The Interpretation Game

The Interpretation Game
How Judges and Lawyers Make the Law

Robert Benson

With a foreword by Ronald K. L. Collins

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For Lesley Ann

And dedicated to the memory of Jorge Luis Borges,
whose crazy stories provided a sane refuge
when I was a law student

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Foreword

Law, like life, is what we make of it.

That maxim is hardly controversial. But it becomes so when that "we" includes judges. The maxim obviously applies to the legislative branches. Moreover, when duly authorized, the executive branches of our federal and state governments also make law. What, then, of the judiciary? Do judges *make* law? Well, yes. Just consider our centuries of common law. Beyond that, however, judges ought not—nay, must not!—make law. Or so the old law story goes.

Contrary to the old story, there is also an old truth crafted in stone. Though few see it, you'll find it on the friezes in the solemn chamber of the United States Supreme Court. As the nine Justices, suited in their symbolic robes, glance up to their left and right, they bear witness to images of the great lawgivers of mankind—from Menes and Hammurabi to Moses and Confucius to Justinian and Charlemagne to King John and Blackstone, among others. The last person in this lineup of great lawgivers is neither a prophet nor a king but a judge—Chief Justice John Marshall.

Make of it what you will, but in 1803 John Marshall *made* law in *Marbury v. Madison*. And for all the trees leveled in the mind-numbing duels over judicial review, the law Marshall made centuries ago remains the supreme law of our land, just as if he had "quilled" it on the parchment of the Constitution of 1787. Could he have ruled otherwise? Yes, of course. But the America we know today—the America of constitutional checks and fundamental freedoms—could not exist without John Marshall's jurisprudential handiwork.

Let me be forthright: Judges do make law. Liberal judges of old like Oliver Wendell Holmes made law. Conservative judges of old like Rufus Peckham did likewise. So, too, with their modern counterparts—liberal textualists like Hugo Black and their conservative counterparts like Clarence Thomas. And the same holds true for the dizzying "jurisprudence" of "balancers" like the circuitous Felix Frankfurter and the confusing Stephen Breyer. For better or worse, much of our law is what they and other judges have made it. Mind you: God did not command them, the Founders did not constrain them, the Constitution's text

and history did not confine them, and no judicial oath or code controlled them. Not really. The basic restraint on their power was their conscience, or if you prefer, their will, *and* what the public would tolerate.

At its core, that is the lesson of *The Interpretation Game*. And that lesson goes beyond judges. According to Professor Benson, every bureaucrat, every teacher, every citizen, and every interpreter at some point makes rather than finds law when interpreting legal texts. In the interpretive process, one inevitably breathes his or her life into a text in order to give it this or that "meaning." That's just the way words work. Or more accurately, that is how we make them work.

The Interpretation Game is a sobering lesson grounded in the soil of realism. In that regard, Robert Benson is a sort of modern-day Niccolo Machiavelli, though not in any pejorative sense. To reweave a thread of thought borrowed from the father of modern political science: Others will tell you what the law should be, but I will tell you what it is. Heed those words as you read this slender volume of clear-headed, say-it-as-it-is talk about American statutory law, common law, and constitutional law. (In the Web supplement to his work, Professor Benson applies his straight talk to international law too.)

Beware: What you are about to read flies in the face of what every law student is taught, namely, that *the law* is what some dead souls proclaim/or that *the law* is what a dead-letter text announces/or that *the law* is structure/or that *the law* is neutral/or that *the law* is bound by precedent. If you believe that, believe it like you would a novel by Dickens, Melville, Twain, Stevenson, Lawrence, Cather, or even John Grisham. It all makes for fine fiction.

This debate lingers mainly because law is typically taught from an *appellate judge's perspective*. This judge-centric perspective, of course, deprives students of a variety of other important perspectives. But that is a gripe for another day. For now, it is enough to say that if law schools insist on perpetuating such myopia, they should at least recognize the role of realism in the process. A contemporary example may help to illustrate my point, and one of the key points of *The Interpretation Game* as well.

Two friends of mine—one a respected constitutional law scholar, the other a noted First Amendment lawyer—recently told me how they litigate certain cases before the Roberts Court. There is a class of cases, they observed, in which the only vote that really counts is that of Justice Anthony Kennedy. That is, since four justices almost always line up one way, and four others the opposite way, the key vote is left in the lap of Justice Kennedy. "So I brief my case," one of them said, "in a way that is pitched almost entirely to what I think will win Kennedy's vote." If that takes an originalist or structuralist or minimalist or any other kind of *ist* argument, then that is what will be offered up. That

is, he will offer *his* views through *those* lenses. No sensible lawyer, be he in a private firm or she representing the government, would do otherwise. Hence, for the practicing lawyer—the seasoned realist—the quarrel that rages on in the legal academy is of no moment beyond his or her ability to master the various legal arguments and rally them to his or her cause when the case demands. (On that score, may I recommend another book, *Tactics of Legal Reasoning*, by Pierre Schlag and David Skover.)

Now, some would argue that such realism is nihilism, simply. That's bunk! For consider: What great principle is vouchsafed when a texualist judge applies the law blindly to produce a ruinous or ridiculous result? What high value is preserved when an originalist jurist, time and again, selects strands of history to justify a rule so inhumane that even his fellow originalists keep their horrified distance? And how many defenders of "judicial restraint" would honor precedent if it meant saving segregation? If it meant denying the human-rights claims recognized in *Brown v. Board of Education*? No, the nihilist argument cuts the other way—against those who would turn the law into a lifeless abstraction.

Still, as Professor Benson quite aptly points out, the sham of "judicial neutrality" continues during every federal judicial confirmation hearing. As the cinematic C-SPAN lens zooms in on each disingenuous moment, nominee after nominee swears under oath that he or she would never make law but would only "follow" the law in a neutral way. Everyone knows it's a game; all know that the nominees will veer from their representations; and yet, the "neutrality" farce continues. It's rather like the "no gambling" edict in Captain Renault's Casablanca.

By exposing the real workings of the legal profession's trade, Robert Benson (my own professor three-plus decades ago) has done the legal academy and ordinary citizens alike a great service. Read his book, understand it, develop it, grapple with it, and, yes, challenge it. But above all, know this: There is no lie as great as the one we tell ourselves.

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Preface: The Book in a Nutshell

This is a book for law students, journalists and ordinary citizens who want to know what's really going on when judges and lawyers interpret the laws. It is even for the judges and lawyers, most of whom tell a story about legal interpretation that is simply a scam. I hope to coax them into candor.

The scam is there every time a President or governor nominates someone to wear the black robe of judge and the nominee sanctimoniously swears "to set aside my personal views," or, "not to make law, but to find it." The scam is there whenever courts veil controversial rulings behind incantations of "strict construction," "original intent," "plain meaning," "legislative purpose," and other legal mysticisms. The scam is there whenever a lawyer, bureaucrat or a corporate paper-shuffler tells you, "well, I'm just following the law."

The truth is, there is no such thing as "just following the law." Every judge, every lawyer, every interpreter always makes the law, never finds it, when reading a legal text. And their personal views inescapably play a central role in the making. These facts are of profound importance in a democracy said to be based upon "the rule of law" where lawyers and judges exercise enormous power. Yet public discourse on the topic consists of little more than shallow shibboleths. Most people will grant that it makes a difference whether a liberal or a conservative is appointed to the Supreme Court, but they naively assume that so long as the nominee is deemed "well qualified" by professional peers, and so long as ideological extremists are excluded, we can rest in the assurance that, as John Roberts declared when he was nominated to be Chief Justice of the United States, "judges are like umpires. Judges don't make the rules. They apply them." Pure flapdoodle, but the public, press and politicians fall for it.

This is not a book about who gets appointed to the bench, or whether there are too many liberals, too many conservatives, who is a "strict constructionist," or who is an "activist judge." It is, rather, about the interpretation game that all of these, and all lawyers, play in order to shape the law

the way they think it ought to be. I intend to show how this game is played by judges and lawyers of all philosophies—right, left and center. If I were a magician revealing how my colleagues do their tricks, I would be rightly drummed out of the magic profession. But the law is not magic, and lawyers are not magicians, or shouldn't be. The legal profession deserves to have its tricks exposed.

I'm far from the first to attempt it. Oliver Wendell Holmes, Jr. and Benjamin Cardozo, judicial giants of the early 20th century, not to mention many later scholars, tried but failed to get the profession to acknowledge that it makes, and does not find, the law. The profession went right ahead pushing the juggernaut of the Old Story over each new generation of law students. What I call the Old Story is a glorious, clever, complex, but patently false tale describing a neutral set of rules and methods which purport to yield more or less objective answers about the meaning of any legal text. In order to expose the judges' and lawyers' tricks, I will have to get into the Old Story in detail, debunk it, and then go on to describe the actual moves that legal interpreters make in their game.

I write for the serious, sophisticated reader, not for the glib. But what John Kenneth Galbraith said of economics can also be said of the law: "[T]here are no important propositions too complicated to be stated in plain language." I've tried to set out this book's ideas clearly and simply in a main text that stands alone, without legalese. When I can't avoid legalese, I explain it. I put scholarly references in the back of the book to keep them out of sight, like the pots and pans in which the dinner was cooked.

Part One presents the Old Story in detail and tells why it is simply nonsense to contemporary thought. The chapters in this part put legal history within the broader context of general cultural and intellectual history to show that the Old Story is an odd fossil of ancient thought that crumbles in the light of the modern and postmodern thinking that is now common to other institutions and intellectual disciplines. This part goes on to give a new, realistic description of what actually goes on in legal interpretation. Part Two gives practical illustrations of the new view as applied to statutes, constitutions, and case precedents. This part uses several widely known legal texts as paradigm examples: the statutes that once set highway speed at 55 miles per hour, the constitutional case *Brown v. Board of Education*, and the famous common law tort case *Palsgraf v. Long Island Railroad*. An extra chapter on international law, using the Bush Administration's torture memos to illustrate, is published at the book's website, www.theinterpretationgame.info, free for the world to download and read.

Here are the key points of the book, straight away:

- Contrary to the Old Story, interpreters never discover the meaning of a law by finding the "holding" of a case, the "literal words" of a document, the "legislative intent" of a statute, or the "original intent," "structure," or "purpose" of a constitution. These simply aren't things that can be discovered like buried treasures. They are cultural fictions, rather like the Santa Claus myth, useful or not depending upon what the reader and society wish to do with them.
- The interpreters of a law likewise are not really constrained by legal language, precedents, rules, doctrines or principles, because these aren't like the reins of a horse that could control the reader's behavior. They are more like artist's materials which the interpreter uses to create meanings.
- The modern understanding of language and culture shows us that meaning is *not* something that texts possess. It's something that interpreters produce. Laws are no exception. The meaning of a law—whether it's a regulation, statute, case precedent, constitution, contract, will or other legal document—doesn't reside in its text, but in the interpreters who give it meaning. When we say, "What does this law mean?," we are actually saying, "What meaning should we give this law?"
- In creating meanings, interpreters—including judges—have extraordinary license, and are inescapably influenced by their own psychological character, values and personal contexts. In this sense, legal interpretation is subjective. It differs widely with individual personalities.
- Individuals are not free, however, to make up legal meanings willy-nilly. We all view the world, and legal texts, from a certain moment in history and from within our own culture, which enables us to think certain things and not others. Moreover, the desire to persuade others in society to accept our meanings limits idiosyncratic interpretations. In these senses, legal interpretation is constrained by things outside the individual.
- Legal interpretation at bottom, then, is a creative act that ends in an effort to persuade others to accept our meanings. The practices of persuasion differ from time to time and culture to culture, but anthropologists visiting Anglo-American legal culture today would see a ritualistic process in which meaning is constructed in the following way: Interpreters, acting with largely undisclosed political, social and moral values, make claims about what the text of the law is, the importance of its source, and how other interpreters view it. If interpreters with sufficient social power accept or acquiesce in these claims, legal meaning is temporarily established. It is a process that highlights the artifices of ritual while hiding the real values and the social power that

actually determine legal interpretation. The consequences of these observations are large.

The notion that we live under "the rule of law" is, unfortunately, mistaken. We live under the rule of people. It makes a crucial difference who those people are and what values they hold. While "the rule of law" is very important as a political ideal that can influence behavior, it is perilous to let a naïve faith in it blind us to this reality, to believe that words on paper alone protect us. Some who have been so blinded have paid the price in exploitation, and even their lives.

Lawyers and judges claim a special right to rule in the name of law, arguing that their training in objective techniques entitles them to a monopoly on the construction of legal meaning. Their training and techniques, however, are based upon the Old Story about legal interpretation, a story that no longer makes sense. It is a story that conceals the rhetorical moves that are actually made. It masks the political, social and moral struggle for persuasion that actually takes place every time a law is interpreted. It is a story that allows the childish myth to be foisted upon the public that judges are merely umpires, determining what is lawful or unlawful as if they were calling balls and strikes in a baseball game.

We live in modern times. The legal profession should take off the old mask. It should tell the real facts about legal interpretation, even if those facts lead to results that some members of the profession won't welcome, such as these:

- Recognition that legal interpretation is mainly a special form of political and social debate.
- Candid accountability of judges, lawyers, and bureaucrats for the political, social and moral choices that are at stake in every "legal" decision they make.
- Public scrutiny of the personal values of individuals nominated to wear the black robe of judge.
- The spread of informal, inexpensive legal procedures.
- Laws and law-talk in clear English.
- And cutting of massive deadwood from the bramble bush of law school education.

There you have it, in the proverbial nutshell.

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