Chapter Six
Authorial intention in jurisprudence and legal theory

The introduction to this book quoted the memorable one-liner by Stanley Fish that intention is "a vexed topic that usually brings out the worst in everyone" (Fish 1989, 116). In retrospect, from this point of our argument, one couldn't agree more given the polemic and strategic tendencies reconstructed in the debate from the 1940s onwards. But the context in which Fish's assessment was made was not interpretation in literary criticism – it was interpretation in *law*. Fish had coined his phrase in October 1983 in the middle of a chain-discussion between himself and law professor Ronald Dworkin, which was itself part of a much wider discussion in the 1980s on intention in legal theory and jurisprudence. Representative voices of this debate were collected in Sanford Levinson and Steven Mailloux's twice reprinted *Interpreting Law and Literature*. In their introduction, the editors called the debate with considerable diplomatic talent "passionate" (Levinson and Mailloux 1991, xii). In fact, the book unveiled a rather messy situation in which professing intentionalists (Edwin Meese III), anti-intentionalists (William J. Brennan), non-originalists (Paul Brest), deconstructivists (Clare Dalton) and anti-intentionalist intentionalists (Ronald Dworkin, according to Jessica Lane) were raising their voices. A peak in this debate were the Tanner Lectures given by Supreme Court Judge Antonin Scalia in 1995 and the volume documenting them, including five substantial comments, authored by, among others, Harvard law professor Laurence Tribe and Ronald Dworkin (cf. Scalia 1997). Without any consensus in sight, the discussion has since then somehow faded away – though the trenches still seem to be present in the twenty-first century (cf. McLoughlin and Gardner 2007).

At first view, the parallels with the fierce debate on intention in literary criticism in the second half of the twentieth century are striking, especially its temporary intensity, its polemics and its gradual fading out without ever coming near any common ground. To what extent then can the typology reconstructed above be used for descriptive purposes outside literary criticism? And to what extent can the course of the debate on intention in legal matters be explained with the institutional approach pursued here? The following comparison will give at least some indications for answers. It will look at the most important types of intention in interpretation at stake in jurisprudence and legal interpretation, with a focus on the USA where the debate mentioned above was fiercest. In a second step, it will present possible explanations for that "passion" in the

 https://doi.org/10.1515/9783110767858-007

debate on intention in legal matters in the 1980s and 1990s, ending with comparative remarks on disciplinary peculiarities of literary and legal criticism.

Promising predictability: Intention in jurisprudence and legal interpretation

Before starting conceptual comparisons, some preliminary reflections on the differences between both fields might be useful. Interpretation in a legal context has a very long history, basically reaching from the invention of writing via antiquity and the disciplinary differentiation of the early universities in Europe from the thirteenth century onwards to our days (Rüegg 1993 – 2010). Within and outside faculties of law, the notion and the concept of "intent" was often and explicitly used in interpretation. To take an arbitrary example: Chief Justice Robert Brook, reflecting on legal documents in general, held in 1555 that a "party ought to direct his meaning according to the law, and not the law according to his meaning, for if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance, and to destroy all learning and diligence." What Brooks is aiming at could be seen as an imperative of judicial professionalism in the first place. This professionalism, he claims, allows individuals to profit from law's promise of greater certainty only if those individuals make use of judicial "learning". Chief Justice Brook continues: "For if a man was assured that whatever words he made use of his meaning only should be considered, he would be very careless about the choice of his words, and it would be the source of infinite confusion and incertainty to explain what was his meaning." Translating Brook into present discourse: one should take the help of jurists and try to articulate one's intentions within the language and the judicial framework these professionals offer. When Brook summarises his thought with "the law rules the intent, and not the intent the law", this formula is therefore in no way an "anti-intentionalist imperative", as Michael Hancher tends to think (Hancher 1991, 104; Brook qtd. from this page). There are no indications that Brook might have doubts about the possibility of reconstructing intentions or that he regards it epistemologically or otherwise fundamentally problematic "to explain what was [a man's] meaning". Brook's point is that one can avoid "infinite confusion and incertainty" only by applying the rules and the language of the law. For him, the law seems to be a kind of lens that focuses the intent of the client – as part of the act of the articulation – in contrast to someone drafting a text and hoping for the law afterwards to bring legal focus into it. So the first

caveat should be that the use of "intent" in law needs careful reconstruction in its specific disciplinary historical context.

Brook's quote reveals another important aspect regarding the societal functioning of law. The mirror image of Brook's wish to avoid "confusion and incertainty" seems to be something like a programme which contributes to greater stability and certainty in societal actions and conflicts – not exactly how one would describe the dynamics of literary criticism. In a recent contrastive argument on this matter, Kate McLoughlin and Carl Gardner convincingly held that "disambiguation is central to the judicial project (while the literary critical project is as likely to celebrate ambiguity)." Accordingly, the law has developed more or less predictable rules and approaches to interpretation, in order to resolve disputes, and to enable lawyers to advise on them before somebody goes to court (cf. McLoughlin and Gardner 2007, 94). Imagine – following Walter Benn Michaels – a judge starting his decision on a contract with praising the art of the contract makers, their subtle refusal to simplify the experience by specifying fryers or stewing chicken, their recognition of the ultimately problematic character of the chicken as such; then "we would know that something has gone radically wrong" (Michaels 1991, 224) – with regards to disambiguation, predictability, stability and certainty, we might add.

Another problem for a systematic historical overview of concepts of intention in law is the diversity of judicial genres with regard to authorship and intent. While wills usually articulate the intention of one person, contracts have to cope with what at least two persons or parties intend to do or not to do. Statutes and constitutions further complicate the matter, with mostly many individuals and individual intentions involved in the making, who at the same time represent the purpose of groups, legislative institutions, the state or the "people" etc. – not to mention the fact that all these texts are usually (co-)written by jurists. Are generalisations about "intention in law" even possible with so many different shades of intention at stake? The conclusion should be, at least, that literary scholars cannot be careful enough when dealing with the word or the concept of "intention" in jurisprudence. Let me therefore stress once more the tentative character of the following remarks and start with discussing some judicial genres separately.

Wills, contracts, statutory and constitutional laws

A contemporary standard view on intention in wills can be found in *The Law of Succession:* "The function of the court is to interpret the words which the testator has used and not to make the will itself. The court can only interpret the testa-

tor's intention as expressed in the will itself" (Margrave-Jones 1991, 131). Two things are relevant from our perspective. First, that a hierarchy between the testator and the court is constructed with the testator on top, and second, that the testator's intention is to be found in the text. Compared to what in Chapter Two of this book was called the standard view on authorial intention, the view expressed here seems to come close to the unity of what the author-testator intends, what the text says, what the context suggests, and what the reader-judge makes of it, with the authorial intention of the testator as the pole star guiding navigation (cf. Jarman 1986, 2066). This view can be discovered already in Swinburne's more political metaphor from 1590: "the will or meaning of the testator is the Queene or Empresse of the testament." When he explains that the courts have the task of "[p]ondering not the words, but the meaning of the testator," he does not depart from the unity of the standard view by separating the intention of the author from it. Swinburne has no doubt that "no man be presumed to thinke otherwise then hee speaketh." When he adds, "yet cannot euery man vtter al that he thinketh," it becomes clear that Swinburne is not thinking of an opposition to the testator's intention and what he says, but more of a possible discrepancy between what is explicitly stated in the text and what else could be intended. A point that Brook, too, had already made when he wrote that "it is presumed that the testator has not time to settle every thing according to the rules of law, and wills are commonly made on a sudden, and in the testator's last moments." Brook and Swinburne only give wills an exceptional status concerning the required degree of judicial formalisation and explicitness, not concerning the relation between intention and text, as a contemporary interpreter might think (Hancher 1991, 104; all quotes from Swinburne there).

Many quotes pointing into the same direction could be collected from the existing studies and commentaries between then and now, such as, for example, a remark by the Lord Chancellor in the House of Lords in 1943 which sees the task of the court as to follow what "the testator intended": "The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case – what are the 'expressed intentions' of the testator" (qtd. from McLoughlin and Gardner 2007, 95). The conceptual unity of intention, text and context is clear from this passage. This unity is also at the core of the much quoted "armchair rule". According to Judge James in 1880, trying to understand the intention of the author from the text of his will, the court might want to check all the facts that were known to the testator when he made his will: "You may place yourself, so to speak, in [the testator's] armchair, and consider the circumstances by which he was surrounded, when he made his will to assist you in arriving at his intention" (qtd. from Margrave-Jones 1991, 143). The standard model of authorial intention in criticism, reaching from

Augustine to adherents of contemporary forms of intentionalism, seems to have a lot in common with the judicial view on intention concerning wills. To what extent does that hold for contracts?

One would expect a completely different story when one reads H. Jefferson Powell's summary that "the common law approach to the interpretation of contracts was blatantly unconcerned with the subjective purposes of the parties." Though, one has to stress the word "subjective" in this quote, and then connect it, according to Powell, to an ambiguity in the Latin "intentio", which could "refer either to individual, subjective purpose or to what an external observer would regard as the purpose of the individual's actions" (Powell 1985, 899, 895). The latter option was what we saw as the dominant judicial understanding of intent concerning wills – and for most professional jurists, this is the relevant dimension concerning contracts, too. In the words of Lord Nicholls of Birkenhead, dealing with contracts as a legal specialist is about "identifying presumed intention, not actual intention" (Nicholls 2005, 582). In retrospect, it was *actual* intention ("individual, subjective purpose") that H. Jefferson Powell set aside as "blatantly" irrelevant for the interpretation of contracts. From this perspective, the picture regarding contracts does not differ significantly from what we have seen about wills. Already in the first English treatise on contracts by John Powell from 1790, for instance, contracts were conceived as "concurrence of intentions". What he was talking about was intention in the sense of *presumed* intentions of the parties that can be derived from the text and context. Accordingly, John Powell advised to look for these intentions rather in "men's general motives, conduct and actions" than in statements made by the parties themselves (Binder and Weisberg 2000, 44).

A famous articulation of this unity of text, context and contract parties situated within in a continuum, with the expressed intent as the point where all these aspects meet, comes from Judge Learned Hand in 1911: "A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent an known intent." Reusing the comparison mentioned earlier with regard to the standard model: one might see the presumed intent of the parties as the pole star that guides the interpretation of the courts. And that concept remains unchanged, as Judge Learned Hand continues: "If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meanings which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort." The point here is not that the intention of the parties is dismissed as unavailable and undesirable *sensu* Wimsatt and Beardsley (Michaels 1991, 216; all

quotes from Judge Learned Hand there) – the point is that the intention expressed in the contract is what counts. That is what guarantees the parties – and many others – a significant degree of reliability and certainty. It is basically "individual, subjective" intent that is more or less banned from the judicial procedures dealing with contracts, not intent that can be presumed – let alone intention in general. Parties can make mistakes or they may more or less consciously try to mislead the other party. But this does not change the normal judicial way of dealing with contracts, which seems to be based on the standard model described above. Accordingly, many similar nineteenth- and twentieth-century references could be given for the intentional unity of author, text and context. A good example is Lord Nicholls of Birkenhead who has recently put into concise words this view on contracts: "what would a reasonable person *in the position of the parties* understand was the meaning the words were intended to convey?" (Nicholls 2005, 579 – *the emphasis is Nicholls', RG*; cf. McLoughlin and Gardner 2007, 96 f.).

As far as wills and contracts are concerned, the way the law deals with intention seems to be rather homogeneous over the last centuries. Does this impression change when the interpretation of texts with multiple and collective authorship such as statutes and constitutions is scrutinised? In the discussion around statutes, the golden rule of: "as expressed in the statute" is often mentioned, for example by Max Radin when discussing cases from 1844 and 1897: "intent governs the meaning of a statute, by saying that it must be the intent 'as expressed in the statute'" (Radin 1930, 872). According to the rich evidence quoted by Kate McLoughlin and Carl Gardner, this "golden rule" approach has remained the standard up to the most recent handbooks on statutory interpretation. Their central quote in this regard is from Lord Radcliffe holding that "the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention" (McLoughlin and Gardner 2007, 98). The dominance of the standard model of intention is obviously not limited to wills or contracts, so the first impression.

A similar line of conceptual homogeneity can be traced concerning constitutional laws. According to Aileen Kavanagh, the final aim of dealing with constitutional laws "must always be to give effect to the intention of Parliament *as expressed in the words used*" (Kavanagh 2005, 101; cf. Kavanagh 2006). This conception of looking at intention can be traced back to the formative years of constitutional interpretation, as H. Jefferson Powell (Powell 1985, 915, 942 f.) has convincingly shown. According to Powell, the "original intent" around 1800 was one that left no doubt that "whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construc-

tion“ – quoting here a 1791 statement of the Secretary of the Treasury, A. Hamilton. This is also the way that, for example, Chief Justice John Marshall saw it during his tenure at the Supreme Court in the first four decades of the nineteenth century: seeking evidence as to "the intention of the legislature" (qtd. from Powell 1985, 942), dominantly on the basis of a close analysis of the words and structure of the statutes and the Constitution.

Summarising so far, there is quite some evidence that the intentional unity of author, text and context with presumed authorial intention as the primary point of orientation has been dominant in jurisprudence and legal theory. However, at this stage a twist seems to have been woven into the argument presented here, given the fierce and passionate debates in a legal context referred to above. How does the stability of authorial intention in jurisprudence and legal theory relate to the passionate dissension in legal debates that Stanley Fish is addressing? Since this dimension has shown up primarily concerning constitutional laws, that is where we should look closer.

Gradual shifts

Powell's just quoted article can function as a stepping stone for more insights into the apparent discrepancy between the overall stability of the standard model of authorial intention in law on the one hand and the fierce debate on Framers' intention on the other. From the birth of the American Constitution into the 1820s, Powell shows the undisputed dominance of what the present book has called the intentional unity in which a professional reader finds presumed authorial intention in the text itself, read in its context. After a convincing argument in favour of this point (on 60 pages of his 64-page long article), Powell ends his article with a four-page "Aftermath." According to the "Aftermath", at the beginning of the nineteenth century this understanding of intent significantly started to change, with first "cracks" in the "facade" of the model described above and changes in the years to come: by "the outbreak of the Civil War, intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation". What Powell refers to with "intentionalism in the modern sense" is that "earlier scruples against the use of 'extrinsic evidence' in constitutional interpretation gradually lost their force." With "extrinsic evidence" he pointed at the "growing availability of original materials revealing the actions and opinions of the individual actors who played roles in the Constitution's framing and adoption", like proceedings and relevant opinions (cf. Powell 1985, 947). However, a different view on "extrinsic evidence" is not yet a different concept of intention.

When the meaning of the text of the Constitution is not clear or subject to controversial discussion (a problem that is likely to increase over time, due to changes in language, contexts and values), it is perfectly compatible with the standard model to look for extra evidence elsewhere. See for example a judgment from 1845 (*Alridge v. Williams*) by Justice Roger Brooke Taney, who had replaced John Marshall in the Supreme Court. Taney left no doubt about his adherence to the established model of intentional unity: "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used." But there are cases in which extrinsic evidence may be added: in case of "any ambiguity" the intention of the act can be gathered by comparing it "with the laws upon the same subject, and looking, if necessary to the public history of the times in which it was passed" (qtd. from Binder and Weisberg 2000, 41; as all following quotes by Taney).

On the other side of the line that Taney draws with regards to extrinsic evidence, are documents of the legislative process: "the judgement of the court cannot, in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, or by the motives or reasons assigned by them for supporting or opposing amendments that were offered". Taney argues that the judge has to look for the presumed intention of the legislative institution as a whole, and he has clear ideas where to seek preferentially for this intent. In other words: Taney's starting point is the model of intentional unity ("gather their intention from the language there used"), which in case of interpretation problems ("when any ambiguity exists") can be extended towards using extrinsic evidence ("laws upon the same subject", "public history", but *not* using "the debate which took place on its passage"). However, why legislative debates should not be part of the "public history of the times" in which an act was drafted, is not self-evident. In case of problems still prevailing after a look at public history and similar laws, why not use *all* relevant evidence publicly available? Whatever one's answer may be to that question, one thing seems clear: Taney is using *some* extrinsic evidence, while excluding some other forms. What he is *not* doing is suggesting alternative conceptions of intention.

It would take almost another fifty years until an 1892 Supreme Court decision further extended Taney's range of extrinsic evidence. In the case *Rector of Holy Trinity Church v. United States*, basically, the Court had to decide whether the Holy Trinity Church hiring a foreign minister fell under what Congress had incriminated at the time in the relevant statute prohibiting the import of foreign "labor or service." The Court tried to reconstruct the "intention" of the makers of the statute by not only looking at the act itself, but also at "contemporaneous

events" and "the situation as it existed" (i.e. Taney's "public history of the time"). The extrinsic evidence to be admitted was now enlarged, including also what "was pressed upon the intentions of the legislative body." This reference to petitions to Congress and committee reports informed the Supreme Court's view that "labor or service" at the time of the legislation process had been intended to cover low-paid menial work, and not that of a minister – and the Supreme Court ruled accordingly in 1892. After that judgment, resorting to legislative historical materials became frequent (Scalia 1997, 19, 30 – 37; Binder and Weisberg 2000, 65; all quotes of the case from there). However, more important for the argument developed here is that the Supreme Court apparently established a gradual extension of "extrinsic evidence", step by step. This extension was definitely not uncontested, as Scalia's recent polemic against using legislative history as an interpretive device shows: "What a waste. We did not use to do it, and we should do it no more" (Scalia 1997, 37). Whatever one's position on this scale of allowance for extrinsic evidence in interpreting constitutional law: there are no indications for a new concept of intention in interpretation at stake. All we found until here were gradual shifts concerning the relevance of (kinds of) contextual components within the model of intentional unity in legal interpretation.

Accordingly, the *Handbook on the Construction and Interpretation of the Laws* from 1911 did not raise the slightest doubt that the regular way of jurisprudentially dealing with laws and the Constitution was still looking for presumed intention. There are no traces of significant changes in the *Handbook* compared to what Powell had reconstructed for the period around 1800: "It is a cardinal rule in the interpretation of constitutions that the instruments must be so construed as to give effect to the intention of the people, who adopted it. This intention is to be sought in the Constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction" (Black 1911, 20).

The exception at the end of the quote leaves space to refer to certain parts of the context of the law, of which some examples have been discussed here. While there can be no doubt about changing practices in whether or not to make use of – certain kinds of – "extrinsic evidence" over time, these gradual changes in the toolkit of interpretation arguments must not be mistaken for different paradigms concerning intention. However, many of the anti-intentionalist participants in the law debate – of whom Powell is only a typical example – *did* mistake the one for the other. Powell practically stopped his detailed historical reconstruction of the concepts of intention in law in the 1820s and then made mildly sweeping statements for the years after. If he would have extended it closer to our present, what would he have found?

Some indications for answers may be taken from the seminal debate around Antonin Scalia's Tanner Lectures from 1995. How do they relate to the typology reconstructed here? As far as Scalia is concerned, his conclusion on the *Holy Trinity* trial mentioned above seems to suggest a fundamentally different concept of intention. The standard model was clearly the foundation of the Supreme Court's decision in 1892. As the Court put it in addressing the question whether the law under scrutiny prohibited the work of a minister, too (that is, whether a minister was "within the statute" or not):

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. (qtd. from Scalia 1997, 19)

In terms of intentional unity, the Supreme Court departed from the text of the law, and in its interpretation for the present case also took into account the context of the law ("its spirit") and presumed authorial intention ("the intention of its makers") to come to a decision. By refusing a literalist interpretation of the law, the Supreme Court in its interpretive balancing sailed under the "intention of its makers" as its decisive point of orientation. In arguing that something was unlawful if one looked only at the letter of the law, but in an overall balance it was not, the Supreme Court worked with the tacit assumption that the "makers" of the Law would have phrased the relevant statutory passages differently, would they have known the case *Holy Trinity v. United States* at the time of drawing up the law. All this is perfectly compatible with the standard model of interpretation as reconstructed above.

Scalia, however, disagrees with the Supreme Court claiming that the coming of the Englishman to be Holy Trinity's pastor and rector was *not* unlawful by the federal statute under scrutiny. For Scalia, it definitely was: "Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case" (Scalia 1997, 20). Elsewhere, Scalia phrases his "textualism" or "originalism" in a more general way:

> What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended. (Scalia 1997, 38)

While Scalia's outcome is diametrically opposed to the Supreme Court's, their models of authorial intention in interpretation, though, only differ gradually. To start with, what Scalia excludes by "what the original draftsmen intended", is *subjective* legislative intent (Amy Gutman qtd. from Scalia 1997, ix). Presumed intent as realised in the text, is for Scalia perfectly compatible with his textualism, since he himself argues elsewhere with purposes of the law that cannot be

found in its letter. A typical example is Scalia's dissent in the Supreme Court's ruling on a clause of the Sixth Amendment providing that the accused had the right in "all" criminal prosecutions "to be confronted with the witnesses against him". In the case of sexual abuse of a young child, the court had permitted an exception in order not to confront the young child with its abuser, and the Supreme Court by majority consented. Not so Scalia:

> There is no doubt what one of the major purposes of that provision was: to induce precisely that pressure upon the witnesses which the little girl found it difficult to endure. (Scalia 1997, 44)

Obviously, Scalia argues here with the presumed intent ("one of the major purposes") of the constitutional law. In comparison with the ruling of the Supreme Court in 1892 (the law's "spirit", "the intention of the makers"), the conceptual difference must be seen as a gradual one. Also other phrases by Scalia point in the same direction of an intentional unity of text, context, author, and reader, for example when Scalia states that the interpretation of a law "depends upon its context which includes the occasion for, and hence the evident purpose of, its utterance" (Scalia 1997, 144). Relatively speaking, Scalia puts most emphasis on the text of law, much lesser so on the legislative authorities as factors worthy of their own analysis – however, without denying them relevant "purposes" in drafting the laws. Held against the typology reconstructed here, Scalia seems to be closest to what has been found in Classical Roman sources by Tacitus, Horatius and others, dealing primarily with correct phrasing in a given situation and saying what needs to be said. The words on the roll are where the Roman focus is sharpest, not where authorial or even individual views might be assumed – though it goes without saying that within the Classical Roman model, the ones writing are individuals that do have views and that these views are to be found in the text (cf. Chapter One). Also Scalia propagates this more formal and technical understanding of authorial intention in interpretation on the level of words, grammar, composition, and genre.

A final argument that Scalia's view on authorial intent only gradually differs from the standard model can be taken from his presentation of a quote by Chief Justice Taney from 1845. Taney has already been quoted above as exemplary evidence for the dominance of the standard model in the interpretation of constitutional law. When Scalia uses the very same quote and praises Taney for his "uncompromising view", he adds emphasis on parts of it:

> The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject,

> and looking, if necessary, to the public history of the times in which it was passed. (qtd. from Scalia 1997, 30)

What Scalia promotes first of all by *his* italics is the spotlight on "the act itself", as will be expected from a textualist or originalist. However, what he confirms implicitly by what surrounds his italics is his agreement with the intentional continuum of the standard model. Reading the text of the law is about gathering the "intention" of its makers; turning to different kinds of context ("laws upon the same subject", "public history of the times") can be helpful in this enterprise, especially in case of possible ambiguities. A model, by the way, that also Laurence H. Tribe confesses to in his commentary on Scalia's essay (cf. Scalia 1997, 65, 71 f.).

The striking difference between Scalia's emphasis and the standard model, *and*, at the same time, between the Classical Roman model and Scalia's, is that his positioning in terms of authorial intention in interpretation comes as a kind of strategic rollback *after*, and as a remedy *against* recent conceptual developments concerning intention and interpretation. Scalia's main concern lies in what he sees as a crucial shift in legal interpretation, manifesting itself in judges routinely transgressing the limitations imposed by textual and contextual evidence, judges who claim too much room for their own interpretation of the laws:

> There has been a change in kind, I think, not just in degree, when the willful judge no longer has to go about his business in the dark – when it is publicly proclaimed, and taught in the law schools, that judges *ought* to make the statutes and the Constitution say what they think best. (Scalia 1997, 132)

This is Scalia's main strategic concern, and the reason for *his* emphasis in his version of the standard model: moving towards the text and the historical context, moving away from the interpreter and from the "authors" as individuals. A typical exponent whom Scalia argues against here is Ronald Dworkin and his view on the interpretation of the Constitution.

It comes as no surprise that Dworkin's focus is indeed on moral contemporary judgement, in his terms: a "moral and principled reading of the Constitution" (qtd. from Scalia 1997, 123). When focusing on this understanding of "reading", it is obvious that Dworkin rejects in interpretation the subjective intent "of what the various legislators as individuals expected or hoped the consequences of those laws would be" (qtd. from Scalia 1997, 118). On this rejection of "expectation intention" he agrees with Scalia, and with all the other participants of the Tanner Lectures debate (cf. Scalia 1997, ix). What Dworkin looks for instead is "semantic intention", that is "what a legislature intended to say in the laws it

enacted". This question is what "judges applying those laws must answer" (qtd. from Scalia 1997, 118). However, Dworkin is heading for a special kind of semantic intention in the clauses of the Constitution, namely "abstract moral principles":

> If we read them [i.e. *the clauses of the Constitution, RG*] to say what their authors intended them to say rather than to deliver the consequences they expected them to have – then judges must treat these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they *really* require. (qtd. from Scalia 1997, 126)

Looked at with the typology of the present book, it is clear that Dworkin is close to the standard model, too, when he defines the interpreter's task as to let laws/texts "say what their authors intended them to say". The difference with Scalia's emphasis is also obvious: Dworkin leaves more room for a broader range of interpretations due to two shifts. First, by allowing only "abstract moral principles" as fighters for "semantic intent" into the arena of competing interpretations; second, by giving contemporary judges a robust mandate for deciding about the winners. With the latter role for the judges, Dworkin comes close to Schleiermacher and von Savigny's "better understanding". As Dworkin put it more explicitly in his *Law's Empire* (in which neither Schleiermacher nor von Savigny are mentioned, by the way):

> Interpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. (Dworkin 1986, 52)

Still, Dworkin seems eager to stay side by side with the makers of the Constitution when looking for "the natural semantic meaning of a text" and asking: "why shouldn't the 'framers' have thought" what Dworkin (qtd. from Scalia 1997, 124) thinks that the Constitution is? Accordingly, I would say, Dworkin must be situated somewhere in between the standard and the "better-understanding" model, with a greater proximity to the latter, due to his emphasis on and relative freedom for contemporary judicial readers and readings. For the argument of the present book it is less relevant where exactly on this scale Dworkin is acting, since all options lead to the same effect: a broader range of legitimate professional interpretations. Given Dworkin's conviction that key constitutional provisions are set out as abstract principles, "then the application of these abstract principles to particular cases, which takes fresh judgement, must be continually reviewed" (qtd. from Scalia 1997, 122). As we saw above, it is exactly this structural

extension of the range of interpretations ("fresh judgement", "continually reviewed") that Scalia is opposed to, aiming at a stronger limitation of that range:

> I concede, of course, that textualism is no ironclad protection against the judge who wishes to impose his will, but it is *some* protection. The criterion of 'legislative intent,' by contrast, positively invites the judge to impose his will [...]. Other nontextual methodologies are similarly wish-fulfilling. (Scalia 1997, 132)

From the perspective of the present book, one can concede two things at this point. First, the range of concepts of intention in interpretation that can be reconstructed from law debates are narrower than in literary criticism. With the concept of "presumed" authorial intention, we find a rather stable dominance of what above has been called the standard model and its intentional continuum of text, context, author and professional reader. The conceptual variations in practices concerning constitutional laws seem to be limited to traces of better understanding in the sense of Schleiermacher/von Savigny (see Chapter Four) on the one hand, and on the other – basically in reaction to that – returns to the Classical model as a gradual shift within the standard model, concentrating on text and historical context including historical major purposes, aiming at limitation of interpretations. Second, even the tentative reconstruction given here already shows similar misunderstandings and ahistorical projections as we found before in literary criticism. These projections tend to take differences and tensions – for example between presumed and actual intent, between text and intention, between text and context, between historical author/text/context and the reader's context – as indications of paradigmatic shifts in intentional approaches read into material that on closer inspection turns out to be about something else. If one takes a look at the contributions to the debate over the last fifty years from the side of the Law and Literature movement, more examples can be given.

Projections, mistakes and naps

Exemplary evidence for the fierce debate from the 1970s onwards is collected in the seminal volume *Interpreting Law and Literature*. The editors Sanford Levinson and Steven Mailloux claim to have found not only a counterpart for intentional fallacy respectively anti-intentionalism in legal debates, but even a predecessor. They hold that "the most famous anti-intentionalist argument in statutory interpretation" was put forward by Max Radin already in 1930 – while "the same" was done in criticism sixteen years later by Monroe Beardsley

and W.K. Wimsatt (Levinson and Mailloux 1991, 37). But were these really "the same" anti-intentionalism critiques? There are some reasons for doubting this. A certain scepticism might already arise from their presentation of the argument. Levinson and Mailloux turn around the historical order of dates of publication (1946 before 1930) and start out by devoting three pages to "The Intentional Fallacy", followed by half a page on Radin, arguing that his "anti-intentionalist critique develops along lines very similar to the arguments we have just examined."

More important for doubting their claim are "the arguments" just mentioned. The first is that, quoting Radin from 1930, intention is "undiscoverable in any real sense". Radin explains: "A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs" (Radin 1930, 870). Taking a step back, one can see that Radin's argument is based on the difference between what Lord Nicholls of Birkenhead would have called "presumed intention" and "actual intention" in legal discussions (Nicholls 2005, 582). Radin claims only that *actual* intention is "undiscoverable in any real sense" – he is not speaking of presumed intention, we must add. When Levinson and Mailloux immediately agree with Radin that "the legislative intention behind any statute always turns out to be either radically indeterminate or ultimately undiscoverable" (Levinson and Mailloux 1991, 40), their acceptance is not based on a careful pondering of Radin's arguments but on a projection of their own preference onto history. This projection seems to be informed by the importance they attach to the concept of intentional fallacy (see above).

The second argument against intentionalism that Levinson and Mailloux take from Radin without commenting on it starts from the above-quoted "golden rule" that the intent must be taken as expressed in the statute. Radin continues: "In that case, it would obviously be better to use the expression alone, without reference to the intent at all, since if the intent is not in the expression, it is nowhere. If the doctrine means anything, it means that, once the expression is before the court, the intent becomes irrelevant" (Radin 1930, 872). But again, it is difficult to see where the programmatic attack on intentionalism exactly lies. The dictum "if the intent is not in the expression, it is nowhere" has the air of logic, but is actually axiomatic and unclear. Radin seems to admit that intention is normally in the expression, but if that is the case, why should one ignore something that is admittedly there? What does "nowhere" mean, for example, in cases of error or unclarity? In such cases, intention may not be found in the expression, but definitely somewhere. It is hard to see why a court pondering all arguments should not be allowed to use similar laws or contextual claims on the matter

made by a legislative body, if it helps in augmenting plausibility for reconstructing the presumed intent of the lawmaker *and* of the statute under discussion. The claim that intent must not be considered once the expression is before the court, in the end boils down to confusing subjective and presumed intent, be it by mistake or for the sake of the polemic rhetorical effect.

The doubts about really dealing here with the "most famous anti-intentionalist argument in statutory interpretation" increase when one takes the whole article by Radin into account – what Levinson and Mailloux do not do in their introduction. What Radin's "Statutory Interpretation" basically presents is a general refutation of all "methods" of statutory interpretation, of which intention is one (Radin 1930, 869 – 872). Other more or less problematic methods are, according to Radin, legislative history (pages 872 f.), formalist technical devices (873 – 875), purposes (875 – 879) and plain meaning (879 – 881). He concludes that "the presence of so many confused, contradictory, and meaningless 'theories' and 'methods' create a turbid atmosphere about courts." What Radin holds up against this turmoil is "the sound sense of many judges" (Radin 1930, 882). In other words: Radin is trying to get past the "smoke screen" of every academic methodology in order to give judges more room for judgment based on their "sound sense" and their "social emotions." However, he is definitely not trying to establish a new concept of intention for the professional interpretive behaviour of experts (which is basically what Wimsatt and Beardsley wanted). This interpretation of Radin's article can be corroborated by a statement he made himself, which characterised his polemical criticisms of 1930 twelve years later as "undoubtedly somewhat too sweeping" (Radin 1942, 410 f.).

It seems that Radin's and Wimsatt and Beardsley's articles are far from being "the same", they are hardly even comparable, except for a striking rhetorical and polemical resemblance between calling a certain kind of authorial intention in interpretation "undiscoverable" and "irrelevant" (Radin) and "neither available nor desirable" (Wimsatt and Beardsley 1946, 468; cf. Wimsatt 1968, 222). They are definitely incomparable with regards to the seminal effects they had in the professional theory and practice of their respective disciplines, which is actually nil in the case of Radin (Binder and Weisberg 2000, 81 – 84). The article "Statutory Interpretation" is for example not reprinted in Fisher et al.'s standard anthology, though this anthology does list four articles by Radin in its bibliography and actually contains Radin's 1925 article "The Theory of Judicial Decision: Or How Judges Think" (Fisher 1993, 195 – 198). Concluding, Levinson and Mailloux's presentation of Radin does not offer a new type of intention in legal interpretation. Rather, they seem to project aspects of the contemporary "intentional fallacy" debate in literary criticism onto the history of interpretation in law, in order to

legitimate their own view on intention in legal interpretation by identifying what seem to be historical allies – but who turn out not to be.

Summarising my argument so far, the passionate debate on intention in law at the end of the twentieth century seems to be mainly a strategic debate that reveals more about the debaters, their projections and their need for allies and enemies than about typologically different concepts of intention in legal interpretation from a historical perspective. The debaters at the end of the twentieth century make use of the fact that the concept and the notion "intention" are frequently used in jurisprudence and legal interpretation, ignoring that this use seems to be based on a rather stable model of presumed intention and an intentional unity of author, text, context and a professional reader's interpretation.

A final example may suffice to corroborate my claim that this historical projection is a widespread phenomenon in debates on intention in law from the end of the twentieth century onwards. A famous case on wills in *The Law of Succession* may illustrate this:

> The testatrix, who had lived in Scotland throughout her life, gave a series of legacies to Scottish charities. In the midst of these legacies there was a legacy to 'the National Society for the Prevention of Cruelty to Children', which was the precise name of an English charity. There was no evidence that the testatrix had taken the slightest interest in the English charity. As the description fitted the English charity exactly, there was no ambiguity entitling the court to admit extrinsic evidence that the testatrix almost certainly intended the legacy to be given to the Scottish National Society for the Prevention of Cruelty to Children. (Margrave-Jones 1991, 131)

Thus the House of Lords decided in 1915, overturning two Scottish Courts in Edinburgh who had decided the other way round. For Hancher, this case shows that the "'interpretive strategies' invoked for the different readings (intention versus plain meaning) were fundamentally irreconcilable" (Hancher 1991, 113). Though this way of presenting the case seems plausible from today's perspective, it can be taken as another example of an ahistorical approach that projects conceptual "interpretive strategies" of the 1980s back into 1915. In the context of the argument of the present book, I would hold that nobody around 1915 perceived this as a clash of two irreconcilable "interpretive strategies". I will argue that the courts basically had to decide in 1915 how likely it was that a mistake had been made in the text of the will, and what this meant for its execution.

The traditional legal way of dealing with mistakes has been phrased by the above mentioned Chief Justice John Marshall. After having described the standard way of collecting the spirit of a judicial instrument "chiefly from its words," he continued in his 1819 judgment on *Sturges v. Crowningshield:* "[I]f, in any case, the plain meaning of a provision, not contradicted by any other pro-

vision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application" (Brest 1991, 71). In other words: when the court disregards the words of the text, the error must be beyond any doubt.

Such a mistake based on a discrepancy between text and intention is another example of "Homer's nap", mentioned several times in the preceding chapters: although poets should not make mistakes, some mistakes may be discovered even in the texts of the giant Homer, Horace tells us. Assessing, and possibly correcting, mistakes in this sense has nothing to do with two irreconcilable interpretive strategies (text versus intention), but only with the question of how to deal with the domain of mistake, inadequacy, etc. This domain confronts the reader with difficulties, but does not invalidate the standard intentional model of how to deal with texts in general, and does not indicate that different interpretive strategies clashed over such mistakes.

Thus, from a historically informed conceptual perspective on intention, the Scottish case is about a "mistake of expression," as Chafee would call it: "the word may not correctly express the thought" (Chafee 1941, 386). Obviously, the House of Lords was not absolutely sure that such a clear-cut mistake had been made when the money was given to an English charity that resembled the Scottish one and had exactly the name mentioned in the will. Because not "all mankind" would and did see it the way the Edinburgh Courts saw it, the House of Lords stuck to the words of the will and did not claim the testatrix had taken a nap. This was not a decision on the basis of another interpretive strategy, but a gradual difference in assessing how likely it was that a mistake had been made in phrasing the will. Homer's nap only *seems* to be about different concepts of intention, but on closer inspection it is not – as is the decision of all courts on this testament.

Institutional contexts

Summarising, there is considerable evidence that the dominant concept of intention in jurisprudence from Renaissance until today is a model in which the author's (i. e. the testator's, contractors', legislator's...) intention is the pole star that guides the interpretation. The interpretation is mainly based on what the text says, and, if necessary, makes use of contextual evidence of different kinds. This concept comes close to what has been called above the standard model of authorial intention which can be traced since antiquity. Given this back-

ground, the increasingly fierce debate on intention in law at the end of the twentieth century turns out to be fuelled primarily by variations aiming for and sometimes going beyond the boundaries of the standard model. On the one hand, we found an orientation – with Dworkin as a typical example discussed here – toward a better understanding of the text of the Constitution in terms of contemporary values and needs, allowing for the transgression of boundaries that traditionally were imposed by the intention of the "Framers" and the historical context. On the other hand, as a kind of intentional conceptual historical rollback, there is the textualism of someone like Scalia, explicitly trying to reduce the range of possible interpretations in the name of what the present book has called the Classical Roman foundation of the standard model, staying as close as possible to the words of the text, bound by its historic context and the general purpose of the text within that context. In addition, it was shown that the frequent use of intention in legal contexts functions for some scholars as a projection screen for fundamentally differing concepts of intention coming from contemporary literary criticism. Modern concepts of intention were frequently projected back in time onto debates that, on closer inspection, show no signs of moving outside an established model of presumed intention in jurisprudence.

Why were these historical and conceptual pitfalls so tempting? It is striking that all the examples of what was called in my argument "projection" were basically published only after the 1970s. It is probably not only coincidence that this happened at the time when the Law and Literature movement got off the ground (cf. Gaakeer 1998, 15–36). For these academic actors, intention was a suitable subject, because the concept was part of the professional practice of both disciplines, Law and Literature. It was furthermore suitable, because it had been debated fiercely in literary criticism since 1946 ("The Intentional Fallacy") and especially since the 1960s, when, as we saw in the preceding chapter, Hirsch, Kristeva, Barthes, Derrida and others became involved. The merging of literary and legal criticism in interdisciplinary Law and Literature programmes offered the possibility of asking new questions with regard to law in synchronic and diachronic perspectives. From an institutional perspective, this gave academics ample opportunity to distinguish themselves with new positions in existing debates and views. However, as far as conceptual content is concerned, the impact of this debate seems to have been rather marginal in law and legal interpretation. In 1995, Ronald Dworkin could still ironically mock Antonin Scalia in the opening remarks of his commentary:

> Justice Scalia has managed to give two lectures about meaning with no reference to Derrida or Gadamer or even the hermeneutic circle, and he has set out with laudable clarity a sen-

> sible account of statutory interpretation. These are considerable achievements. (qtd. from Scalia 1997, 115)

Still it is also a fact that not only Scalia showed, in his essay, no affinity whatsoever with the general debates in literary criticism on meaning and intention. Dworkin's was the only one among the five commentaries that referred to literary hermeneutists or poststructuralists. What is more, the quote above was the only passage in which Dworkin did use such a reference, making it primarily a distinctive authority claim – in his lecture, none of his arguments were explicitly taken from the theorists he referred to.

There is another fundamental functional difference between concepts of intention in literary and in legal interpretations. In criticism, as we have seen, concepts of intention departing from the standard model of authorial intention did function as an instrument for professional transgression of limitations. Every new conceptual version of intention (1838 Schleiermacher, 1946 Wimsatt and Beardsley, 1967 Barthes) increased the space in which the critic could act professionally, while at the same time it decreased the author's and others' authority to limit the range of possible interpretations. While this dynamic seems institutionally functional for Law and Literature scholars, too, this is not the case in the practice of jurisprudence and legal interpretation. There, the societal function is dominantly one of offering a promise of certainty and predictability in judicial actions. Consequently, in terms of intention and interpretation, conceptual differentiation and individual position taking play a less central role in judicial professional practices as compared to literary criticism and Law and Literature scholars.

In this context, functionally speaking, it seems that in the recent debate on the interpretation of statutory and constitutional law, intent is used, too, as a weapon in a fight that is basically about political normative orientations. Especially for those who wanted to use the Constitution or laws in a fight for emancipation and human rights, the ethics of the historical founders and lawmakers were more often than not an obstacle to overcome. Schleiermacher's "better understanding" or intentional fallacy may be used in this regard as a viable interpretive strategy to get rid of limiting authorial, historically bound arguments that were turned against contemporary progressive interpretations of laws or against "a general principle of political morality", as Dworkin would have it (qtd. from Scalia 1997, 119). Accordingly, the choices in the legal debates for specific concepts of intention generally seem to be connected to specific political preferences, as Levinson and Mailloux already diagnosed. Concerning the contemporary debate, they admit "a modicum of truth" in the "tendency to identify intentionalism with political conservatism" (Levinson and Mailloux 1991, 10) – which is

definitely not what they themselves as editors of *Interpreting Law and Literature* and as adherents to intentional fallacy would vote for, as the contributions to their volume clarify. However, clashes of political or ethical normativity dressed as different concepts of intention are not a fertile ground for finding a consensus concerning the role of authorial intention in interpretation. This political and ethical normative dimension of the debate on intention in interpretation is another explanatory factor for its fierceness as well as for its fading out in silence, without a result in the conceptual matter: intention seems to have been more a strategic instrument at a certain historical moment than the core of the debate in jurisprudence and legal interpretation.

Finally, still institutionally speaking, even within the relatively limited range of conceptual developments concerning authorial intention in legal practices, a tendency towards enlarging professional participation can be reconstructed behind the back of the participants in the debates. When one subtracts from the following quote Scalia's polemics against a style of interpretation he disapproves of, its descriptive substance shows the unlimited opportunities for professional work, especially when turning to legislative history. While there are ambiguities in every technique of interpretation,

> the manipulability of legislative history has not *replaced* the manipulabilities of these other techniques; it has *augmented* them. There are still the canons of construction to play with, *and in addition* legislative history. Legislative history provides, moreover, a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody. [...] The variety and specificity of result that legislative history can achieve is unparalleled (Scalia 1997, 36; *emphasis Scalia's, RG*).

For the present book it is interesting that Scalia also uses "poetry" in his crusade against this tendency towards variation, diversification and maximalising participation: "There is little use in having a written constitution if textual construction is so indistinguishable from poetry," Scalia (1997, 142) writes. This quote confirms indirectly what was one of the results of our historical overview: the range of the concepts of intention available over time, in literary criticism *and* in law – despite their structural differences shown above – primarily functions as a stimulus to produce growth in professional interpretations, both in number and in range.

The comparison of the debate on intention in interpretation between law and literary criticism has shown several things. First, that a systematic historical reconstruction of concepts of intention in legal interpretation might be a piece of critical work definitely worth the effort. For the time being, we must live with exemplary cases. The comparison between these case studies in law and the historical typology of concepts of intention in literary criticism reveals many overlaps

between the standard model of authorial intention on the literary side, and on the side of legal interpretation a model of "presumed" intention. Taking concepts of intention in interpretation as a parameter and historically speaking, interpretation in jurisprudence seems to be more stable and homogeneous than in literary criticism, with lesser deviation and heterogeneity at the core of the debates. The dominating procedure for legal interpretation, also in the last 50 years, is aiming at presumed intention, with only gradual differences regarding the focus on specific parts of the intentional continuum of "author", text, context, and professional reader. Needless to say, that also these gradual differences can lead to diametrically opposing judicial outcomes and passionate debates – as we saw above.

Second, especially in the context of the Law and Literature movement, we found tendencies of ahistorical projection of a wide range of recent literary concepts of intention onto the debates on intent in the field of law. On closer inspection, however, the examples from jurisprudence discussed here showed few indications for structural conceptual changes in the direction of the intentional fallacy or poststructuralist types in almost all judicial practices.

Finally, the comparison seems to indicate a difference in function of the concepts of intention in interpretation in both disciplines. Generally speaking, the dominating mechanism of professional interpretation in literary criticism aims primarily at increasing the legitimate possibilities of interpretation and possibilities for distinction of individual scholars and increasingly so since the 1940s. The field of law, from this perspective, is dominated more by an orientation towards intersubjective foundations for professional academic behaviour contributing to relative stability, certainty and disambiguation in jurisprudence – also with regard to its use of concepts of intention in interpretation. Yet, an overarching tendency towards increasing the range of legitimate professional interpretations even within the more limited legal interpretative spectrum over the years can be diagnosed in jurisprudence and legal theory, too, as we have seen above.

Works cited

Binder, Guyora, and Robert Weisberg. *Literary Criticisms of Law*. Princeton: Princeton UP, 2000.

Black, Henry Campbell. *The Handbook on the Construction and Interpretation of the Laws*. 2nd ed. St. Paul, MN: West Publishers, 1911.

Brest, Paul. "The Misconceived Quest for the Original Understanding." *Interpreting Law and Literature. A Hermeneutic Reader*. Eds. Sanford Levinson and Steven Mailloux. Evanston: Northwestern UP, 1991. 69–96.

Carroll, Noël. "The Intentional Fallacy: Defending Myself." *The Journal of Aesthetics and Art Criticism* 55 (1997): 305–309.

Chafee, Zechariah Jr. "The disorderly conduct of words." *Columbia Law Review* 41 (1941): 381–404.

Dorleijn, Gillis J., Ralf Grüttemeier and Liesbeth Korthals Altes, eds. *Authorship Revisited. Conceptions of Authorship around 1900 and 2000*. Leuven: Peeters, 2010.

Dworkin, Ronald. *Law's Empire*. Cambridge, Mass.: Belknap Press, 1986.

Fish, Stanley. *Doing What Comes Naturally. Change, Rhetoric, and the Pratice of Theory in Literary and Legal Studies*. Durham: Duke UP, 1989.

Fisher, William W. III, Morton J. Horwitz and Thomas A. Reed (eds.). *American Legal Realism*. New York/Oxford: Oxford UP, 1993.

Gaakeer, Jeanne. *Hope Springs Eternal. An Introduction to the Work of James Boyd White*. Amsterdam: Amsterdam UP, 1998.

Graff, Gerald. "The future of theory in the teaching of literature". *The Future of Literary Theory*. Ed. Ralf Cohen. New York: Routledge, 1989. 250–267.

Hancher, Michael. "Dead Letters: Wills and Poems." *Interpreting Law and Literature. A Hermeneutic Reader*. Eds. Sanford Levinson and Steven Mailloux. Evanston: Northwestern UP, 1991. 101–114.

Iseminger, Gary (ed.). *Intention and Interpretation*. Philadelphia: Temple UP, 1992.

Jarman, Thomas. *A Treatise on Wills*, vol. 3, 8th edition. London: Sweet and Maxwell, 1986.

Kavanagh, Aileen. "Pepper v Hart and Matters of Constitutional Principle." *Law Quarterly Review* 121 (2005): 98–122.

Kavanagh, Aileen. "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998." *Oxford Journal of Legal Studies* 26 (2006): 179–206.

Knapp, Steven and Walter Benn Michaels. "The Impossibility of Intentionless Meaning." *Intention and Interpretation*. Ed. Gary Iseminger. Philadelphia: Temple UP, 1992. 51–64.

Levinson, Sanford and Steven Mailloux (eds.). *Interpreting Law and Literature. A Hermeneutic Reader*. Evanston: Northwestern UP, 1991.

Margrave-Jones, Clive V. *The Law of Succession*. 5th ed. London: Butterworth, 1991.

McLoughlin, Kate and Carl Gardner. "When is authorial intention not authorial intention?" *European Journal of English Studies* 11 (2007): 93–107.

Michaels, Walter Benn. *The Shape of the Signifier*. Princeton: Princeton UP, 2004.

Michaels, Walter Benn. "Against Formalism: Chickens and Rocks." *Interpreting Law and Literature. A Hermeneutic Reader*. Eds. Sanford Levinson and Steven Mailloux. Evanston: Northwestern UP, 1991. 215–224.

Nicholls, Donald. "My kingdom for a horse: the meaning of words." *The Law Quarterly Review* 121 (2005): 577–591.

Powell, H. Jefferson. "The original understanding of original intent." *Harvard Law Review* 98 (1985): 885–948.

Radin, Max. "Statutory Interpretation." *Harvard Law Review* 43 (1929–1930): 863–885.

Radin, Max. "A Short Way with Statutes." *Harvard Law Review* 56 (1942–1943): 388–424.

Rüegg, Walter (ed.). *Geschichte der Universität in Europa*. Four volumes. München: Beck, 1993–2010.

Scalia, Antonin. *A Matter of Interpretation. Federal Courts and the Law*. An Essay by Antonin Scalia. With Commentary by Amy Gutmann (ed.), Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, Ronald Dworkin. Princeton, New Jersey: Princeton UP, 1997.

Schleiermacher, Friedrich. *Hermeneutik und Kritik*. Ed. Manfred Frank. Frankfurt/M.: Suhrkamp, 1995.

Wimsatt, W.K. "Genesis: A Fallacy Revisited." *The Disciplines of Criticism. Essays in Literary Theory, Interpretation, and History*. Ed. Peter Demetz, Thomas Greene and Lowry Nelson Jr. New Haven: Yale UP, 1968. 193–225.

Wimsatt, W.K. Jr, and M.C. Beardsley. "The Intentional Fallacy." *The Sewanee Review* 54 (1946): 468–488.