2008

The Interpretation Game

Robert Rodes
Notre Dame Law School, robert.e.rodes.1@nd.edu

THE INTERPRETATION GAME

Robert Benson
Carolina Academic Press, 2008

REVIEWED BY ROBERT E. RODES, JR.

> Truth, Sir, is a cow that will yield such people
> no more milk, and so they are gone to milk the bull.
> Samuel Johnson[1]

Sir James Fitzjames Stephen, embarking on a powerful critique of John Stuart Mill, says: "In stating the grounds of one's dissent from wide-spread and influential opinions it is absolutely necessary to take some definite statement of those opinions as a starting point, and it is natural to take the ablest, the most reasonable, and the clearest."[2] This is my justification for reviewing the present work. My disagreement with it is broad and deep, but, unlike many proponents of similar views, Professor Benson writes clearly and without jargon, and he brings to his work the experience of a working lawyer and a teacher of working lawyers. He presents his doctrine in such a way that one can profitably engage with it.

That doctrine is in the end postmodern. Benson gets there in three steps. He begins with what he calls the Old Story, which is founded on the idea that "the law is in the text" (6). In addition to statutes, judicial decisions, and the like, he characterizes as texts all the transcendent values to which people have looked in the adjudicative process, whether they are written in people's hearts as natural law, or written on stone or parchment as the Hebrew Scriptures are. Wherever the texts come from, the adjudicative task, according to the Old Story, is the same. It is "to discover the meaning placed in the text by the author" (7).

At this point, Benson drops his consideration of unwritten texts, and addresses the principles offered by the Old Story for the interpretation of statutes, constitutions, contracts and the like on the one hand, judicial precedents on the other. He takes up four rules for the interpretation of the first category—"texts that attempt to guide future conduct" (8). These are:

---

1. *Boswell's Life of Johnson*, Thursday, 21 July, 1763 (London: Oxford University Press, 1953; 3d ed. orig. pub. 1799), 314.

2. James Fitzjames Stephen, *Liberty, Equality, Fraternity*, ed. R.J. White (Chicago: University of Chicago Press, 1991; 2d ed. orig. pub. 1874), 54.

1. "Follow the plain meaning of the words" (8-10).
2. "If the words are ambiguous, apply intrinsic canons (rules) of construction that help clarify the internal workings of the language or the law" (11-12).
3. "If ambiguity persists, look for extrinsic evidence of the purpose the authors intended" (12-16).
4. "Always be certain that your interpretation is reasonable"(16-18).

Benson then offers three rules for the interpretation of judicial precedents:

1. "Separate the precedent case into its basic elements: Facts, Procedural History, Issue, Holding, and Reasoning" (19-20).
2. "Focus on the holding (the ratio decidendi, deciding reason, or ground of decision) of the case, and exclude the incidental remarks (obiter dicta) made by the judge" (20).
3. "Reasoning by analogy, show how the case at hand is either similar to or distinguishable from the precedent case, and therefore either is or is not controlled by its holding" (21).

These principles are all familiar enough, and Benson presents them as straightforwardly as one could wish before proceeding to deconstruct them.

He carries out the deconstruction in a chapter called "The Modern Story," in which he refutes all the rules of interpretation that he described in the previous chapter:

1. "There can be no rule that plain meanings must be followed, because words have no plain meanings" (33-37). Words are constantly changing their meanings in accordance with the context in which they are used, or in accordance with changes in the culture.
2. "The intrinsic canons of construction are too contradictory and enigmatic to be called rules, and are ignored as often as they are used" (37-41). Benson (giving due credit to Karl Llewellyn) supports his claim with a tabular presentation of fifteen familiar canons, each with a quotation from a court that has declined to apply it.
3. "Extrinsic evidence of intended purpose cannot constrain interpreters because the evidence is limitless, manipulable, and unordered, and because 'intended purpose' is usually a fiction anyway" (41-51).
4. "By making 'reasonableness' its ultimate requirement, the Old Story quietly welcomes subjectivity after all. Moreover, the doctrines supposedly promoting rationality are fantasies" (55-57). Here Benson argues that the appeal to any transcendent rationality is hopelessly out of date:

> With modernism, the immutable sources disappear. Holmes could finally proclaim that "the common law is not a brooding omnipresence in the sky" because reason was no longer a brooding omnipresence in the sky either. The pulse of reason beats within the law only to the rhythm of our own hearts. And one person does not march to the same beat as the next. (55)

Having disposed of the rules of interpretation of statutes, contracts, and the like, Benson goes on to say that "There are no Meaningful Rules for Finding the Meaning in the Texts of Judicial Precedents"(58-62). He shows this largely by raising the familiar objections to Langdell's "scientific" approach to case analysis, and applying them to all claims that judges are constrained by stare decisis, and indeed to all claims that law can be taught through case analysis: "The case method of pedagogy gave the law schools and practicing lawyers protected marketplace niches, but at the cost of making American law students, professors, lawyers, and judges Langdell's prisoners. They are its prisoners even today..." (59).

Benson follows his account of the Modern Story with a chapter on "The Postmodern Insight," evidently intended to provide a context for his detailed critique of the Old Story, and an alternative way of dealing with legal texts. He begins with this description of the insight:

> The postmodern insight is that the meaning of anything—language, history, science, a painting, a building, a poem, a novel, a law—is assembled by the humans who attempt to understand it, from complex component parts which can always be shattered and reassembled different ways into different meanings, like a collage. Every new assembly is an interpretation of the components, which gives them meaning. And since each of us always views our world from the standpoint of some assembled interpretation in our own heads, there is no external, objective standpoint from which to view any other, no single "true" or "best" collage. (67-68)

But we are not free to interpret any way we please, because we belong to "interpretive communities" (term taken from Stanley Fish) (74), which attach "if not an objective, at least an intersubjective meaning which acquires a privilege" (quoting Umberto Eco) (74). Benson accepts that the law is such an interpretive community. All he seeks to do is free that community from the restraint of objective standards external to itself.

In subsequent chapters, Benson shows how his insights affect real or hypothetical cases. He shows that a stop sign cannot always mean to stop, because there are some situations—say you are running from a flash flood—in which you will not be expected to stop He shows that the 55 mph speed limit

that Congress imposed on the States between 1974 and 1995 was not really a 55 mph speed limit because it was seldom enforced. He gives a fairly detailed examination of the prevailing opinions in *Brown v. Board of Education*[3] and *Palsgraf v. Long Island Railroad*[4] to show that considerations other than those projected by the Old Story entered into the judges' choice of texts and therefore into their decisions.

As an unreconstructed adherent of the Old Story, what can I say about this concerted and vigorous attack on it? Let me begin with the propositions I have quoted from Benson's second chapter, for they are the foundation of his critique. First, is it in fact the case that words have no plain meanings? I submit that it is not. There are many words that refer to specific things or classes of things, and everybody who hears them knows the things or classes to which they refer. Benson seems to think that this claim is refuted by the fact that words have different meanings in different contexts, but I cannot see that it is. I am the holder of a chair in my University. When I go to a committee meeting, I find a person called a chair presiding over it. I sit in a chair to participate. This does not show that the word "chair" has no plain meaning. It shows that it has three meanings, all of them plain. Everyone understands these meanings.[5] No one supposes that I am sitting in the endowments by which my salary is paid, or that the object in which I am sitting is presiding over the meeting.[6] Reality is presenting us with three distinct objects, one physical and inanimate, one human, and one abstract. Since they all exist, it is appropriate to use words to refer to them, and that is what we do, extending metaphorically the word for a concrete object because that is easier than coining new words.

Or supposing I go to my sink and turn on a tap marked "C." If I am in the United States, I will get cold water. If I am in France, and the hot water heater is working, I will get hot water. Does it follow that the letters on taps have no plain meaning or that the distinction between hot and cold is a social construct? I submit that it does not.

---

3. 347 U.S. 483 (1954).

4. 162 N.E. 99 (N.Y. 1928).

5. To be sure, "everyone" here is limited to speakers of English who are acquainted with committee meetings and endowed professorships. But it does not follow, as Benson says it does, that "It is misleading... to think of words as labels for anything" (35). Rather, the fact that it takes some acquaintance with an object to understand a word referring to that object bespeaks exactly the relation between word and object that is indicated by calling the word a "label." Nor is the English word any less a label because other languages may connect different words to the same object. I have had the experience of pointing at an object and asking and being told the word for that object in another language. The word I was given was a label too.

6. To be sure, if someone at the committee meeting were to say that I should give up my chair to a colleague, there might be a momentary misunderstanding, but it would be quickly cleared up.

Benson supports his attack on the Plain Meaning Rule by showing that there are cases in which a motorist will not be expected to stop at a stop sign, and that there were many places in which the 55 mph speed limit was not enforced. Here, he conflates the view—which nobody doubts—that the law is not contained within its written texts with the view that the texts have no intrinsic meaning. It seems to me that when I fail to stop at a stop sign (I generally have worse excuses than running from a flash flood) it is not that I am not aware that the sign says to stop. It is just that I decide not to do what the sign says. There is a classic doctrine called *epikeia* (or *epieikeia*) that limits the application of legal rules.[7] The word is sometimes translated as "equity," but it has also a flavor of common sense. The classic example was the rule that the city gates were to be shut at sundown. On this particular day the country is being invaded. At sundown, the inhabitants are fleeing to the city for protection, and the defending troops are coming into the city to take up positions on the walls. We do not shut the gates.[8] But *epikeia* is not a principle of interpretation. When we leave the gates open, we are not interpreting the rule; we are deciding not to follow it.

Look next at Benson's attack on rules of construction. If they purported to be rules of law in the sense that statutes or judicial pronouncements are rules of law, he would be quite right to attack them as he does. In fact, though, they have never purported to be that. They are maxims, rules of thumb, bits of common sense like "early to bed, early to rise," "don't spit to windward," or "measure twice, cut once." They are the product of many generations' experience of people trying to understand other people's normative language. No one has ever supposed them to be normative language in their own right.

When it comes to interpreting a piece of language in the light of the intention behind it, Benson impermissibly confuses *finis operis*, the purpose of the work, with *finis operantis*, the purpose of the worker. The impossibility of arriving at the latter—which is what Benson effectively points out—has no effect on the possibility of arriving at the former. When I see, say, a medieval shoe, I do not have to probe the psychology of the cobbler to know that what it is for is to be put on someone's foot. Similarly, when I see a medieval statute, say Quia Emptores,[9] I do not have to probe the mental processes of King, Lords, or Commons to know that what it was for was to stop subinfeudation.

---

7. See Robert E. Rodes, Jr., *Classic Problems of Jurisprudence* (Durham, NC: Carolina Academic Press, 2005), 61-63.

8. See St. Thomas Aquinas, *Summa Theologiae*, 1-2, q. 96, a. 6; and 2-2, q. 120.

9. 16 Edw. 1, stat. 1 (1290).

I might of course go on and ask what was wrong with subinfeudation. I could get some idea from the Preamble to the Act, and get more of an idea by reading T.F.T. Plucknett's *Legislation of Edward I.*[10] I would still not be inside anybody's head; I would simply be looking at what was going on in the society into which the statute was introduced. The possibility of examining questions of this kind is reflected in the so-called Mischief Rule, which calls in some cases for limiting or extending the operation of a statute in the light of the problem with which it was meant to deal.[11] For instance, a statute that forbade the prevailing litigant to give "food and drink" to the jurors in a case was extended to forbid giving them cigars.[12] And a statute requiring a train to stop if an "animal or obstruction" appeared on the tracks was held not to apply to a goose because a goose could not derail the train.[13] In such cases, we can discern the purpose of a statute without any regard to the motivation of the legislators.

Such discernment, of course, is based on reason, which Benson characterizes as the Old Story's fallback position. His attack on that position is based on the fairly obvious fact that people do not all reason alike: "the standard of reason is inevitably subjective: one interpreter's rationality may be another's absurdity" (57). He supports his claim with two cases, neither of which supports it. In each of them, the dissent is appealing to reason while the prevailing opinion is appealing to something else.[14]

In any event, the fact that people disagree on a question does not necessarily mean that the answer is subjective. As Alexander Pope says, "'Tis with our judgments as our watches, none go just alike, yet each believes his own."[15] But there is still a right time. There are all kinds of questions on which people can disagree without calling into question either their methodology or their

---

10. T.F.T. Plucknett, *Legislation of Edward I* (Oxford: Clarendon Press, 1949), 102-8.

11. See *Heydon's Case*, 3 Co.Rep. 7a, 76 Eng. Rep. 637, 638 (Exch. 1584).

12. *Baker v. Jacobs*, 23 A. 588 (Vt. 1891).

13. *Nashville & K.R. Co. V. Davis*, 76 S.W. 1050 (Tenn. 1902).

14. In *TVA v. Hill*, 437 U.S. 153 (1978), Chief Justice Burger explicitly disclaimed any use of his own standards of reasonableness:

> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

In *Korematsu v. U.S.*, 323 U.S. 214 (1944), Justice Black, for the majority, simply refused to second guess the military authorities:"We cannot—by availing ourselves of the calm perspective of hindsight--now say that at that time these actions were unjustified."

15. Alexander Pope, *An Essay on Criticism*, stanza 2 (1711), reprinted in *Pastoral Poetry & an Essay on Criticism*, ed. E. Audra and Aubrey Williams (London: Methuen and Co., 1961), 239-40.

objectivity. I saw a documentary on television the other night in which different anthropologists were expressing different opinions as to whether Neanderthals interbred with Cro-Magnons. Debatable as the question is, one of the proposed answers must be right and the other wrong. Questions of what decision in a case is reasonable may also be debatable and still have objectively right answers.

When it comes to judicial precedents, Benson makes a strawman of Langdell. He characterizes "the Old Story's claim about precedent" as being, "that the texts of prior cases themselves control judicial behavior" (58-59). It may be that Langdell extracted rules in this way from case reports and applied them as if some legislature had enacted them,[16] but I doubt if anyone else did. For most lawyers, in Langdell's day as in our own, a case report is a story about a problem that someone brought before a judge or a bench of judges, and how the judge or judges drew on available legal materials to solve it. Stare decisis, then, is simply a matter of treating similar problems in similar ways. In fact, Benson ends his critique of stare decisis by saying, "My objections to the Old Story's version of stare decisis aren't recommendations for reform, they're descriptions of what we've already got" (62). I question whether anybody, with the possible exception of Langdell, ever thought we had anything else.

I think that where Benson really differs from the Old Story—and from me—regarding precedent is in the extent to which the whole narrative of a prior case constrains or ought to constrain a judge deciding a subsequent case. Adherents of the Old Story tend to believe, as do I, in a certain historical continuity in the ongoing life of a community and in people's aspiration to deal justly with one another. The development of judicial precedent is a part of that historical continuity, and the judges of every generation are called to carry it on rather than return it to square one and start over.

Benson completes his argument by taking up *Brown v. Board of Education*[17] and *Palsgraf v. Long Island Railroad*.[18] In dealing with *Brown*, he examines carefully the intellectual formation of all the justices, their racial attitudes, the internal politics of the Court, and the justices' perception of the state of public feeling in the South. He argues that the justices took all these considerations into account in making their decision, and should have been more upfront about doing so. He pays no attention at all to what seem to me (as an adherent

16. The excerpt in the casebook, George C. Christie and Patrick H. Martin, *Jurisprudence*, 3d ed. (St. Paul, MN: Thomson/West 2008), 759-60, certainly supports that interpretation of Langdell's approach. But see Bruce A. Kibmall, "Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature," *Law and History Review* 25 (2007): 345.

17. 347 U.S. 483 (1954).

18. 162 N.E. 99 (N.Y. 1928).

of the Old Story with a bit of Natural Law thrown in) to be the most important points behind the decision: (1) That *Plessy v. Ferguson*, the case first upholding segregation, was an abomination from the start, and should have been overruled for the reasons stated by Justice Harlan in his dissent, and (2) That everyone in the United States knew that segregation of the races was put in place by whites who thought blacks were inferior and wanted to keep them that way. The Old Story as I tell it would have supported bringing these points to the analysis of the Fifth and Fourteenth Amendments, and deciding the case accordingly.[19]

Benson begins his discussion of *Palsgraf* with the intellectual and social formation of Judge (later Justice) Cardozo, who wrote the opinion. That done, he turns to the "texts" on which Cardozo drew for his opinion. He shows that none of those texts was irresistibly dispositive of the case, and tells us that we should stop hunting for texts in cases like this and simply bring our values, whatever they are, to the table. Here, in my opinion, he betrays a serious misunderstanding of stare decisis. Cardozo was a great common law judge, and he did what great common law judges do. What great common law judges do is not combing through old cases for Langdellian texts to apply to the case before them. They look at the whole body of precedent as an artifact that generations of their predecessors have been at work building, and to which they can add a little on occasion. *Palsgraf* is one of a series of cases in which Cardozo elaborated, refined, and extended the doctrine that people who put other people at risk should compensate for the ensuing harm.[20]

I find this doctrine morally persuasive, and, in Cardozo's hands, legally elegant. It is of course quite possible to disagree with it. Judge Andrews, dissenting in *Palsgraf* itself, argues that people should be liable, within basically arbitrary limits of time and place, for all the consequences of their negligent acts. Professor (later Judge) John Noonan suggests that Cardozo loses sight of the humanity of the victims of the accident, and that it might be better to make common carriers liable for all injuries to passengers on their premises.[21] Both these approaches involve values, and they both have some support in the structure of legal precedent that was before the court when it decided *Palsgraf*. Benson accuses Cardozo of "hiding the choices of values being made,"(137) but Cardozo's articulation of risk doctrine looks like a choice of values to me, and he does not hide it at all. Benson thinks that

---

19. Here I differ both from the Court and from Benson's version (120-21) of what "a more candid Court might have said."

20. See Warren A. Seavey, "Mr. Justice Cardozo and the Law of Torts," *Columbia Law Review* 39 (1939): 20-52.

21. John T. Noonan, Jr., "The Passengers of *Palsgraf*" in *Persons and Masks of the Law* (New York, Farrar, Straus and Giroux 1976), 111-51.

Andrews was "more honest," (137) but Andrews's opinion[22] exhibits the same kind of reasoning as other opinions do. He uses more hypotheticals and fewer decided cases than Cardozo does, but he does use cases, and gives a particular accolade to Lord Scrutton's decision in the *Polemis* case[23], which is almost as famous as *Palsgraf.*

Much of Benson's project is founded on the "postmodern insight" to which he devotes a chapter, and much of my criticism of the project entails a criticism of that insight. I continue to insist on the basic coherence of reality. We are able to understand reality, to make laws about it, and to decide cases according to them after we have made them, because reality presents itself to us in intelligible categories, elements of an intelligible design. The necessary understanding does not come easily because our hearts, our minds, and our languages are inadequate to the task. Thought is inadequate to reality, and language is inadequate to thought. But addressing reality with the tools at our disposal is the human condition. This side of the eschaton, full understanding will elude us. But if we keep working together at it, building on what our predecessors have accomplished, as common law judges do, we can come by valuable understandings of what we are about, and even hope to see a given reality improved in some way by our efforts. Benson's postmodern insight is aptly stated in his collage metaphor. But what we really have are the pieces of a jigsaw puzzle. It is not always easy to fit the pieces together, but we should not instead be making them into collages.

22. 162 N.E. at 101.

23. [1921] 3 K.B. 560, referred to 162 N.E.103.