisfactorily translated in terms of conceptual knowledge. And this is true of poetry as well... The ambiguous meaning of poetry is inseparably bound up with the unambiguous meaning of the intentional word... The elements from which language is constructed and which poetry shapes for its own purposes, are pure signs that can only become elements of poetic form by virtue of their meaning... Language as the medium and material

⁴⁷ Ronald Dworkin, *supra* note 35 at 147.

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The skeptical vein in literary criticism, and the hermeneutic theories that nourish it, show how difficult the interpretation of texts can be and by doing so should make lawyers, judges, and legal scholars more cautious, more selfconscious, and more tentative about the process of interpreting legal texts. But it has been the burden of the argument in this chapter that no specific techniques or discoveries of literary criticism, or literary analogies, such as that of the chain novel, are transferable to the law.⁴⁸

Many of Judge Posner's arguments are compelling. However, I believe that they are not meant to reject the similarities linking legal interpretation to literary interpretation. After all, to interpret is to find the meaning of something, and such an idea implies a basic understanding of both legal interpretation and literary criticism. Posner, like other legal scholars who have studied the relationship between law and literature, did not stop to examine how legal interpretive methods can be used to give sensitive readings of poetry. In other words, it could be true that no specific technique for literary criticism is transferable to law; however, from such a claim, it does not follow that legal techniques are not helpful devices to interpret poetry.

I have mentioned some biased approaches so as to think about the relationship between law and literature. However, there are still more dramatic ones. For example, it is possible to recall the tendency to consider literature as more important or "transcendent" than law, as well as writers' work as more sophisticated or complex than the work of the courts. Behind this widespread belief there is the concept of art as the highest expression of human nature, or as the highest product of human spirit whenever compared to other human activities and enterprises. According to this view, whereas poets, storytellers and novelists are illuminated by the flame of the art or something of the sort, legislators, judges and attorneys are trapped in their daily and somehow lower-class life.

From my point of view, this notion must be avoided not only because of the weak metaphysical propositions on which it relies, but also because of the pedantry it presupposes. There are no significant differences between the literary work of an author and any other person's work. In my view, this kind of thinking must be rejected on several grounds. First of all, writing is work just like any other. Besides, there is no doubt that many of the economic, scientific and technological advances over the last two centuries, which have had an incredible effect in elevating the quality of life of millions of persons in the world, are scarcely related to art in general. The existence and practice of Western legal ideas, such as the Rule of Law or the due process of law clause included in almost every democratic legal system nowadays, can be considered human achievements as praiseworthy as any great poem, short story or novel.

⁴⁸ See notes 35 and 36 above.

Furthermore, from a historical point of view, the popularization of art is a recent phenomenon. It can even be considered a by-product of the improvements in the economic conditions of daily life, which have never been as good and widespread as today and which are the product of the work of many people who have never written literature in their entire life.

IV. Conclusion

The sort of prejudice I refer to is so common that it is easy to find clear examples of it, just as the one I found in a very interesting article written by Jessica Lane entitled “The Poetics of Legal Interpretation”:

*Literary criticism is the most highly developed arena we have for the study of the discourse in all its manifestations. Language, the symbolic order, through its construction of the subject, is what constitutes the world, its most perfect products being the texts of reality and art. Consequently, literary criticism responds more deeply to the need for individuation, for elaboration of the intricate possibilities hidden in the dialectic of writing and reading.*⁴⁹

I do not think more should be read into this cliché because legal practice cannot be carried on without language. It is true that the way lawyers use language might never be as elegant or as innovative as the way professional poets can; however, it does not intend to be so.

Moreover, the raw material used by lawyers and writers is mainly the same: words. The law is as fitting a field to investigate the strengths and weakness of language as literature is.⁵⁰ In fact, the origin of interpretation as a creative activity was much closer to judicial practices than to literary delights⁵¹.

In my view, a legal professional can use methods of interpretation available to him in order to achieve sensitive and speculative readings of poetry. In other words, I think people who usually see themselves as distanced from poetry can produce reasonable readings of poetry.

My claim is two-fold and can be stated as follows: on the one hand, lawyers can interpret poetry by using what they know. On the other hand, from a semiotic point of view, legal interpretation can be seen as an instance of speculative and constructive interpretation.

⁴⁹ SANFORD, LEVINSON & STEVEN MAILLOUX, *supra* note 11 at 283

⁵⁰ I think Richard Weinsberg is right in writing: “Once the judge begins to write, his use of power automatically is bound up in the words he uses... all judges, conscious or no of their crafting powers, must match language to outcome in order to produce a coherent result”. RICHARD WEINSBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* 8 (Columbia University Press, 1992).

⁵¹ See *supra* note 17.