JURISPRUDENCE, INTERPRETATION, AND RELEVANCE: How Relevant is Jurisprudence in Modern Practice?

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I. INTRODUCTION

A young man stands in front of a group of voters, explaining to them when they should elect him the next president of their honor society. He finishes his speech and takes questions from the members in the audience and one woman raises her hand and asks, “We are an exclusive society. How do you intend to make sure that our group stays exclusive?” The young man doesn’t hesitate and answers her almost immediately by explaining that there are procedures already in place to make sure that members are only the most qualified and that there really is not much that he must do to ensure that the group remain exclusive. Confident of his answer, he moves on to the next question.

What the young man did in a split second was to interpret the meaning of the question that was posed to him as well as provide his interpretation of a rule of the organization. Without doing much investigating or asking for clarification, he assumed that he knew what the woman was asking and went ahead and gave an answer. Later, the young man learned that the society had been allowing disadvantaged youth into the clubhouse to do their homework and study for exams. Some of the members were unhappy that their space had been intruded upon and they no longer felt that they had privacy. Once the young man learned this information, he began to rethink the meaning of the question and the rule of exclusivity of the society. The young man was faced with two possible interpretations what the question and rule might have meant. How should he decide which is the proper interpretation?
Individuals face these kinds of situations daily. Deciding what a word, phrase, statement, or rule means may be decided in any number of ways, some might not even be consciously thought about because it is second nature to most people. The word interpret is defined as “to give or provide the meaning of; explain; explicate; elucidate.”1 In a larger context, many groups interpret rules and laws in a variety of contexts. From informal organizations, to schools, to religious organizations, interpretation plays an important role in their everyday existence. In fact, religion is one area that provides interpretation on a consistent basis.

Generally, within any religious organization there is a text that is central to the belief system. From this text, rules are provided to the believers but the interpretation of these rules can vary between different branches of the faith. For example, within Islam the central text is the Qur’an but there are different sects that interpret the text differently. The Christian faith is no different with the central text being the Bible, separated into the Old and the New Testament. Interpretation is handed down through the different denominations2 within the Christian faith, each having a different interpretation on religious law.

One particularly interesting example is a fairly well known story to many Americans, even those outside the Christian faith. It is the Biblical story of Jesus in the temple teaching when a woman was brought before him that has been accused of adultery.

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1 Webster’s New World Dictionary 1305 (2nd College Ed. 1986).
2 There are many denominations in the Christian faith. They range from Catholic, to Protestant, to Lutheran, to Baptist, to Fundamentalist, and several more. There are fundamental similarities which bind them all into the Christian faith, such as a common belief that Jesus Christ is God, but the other Biblical rules may have different interpretations.
“And early in the morning he came again into the temple, and all the people came unto him; and he sat down, and taught them. And the scribes and Pharisees brought unto him a woman taken in adultery; and when they had set her in the midst. They say unto him, ‘Master, this woman was taken in adultery, in the very act. Now Moses in the law commanded us, that such should be stoned: but what sayest thou?’ This they said, tempting him, that they might have to accuse him. But Jesus stooped down, and with his finger wrote on the ground, as though he heard them not. So when they continued asking him, he lifted up himself, and said unto them, ‘He that is without sin among you, let him first cast a stone at her.’ And again he stooped down, and wrote on the ground. And they which heard it, being convicted by their own conscience, went out one by one, beginning at the eldest, even unto the last: and Jesus was left alone, and the woman standing in the midst. When Jesus had lifted up himself, and saw none but the woman, he said unto her, ‘Woman, where are those thine accusers? hath no man condemned thee?’ She said, ‘No man, Lord.’ And Jesus said unto her, ‘Neither do I condemn thee: go, and sin no more.’”

On the face of the text there may appear to be only one rule in the passage, but it may be possible to get two rules, or more, out of the story. Most people immediately jump to the most obvious interpretation that appears to them, and fail to divine the other possible interpretations. This story and the rules that come from it may also have had an influence on the formation of American law because it is so well known.

The legal field is a place where interpretation is also used frequently. It is used on a daily basis in fact. Lawyers must interpret what statutes and case law mean so that they can provide the best arguments to bolster a client’s case. Judges are required to interpret statutes, the rules of court, and the rulings from courts above to provide a decision to the parties before it. Justices must also interpret the laws and the Constitution to make the final ruling for the parties involved in a particular case, but also provide a precedent that the lower courts will follow.

Not surprisingly, different schools of thought have developed over time that have tried to point to the most efficient way of interpreting law. Jurisprudence, or the

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3 HOLY BIBLE, King James Version, John 8:2-11.
philosophy of law, has developed over centuries around the world. It does not study the political process per se, but instead looks at the law and tries to understand what the law is, because on its face, it may be ambiguous or it can possibly be interpreted in a number of different ways. These methods of interpretations not only apply to the interpretation of laws in secular society, but can also be applied to laws in religion, the rules of clubs, organizations, corporations, schools, universities, virtually anywhere that rules are found, interpretation is required.

While there is no right or wrong way to interpret statutes and law, there may be a general consensus that lawyers, judges, and justices may actually perform several modes of interpretation at the same time. This of course will be dependent on the situation that calls for the analysis and the particular law that is being interpreted. Just as with religion though, a particular method of interpretation may be more of a personal choice to an individual, a personal philosophy of law, and will the individual will then hold that this is the “correct” way of interpreting.

Jurisprudence and statutory interpretation are distained by law school students and in legal circles outside the academic realm, but both are an integral part of the legal process and as such should be included in all law school education in an effort to turn out practice ready lawyers. This paper will look at the different theories of statutory interpretation, breaking down how the individual theories go about interpretation. The different theories to be analyzed include hermeneutics, textualism, purposive interpretation, dynamic interpretation, liberal interpretation, legal process theory, moral theory, and active liberty. Then the paper will analyze parallels between the interpretation

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4 Black’s Law Dictionary 396 (3rd Pocket Ed. 2006).
of the Biblical passage presented above and explore how the various interpretations may have influenced American law. Finally, ending with an analysis on how jurisprudence may help to create practice ready attorneys by the end of the three-year law school experience.

II. THEORIES

A. Hermeneutics

The word “hermeneutics” is derived from the name of the Greek god Hermes who was the messenger of the gods.\(^5\) From this we can derive that hermeneutics has to do with communication and the interpretation of that communication. The traditional use of hermeneutics has been related to Biblical hermeneutics and interpretation of Biblical passages.\(^6\) Despite this, the theory of interpretation is malleable enough that it can lend itself easily to the interpretation of law. Dr. Henry Verkler, a professor of psychology and active Christian counselor,\(^7\) explains in his book *Hermeneutics* that there is a method of interpretation within the context of hermeneutics and include the following six steps: 1) a look at the historical and cultural context in which the author wrote the passage or law; 2) the lexical and syntactical understanding and relationship between the words that were used; 3) apprehend the theology of the time in which the passage or law was written; 4) decipher the literary style in which the passage was written; 5) compare the interpretation with others who have interpreted the passage or law before; and 6) decide how the interpretation applies in the modern day, in a real world context.\(^8\) In addition, Virkler directly speaks to the relation of hermeneutics and the concept of law stating that law can

\(^{6}\) Id. at 16
\(^{7}\) http://www.sfaconline.org/about-sfac/ executive-committee/henry-virkler
\(^{8}\) Virkler, *supra* note 5, at 76-77.
be divided into three types, ceremonial, judicial or civil, and moral. Each requires the same type of interpretation outlined earlier, but bearing in mind the type of law has an implication for the interpretation in that it should not be applied beyond the intended use.

B. Textualism

Justice Antonin Scalia was appointed to the Supreme Court in 1986 and has been one of the most outspoken advocates on the theory of textual interpretation. The theory of textualist interpretation looks at the words of the item being analyzed; this includes law, statutes, case law, biblical passages, and any number of texts that are open to interpretation. Within the religious community, individuals and sects that take the words that are written literally at face value are called fundamentalists, while those that practice the same type of interpretation within the law are framed as textualists. According to Justice Scalia, “text is the law, and it is the text that must be observed.” Scalia goes on to say that a law or statute should not be interpreted too strictly or too leniently, but rather reasonably, remarking that strict-constructionism is a “degraded form of textualism.” Yet, Scalia acknowledges that the text has a limited range of meaning and cites the Due Process Clause as an example that has been overtaken from the actual text. The Due Process Clause of the Fourteenth Amendment states that, “no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person

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9 Id. at 141.
12 Id. at 23.
13 Id. at 24.
within its jurisdiction the equal protection of the laws.”¹⁴ Scalia argues that the text has been distorted to encompass more liberties that shall not be taken away by the states, including freedom of speech.¹⁵ If the text does not embrace or explicitly give rights the additional rights, then those rights should not be read into the text. This is a formalistic approach that Scalia endorses because “the rule of law is about form.”¹⁶

Scalia also endorses the canons of construction, which he admits have fallen out of favor in recent history, but argues that they are integral to the textualists job of interpretation. He brings three specific examples to light and they include: expressio unius est exclusion alterius which means “the expression of one is the exclusion of another”; noscitur a sociis which is to say “it is known by its companions”; and ejusdem generis meaning “of the same sort.”¹⁷ These three rules Scalia advances have so much common-sense attached to them that they should be a part of any interpretation and should not be scorned. In fact, the words are so important and should be analyzed with the surrounding terms that the exclusion of all else is almost necessary, including analysis of the legislative intent. Scalia states clearly that he does believe legislative intent should be included in the textualist interpreter’s reading of a text. “My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me … to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning.”¹⁸ In the end, the words are all that matter to the textualist and to Justice Scalia.

¹⁴ U.S. CONST., 14th Amend., § 1
¹⁵ Scalia, supra note 9, at 24.
¹⁶ Id. at 25.
¹⁷ Id. at 25-26.
¹⁸ Id. at 29-30.
C. Purposive interpretation

There are various types of definitions within purposive interpretation, with the most common being the understanding that “purpose” is a subjective term, having a different meaning to each interpreter.19 Many in western law treat purposive interpretation as an act of looking for the intent of the author or legislature in writing the rule or law. It is not followed in the same manner throughout the world however. One of the most influential proponents of purposive interpretation is Aharon Barak. Appointed to the Supreme Court of Israel in 1978, he has had opportunity to consider, develop, and administer his own version of purposive interpretation over the years.20 Barak stated that the purpose of any sort of interpretation within the law is “to realize the goal that the legal text is designed to realize.”21 This sounds much like the purposive theories heard in much of western civilization, but Barak adds another layer, including the intent of the legal system itself. The intent of the legal system is framed by the Constitution and includes such things as the “considerations of democracy, separation of powers, the rule of law, and the role of a judge.”22 Barak further explains that purposive interpretation is based on three elements: language, purpose, and discretion.23

The first element of language, Barak disposes of quickly by stating that it is only related to the semantic meaning of the words that are used; whether they are express or implied terms, this limits the interpreter to the a meaning that can only be borne out

19 AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 86 (2005).
21 Barak, supra note 19, at 88.
22 Id.
23 Id. at 89.
through the words themselves. He clearly does not place as heavy an emphasis on language as other theorists do, instead looking more heavily at purpose and discretion.

Purpose is clearly the heavy hitter of his theory, as it is included in the name of the theory. Barak’s rational behind purpose being the most important element is because “purpose is the values, goals, interests, policies, and aims that the text is designed to actualize.”24 There are two categories of purpose though, the subjective and the objective purpose of the statute, rule, or constitution. The subjective Barak labels as the author’s intent, which can be the legislature, a founder, or the electorate.25 The objective intent is the legal system in which the law is to work. By this, he means the rules of how the system operates: the rules of court, civil procedure, criminal procedure, constitutional protections, and the like. When these two systems come into conflict it is the job of the interpreter to balance out these conflicting interests and create a synthesis by which to work the two together.26

Finally, the third element of Barak’s purposive interpretation is discretion. This allows the interpreter or judge to make a determination and decide between several different interpretations that may be available. He states that the interpreter might need “to exercise discretion in determining the limits of language [or] evaluating the reliability of sources of information.”27 Even so, the importance of discretion is in deciding the ultimate purpose of the object of interpretation. Barak goes on to state that discretion is an integral part of any interpretive theory, whether it is announced a part of the theory or

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24 Id.
25 Id.
26 Id. at 91.
27 Id. at 92.
not. Despite that, he argues that it should never become the “primary element” of interpretation.\textsuperscript{28}

D. Dynamic Interpretation

William Eskridge, Jr., is a distinguished professor of Jurisprudence at Yale and an acclaimed author who has been influential in the field of same-sex marriage rights and scholarship.\textsuperscript{29} In regard to statutory interpretation, he states that “[it] is the critical battleground for most human rights issues in the United States.”\textsuperscript{30} In light of this statement, Eskridge advances a theory of dynamic interpretation in his book aptly named, \textit{Dynamic Statutory Interpretation}. Within his book he introduces the theory that statutory intent does not need to be the same intent that the legislature or author intended because the further one gets away from the writing and implementation of the statute, the harder it is to divine the intent.\textsuperscript{31} Eskridge also suggests that the intent does not really matter at that point.\textsuperscript{32} The reason for this is because a statute is not fully exercised until it is actually applied against a real world situation, and that situation may be beyond the original situation that the drafter intended. In effect, the situation has changed so much that the application may go beyond, or even against, the author’s original intention for the statute.\textsuperscript{33} Eskridge points to three situations when the application of the statute may change: 1) when there are issues that the statutory enactor was unable to resolve or come

\begin{footnote}
\textsuperscript{28} Id.
\textsuperscript{29} Yale Law School, Biography of William Eskridge available at http://www.law.yale.edu/faculty/WESkridge.htm.
\textsuperscript{30} \textit{WILLIAM ESKRIDGE, JR., DYNAMIC STATUTORY INTENT} 8 (1994).
\textsuperscript{31} Id. at 5-6.
\textsuperscript{32} Id. at 6.
\textsuperscript{33} Id. at 50.
\end{footnote}
to a consensus about at the time of enactment; 2) when issues are not noticed or unanticipated; and 3) when there is political or social resistance to the statute.\textsuperscript{34}

Eskridge also argues that the world is constantly changing and that some of those changes may be because of the statute itself, having an effect in their direction, an effect intended or not intended. Beyond that, he states that “[i]n addition to changes in society and culture, law and policy, there may be sea changed in the community’s general cultural assumptions and framework of thought.”\textsuperscript{35} In addition, an individual brings his or her own understanding, biases, and experience into interpretation as well.\textsuperscript{36} Therefore, the interpreter should be making an analysis from a bottom up fashion, not the traditional top down analysis normally applied.\textsuperscript{37} This bottom up analysis will allow for more intellectual discussion that may be lost from the tradition analysis. These arguments are the basis for the dynamic interpretation that Eskridge advocates, more of an analysis that comes from the people, comes from the situation, and comes from society, not solely looking at the intention of the enactors of legislation, but rather a synthesis of all of these interpretations.

E. Liberal Theory

Liberal interpretation is a misnomer in some sense because the term liberal does not coincide with the current cultural definition of term. The term liberal, in this context refers to the ideal that the government is not as important as the individual. Eskridge

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\item \textit{Id.} at 51.
\item \textit{Id.} at 55.
\item \textit{Id.} at 58.
\item By bottom up, Eskridge means to say that an interpreter should be looking at the interpretation from the parties involved in the legal issue, and then society’s interpretation, and working up toward the interpretation of the highest court of the jurisdiction. Traditionally the analysis has been from the highest court, down to the interpretation of the parties involved. \textit{Id.} at 70.
\end{enumerate}
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describes liberalism as a “social contract” between the government and an autonomous
group of individuals that that gave up some of their freedoms to form the government for
reasons of protection and safety.\textsuperscript{38} This means that the government only operates on the
consent of the people and that the government recognizes that fact. However, in the
abstract, this means that there is a hyper focus on individual rights, such as the right to
property and the right to contract. Eskridge claims that the liberalist see the job of
interpretation as mechanical because they have means that will allow them to determine
the meaning of the statute or legislation.\textsuperscript{39}

The central issue though is consent, and the Constitution of the United States was
the ultimate consent of the people to be governed. The Constitution states that the
Congress shall be the enactor of laws, and to pass laws the Congress consents to certain
arguments; therefore, liberalist are uncomfortable when anyone outside of the legislative
process interpreting a statute if they are not looking at what the Congress consented to
when they passed the legislation.\textsuperscript{40} Arguably, liberalist can sometimes be called
originalists as well because they begin with the text of a statute, then look at background
information, and then divines the principles of the author. If the situation is not one that
was thought of at the time of enactment, then the interpreter tries to find equivalent
situations that would coincide with the same principles.\textsuperscript{41} This is why, Eskridge argues,
that intent resonates so well within liberal theorists.\textsuperscript{42}

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\textsuperscript{38} \textit{Id.} at 111.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 121.
\textsuperscript{41} \textit{Id.} at 134-135.
\textsuperscript{42} \textit{Id.} at 121.
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F. Legal Process Theory

The legal process theory has been cited as gaining its popularity with the addition of Justice Harlan to the U.S. Supreme Court in the mid-1950s.\textsuperscript{43} The theory was a combination of several different theories brought under one umbrella. One theory brought in was that legal decision-making was a search for cohesion and coherency within the law.\textsuperscript{44} Another was that complex social problems should be left to the administrative agencies or the states to solve, handle, and regulate.\textsuperscript{45} The final component, spawned by American resistance to the totalitarianism of World War II, created a belief that America was the best legal system and government in the world and that a free democracy created a more informed electorate and better political discourse.\textsuperscript{46} These theories were exemplified by Justice Harlan who believed strongly in the rule of precedent and strict adherence to the rules of court, deference to the other branches of government and the states, and the belief in the American Federalist system.\textsuperscript{47}

These theories were espoused earlier than Harlan however, dating back to 1938 at its earliest inception. Henry Hart and Albert Sack’s were two theorists who advocated for this theory.\textsuperscript{48} Eskridge states that the theories advanced by both men were the first type of dynamic interpretation within the American system and contained a coherence component that the statutes and laws should be interpreted within the surrounding legal framework and should remain consistent within those themes. This is consistent with

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\textsuperscript{43} Donald Dripps, \textit{Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School} 3 Ohio State Journal of Criminal Law 125, 132
\textsuperscript{44} Eskridge, \textit{supra} note 21, at 141.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Dripps, \textit{supra} note 43, at 132.
\textsuperscript{48} Eskridge, \textit{supra} note 30, at 141.
Harlan’s respect for the common law and the precedent that had been passed down from earlier cases. Beyond this, Hart and Sacks also believed that the statutes and laws were not merely directions for the regular citizen but were also direction for the government officials as well.\(^49\) Again, this is consistent with Harlan’s belief that the court should show deference to governmental agencies and their interpretation of statutes because the statutes and laws are also a directive to them and they are better equipped to understand “the situation on the ground.”\(^50\) Finally, falling within Harlan’s system of belief, is the belief that the American system of government is one of the best, if not the best, in the world. While not a direct democracy, the founders viewed the federal system as being the best for protecting the rights of the minority from the tyranny of the majority, ensuring what is in the best interest of the public.\(^51\) Despite these high ideals, legal process theory has fallen out of favor in recent times and the Supreme Court that Justice Harlan was a part of has completely turned away from the ideals he has set forth, despite himself being the conservative of the Warren Court.\(^52\)

G. Moralist Theory

Ronald Dworkin is a respected legal and philosophical scholar, having worked under Judge Learned Hand, been a professor of law at Yale University, appointed Chair of Jurisprudence at Oxford University, he is currently a professor at New York University’s Law School.\(^53\) He has advocated a theory of interpretation that focuses on

\(^{49}\) *Id.* at 143.
\(^{50}\) *Id.* at 170.
\(^{51}\) *Id.* at 156.
\(^{52}\) Dripps, *supra* note 43, at 130.
\(^{53}\) Oxford University, Biography of Ronald Dworkin *available at* http://www.ou.edu/cas/psc/dworkin.htm; see also New York University, Biography of Ronald Dworkin *available at* http://philosophy.fas.nyu.edu/object/ronalddworkin.
the moral interpretation of a statute or law within the bounds of political decency and justice. Dworkin recognizes in his book *Freedom’s Law* that the moral theory is often criticized as giving judges and justices absolute power in interpretation by enforcing their own moral code on the public; however, Dworkin argues to the contrary, stating that this form of interpretation is not new and that most lawyers and judges practice this form of interpretation, even if they refuse to acknowledge it in public. This is the reason that it is so easy to “pigeon hole” interpreters into the classification of conservative and liberal. Conservative judges will interpret abstract language in a conservative fashion and liberal judges will do the opposite, interpreting in a liberal fashion. Dworkin maintains that moral readings are so entrenched in the American jurisprudence that it cannot be abandoned; but that the courts are loathe to acknowledge it because it would make it appear that an elite is enforcing their beliefs on the citizenry. However, Dworkin favors stating things as they actually are on their most basic level.

In looking at principles of morality within constitutional interpretation, Dworkin, discusses the amendments to the Constitution that protect individual freedoms looking at them in the most natural language and advocates acknowledging the moral principles.

I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its domain at having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of

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55 *Id.* at 3.
56 *Id.* at 2-3.
57 *Id.* at 7.
58 *Id.*
speech and religion.  

Dworkin freely acknowledges that other may endorse a different reading that may be more basic than his own and even might be the opposite, but he argues that acknowledging the moral implications that one finds in a text should not be overlooked and dismissed as irrelevant. In fact, he argues that those Justices on the Supreme Court whose methods appear close to moral theory have become advocates of individual rights and that the general public is comfortable with the moral and individual implications.  

H. Active Liberty

Justice Stephen Breyer, in his book *Active Liberty*, discusses his theory on how he believes judges and justices should interpret the Constitution and statutes, which includes protecting minorities. Breyer explains that Benjamin Constant, a political philosopher, wrote at the beginning of the French Revolution that there were two types of liberty; one was “liberty of the ancients” and the other was “liberty of the moderns”.  

Ancient liberty included a concept called active liberty, which meant that liberty was shared by the people of the country and those people had to be active participants in the system to make it work. Yet, this system lacked the protections for the minority from the abuse of power by the majority. This is an important distinction that Breyer tries to include in his theory of interpretation. He calls great attention to active liberty in his book and states, “My thesis is that courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts.”  

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59 *Id.* at 8-9.
60 Scalia, *supra* note 9, at 126-127.
62 *Id.* at 10.
63 *Id.* at 11.
should not be so confident in their positions because the people speak through their legislatures and that judges “lacks relevant experience.” This is because the people themselves at times lack the experience and must learn for themselves through the legislative process what does work and does not work for society. However, Breyer states that his objective is to show that keeping in mind the democratic objective can bring judges and justices closer to a balance between the voice of the majority and the minority. In looking at the practical consequences of a ruling and making sure that those consequences are in line with the democratic and constitutional ideal.64

In more practical terms, Breyer states that his thesis is not representing a general theory of interpretation, but more of a theme.65 Relying on the words of Learned Hand, Breyer states that interpreting is similar to interpreting a musical score. While one individual might emphasize one area of the score more heavily, another may deemphasize that same area. Therefore, Breyer says that interpreters must look at interpretation in the terms of approach, perspective, and emphasis.66 In particular emphasis matters because most interpreters look at the same things when they are trying to analyze a particular statute or constitutional section; most agree on the basic elements of “language, history, tradition, precedent, purpose, and consequence.”67 Yet, different interpreters place higher emphasis on different elements, including different historical Supreme Courts.68 Breyer’s book goes on to illustrate, through specific examples, that

64 Id. at 12.
65 Id. at 27.
66 Id. at 27-28.
67 Id. at 28.
68 Breyer emphasizes that historically different Supreme Courts have emphasized different “themes, objectives, and approaches” and have lead to periods of history that have distinct judicial philosophies. He points to the early nineteenth century court has
other approaches to interpretation that underemphasize consequences of the interpretation takes a toll on the Constitution that is too high.\textsuperscript{69}

\textbf{III. ANALYSIS}

It may appear, and it is true, that some of the above theories overlap with one another. Several hold the same principles to be important and others may appear to be bleeding toward a similar theory without actually crossing the line into the adjoining theory. This is the case in any type of philosophical theory because starting with one theory will create a new way of thinking and then that theory will be outgrown and a different, new theory will be created; a cycle of evolution in theory.

Applying the various theories of interpretation to the Biblical at the beginning, the woman brought before Jesus that was caught in adultery, may highlight the differences in the theories and the finer points that the theories are trying to achieve. Within the Biblical story there are two specific items that require analysis, the first being the statement of “He that is without sin among you, let him first cast a stone.” The second part requiring analysis is “Woman, where are those thine accusers? Hath no man condemned thee?” She said, ‘No man, Lord.’ And Jesus said unto her, ‘Neither do I condemn thee: go, and sin no more.’” Arguably, these are the Christian laws within the text, but what are those laws and what influence have they had on American law?

A. Application of the Theories to the Biblical Text

According to the hermeneutic principle, there are several steps that the interpreter must go through in coming to an explanation of what this text means. First, we need to

\textsuperscript{69} \textit{Id.} at 30-33.

\textsuperscript{69} \textit{Id.} at 33.
understand the historical context of the story. The story was written in a time when the new Christian faith was blossoming, but the period within the story itself is one of political turmoil in Israel around 30 A.D. because the Romans were occupying the country and the Jewish people wanted them to leave. The second step is to look at the language around the given text, in this case the language is clear that the religion leaders were trying to find a reason to arrest Jesus because he was a rebel in the community because it states “This they said, tempting him, that they might have to accuse him.”

Third, one must understand the theology of the time that the text was written. When the text was written, the Christian faith was relatively young but the Christian people were constantly being persecuted for their faith and this may have lead to this passage being a type of comfort to the Christians that their accusers were really just as bad so that they should feel vindicated. The fourth step requires one to decipher the literary style in which it was written. The passage as we read it is in King James English, but the original text was probably written in Aramaic, a language that we do not have the ability to analyze for the purposes of this article; however, it is worth noting that the translation may likely play a role in determining the true meaning of the text. The fifth step is to compare the interpretation to other’s interpretations. In general, there have been several interpretations; one is that Jesus is saying that people should not judge others or condemn others unless they are free from the same charges or sinless themselves; on the other hand, Jesus, who was said to have been sinless himself, forgave the woman so we should be willing to forgive transgressions no matter how horrible they may be; and finally Jesus was forgiving her conditionally because he is granted her pardon, but enjoined her not sin again. The final step of the analysis is to decide how it applies in a real world context and
this is more difficult because in order to come to this conclusion, the various interpretations must be balanced out. Considering the other information of the political turmoil of the time, coupled with the comfort the text may have meant to have to the persecuted Christians, it seems likely that the rule may have been that people should not be going around judging each other and condemning one another for sins that they may be guilty of themselves.

Textualism interpretation on the other hand requires looking only at the text and not any of the surrounding information that the hermeneutic principle looks at, rendering everything other than the text itself superfluous. In the Biblical example one would not take into account the history, instead judging the story only on the words. However, with this alone, one cannot make an informed decision because it is difficult to find a meaning other than the command that Jesus gave to the accusers that none can punish her unless they are without sin themselves and the command to the woman to sin no more. There are no other commands that Jesus gives within the text and no other words direct the reader to any sort of action. Therefore, under the textualist interpretation this passage is about sin; not judging unless one is free of sin and making sure that one does not sin at all. This is the general interpretation that is widely used in the Christian tradition today.\(^70\)

Beyond looking at the text itself, a textualist interpreter can use the cannons of construction to look at the surrounding words to come up with text and to analyze the text itself. The first canon is that the “inclusion of one is an exclusion of all others,” in the text Jesus is discussing punishment because the men brought the woman who was caught in adultery and wanted to put her to death, but asked Jesus what he thought they should do

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with her. Therefore because it is discussion of punishment, this may mean that people can judge her, but they are not allowed to punish her for her sin unless they are sinless themselves. The second canon is that “it is known by its companions” in which Scalia implied that some words have multiple meanings and that we divine the correct meaning from the surrounding words. The two particular Biblical commands here do not contain words that might have multiple meanings, so this analysis does not apply. The final canon is “of the same sort,” and here Scalia meant that if the text meant fasteners, then a zipper and button would surely be within that list because they are all known as fasteners.\footnote{Scalia, \textit{supra} note 9, at 26.} The only plausible explanation here would be the act of casting the stone, which is an act in which a punishment is being carried out, so it stands to reason that this passage is about punishment.\footnote{MAX SWANSON, RELIGION UNPLUGGED 148 (2011).} In the end, the canons did not change the interpretation from the original interpretation under the textual theory; this text is about sin and punishment and making sure that one does not punish another unless they are without the sin themselves and also not sinning any longer.

Within purposive interpretation there are three elements that need to be analyzed before determining the final interpretation of the Biblical text. First is the language. The language in these passages are fairly straightforward and do not require much complex analysis because there are no double meanings of the words themselves. The second element is purpose, which is the most important, and similar to the previous analysis, but it is hard to discern what the actual purpose of the text is without looking at the context and history behind the text. Looking at the story behind the text still leaves several possible explanations of what the text might mean, so it is important to look at the
subjective intent and the objective intent. The subjective intent of the author may have been to provide comfort to a people who were being persecuted for their new religious beliefs, but it may have also been to create a rule in which one does not judge other individuals, or it may have been to ensure that people will forgive each other for their wrongdoings. It is difficult to know what the subjective intent of the time was because we are so far removed from that time period. Therefore, the objective intent must be analyzed and here the intent of the legal system must be taken into account. The Christian church, depending on the denomination, will have a different legal system within, but generally all are concerned with gaining forgiveness from sin and working toward a more perfect, penitent life. However, by its natural interpretation this would mean that someone is judging another because in order for there to be punishment, one must sit in judgment of another to dispense the punishment and the forgiveness.

The third element comes into play at this point, which is the discretion of the interpreter because we now have conflicting interpretations between the subjective and objective purpose. The objective intent of the legal system cannot be that one should not judge another individual because people must be charged with crimes in or to promote a system of control, order, punishment, and forgiveness. The discretion would then be at the interpretation of the individual providing the interpretation. If the individual was more interested in deterrence of wrong doing and allowing an individual a chance to redeem themselves then discretion would demand that the analysis focus on the element

74 James A. Corcoran, Vernacular Versions of the Bible, Old and New, 4 The American Catholic Quarterly Review 344, 358 (1879).
of forgiveness of wrongdoings and making sure that the individual does not continue to engage in the same activity.

Next, dynamic interpretation does not require an interpreter to look for the original intent because the situation may have so changed from the time that the text was written that it may not be completely relevant in the current world situation. Additionally, the culture in which the text is applied may have been changed so drastically, perhaps in part because of the text, that it is not relevant to look for the intent any longer. What is necessary is that the interpreter discerns the meaning in a bottom up fashion instead of starting with the highest authority and working downward toward the meaning. In this case, the interpreter should ask the average person on the street what his or her understanding of the text means. Then, moving up the ladder, asking a minister or deacon in a church for their interpretation. Continuing up the ladder until one makes their way to the highest level of interpretation or the ultimate authority in the church. Therefore, any of the three interpretation outlined before could be relevant. If one were to synthesis all of the theories, it may sound something like, the following: if you are without sin for a particular wrong doing, you are allowed to sit in judgment of another who has committed that sin, but society should seek to forgive the individual while at the same time helping them not to continue to sin.

Inside the walls of liberal theory the interpreter must look at several issues, including the consent of the governed to the text that is at issue. Again, there are several layers of analysis that overlap with the other theories in that the text is looked at, then the

75 In the Catholic Church this would be the Pope, but in the Anglican Church this would be the Archbishop of Canterbury, and other denominations have a high authority that oversees the church and doctrine of the church.
intent of the author, and if the situation that the text seeks to cover is not included within the original intent, parallel situations and precedent should be looked at to determine the meaning. Despite this, the consent of the individuals is integral and the rights of the individual are in the forefront. Within the current legal context, one that did not exist when the text was actually written, it probably was not envisioned that individuals would be presumed innocent until proven guilty in the American legal system.\textsuperscript{76} Therefore, the right of the individual may demand that that no one judge the individual or pass punishment on the individual who is not free from sins or transgression themselves. The people have consented to this system and the criminal system is built on one of innocence until proven guilty. However, within the context of the legal system of the Christian church, there are no such provisions of innocence until proven guilty because an individual is expected to admit their sins in order to be granted forgiveness. It is because of this system of self-seeking forgiveness for one’s transgressions that would lead to the liberal interpretation that Jesus’ comment that he would not judge her was more of an implication that he would not punish her because he forgave her the momentary lapse of moral transgression. Therefore, the liberal theorist may be more inclined to look at an interpretation of forgiveness rather than punishment or judgment.

The legal process theory incorporates three distinct legal theories within its folds. The first being the belief in the common law and the rule of \textit{stare decisis}. The second is deference to the state agencies and the last is the belief that the American system of law

\textsuperscript{76} This is not actually codified in the U.S. Constitution, but have been legal precedent for quite some time in the U.S.. \textit{See, e.g., Coffin v. United States}, 156 U.S. 432, 453 (1895). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”
is the best in the country. Within the context of interpreting the Biblical story, the legal process theory would look at the precedent that had come before the rule had been enacted, or what rules have sprung up in response to the text. Each of the interpretations of the rules from the story may have had a distinct role in shaping rules and regulations within the American legal system and the legal process theory would have had respect for each of the interpretations in light of the belief that the American system is the best in the world. Some deference would have been shown to the administrative agencies that regulate the people on behalf of the government. As will be shown in the section below, some of the interpretations have spawn administrative regulations. Therefore, because the Legal Process theory is so intertwined with American government, the analysis of the interpretation under this theory will be in the next section.

Moralist theory takes into account the moral applications of the rule or law that is being analyzed and acknowledges that an individual is bringing their own moral assumptions to the table when interpreting that rule. Here the interpretation of the text will depend on the character of the interpreter. If the individual is conservative, he or she may find that the text is only discussing the issue of individuals not judging another individual unless they are without similar sin; therefore, an individual may be qualified to decide the fate of the individual if they have not committed a similar act or lead a relatively pure life. On the other hand, a liberal interpreter may find that the text is discussing forgiveness of the individual and may advocate a system of leniency against individuals who may have committed crimes because of a belief in that individuals can change and will see the error of their ways and strive to do better. Dworkin, himself, might agree with both interpretations but would more likely lean toward the side of
forgiveness if he were forced to choose only one interpretation. However, under the
moral theory, without the true nature of the interpreter it is difficult to know the
interpretation.

Finally, looking at the Biblical text under the lens of active liberty, an interpreter
would need to evaluate the protection of the minority from the tyranny of the majority.
However, there is some deference under this theory to the work of the legislature because
the citizens have to learn from their mistakes, learning to correct their mistakes along the
way and growing from those mistakes; however, this is not to say that the minority
should not be protected if the majority acts with haste. Within the Biblical text, active
theory would look toward protecting the minority, which in this case is the woman that is
accused of adultery because all of her accusers, the majority, are ready to condemn her to
death for her crime. Jesus, acting as the judge because he has been asked to judge this
woman by the majority, has now shown her leniency, despite the seriousness of her
crime. In this story Jesus is the champion of the minority under active liberty and because
he has simply told her to go and “sin no more” he is advocating forgiveness. Therefore,
active liberty’s interpretation of this passage would be one of forgiveness and helping the
individual remain free from sin in the future.

B. Application of Each Interpretation in the American Legal System

There are three major interpretations that have been developed from the Biblical
text under all of the theories that have been examined. Each interpretation has most likely
had an effect on American law and the legal system. The United States, despite the
separation of church and state,\textsuperscript{77} was founded by a small religious Christian denomination seeking to begin a new life in a new land, but there is also evidence that they wanted to come to America to create a society that would be a role-model of piety and purity to England.\textsuperscript{78} The puritans were very conservative in nature, but also deeply religious. The country and the laws of the land have been greatly influenced by the Judeo-Christian tradition, including Christian laws of how individuals should conduct themselves within society. This part of the discussion will focus on how the Biblical story of Jesus and the adulterous woman may have had an effect on the American legal system, but will only focus on the context of criminal law and prosecution of those crimes. The reason for this is because in the Biblical story, the woman brought before Jesus was guilty of a crime and was to be punished for that crime. The story did not have much to do with civil trials, although an argument could be made that it could apply to civil trials, but that is beyond the scope of this article.\textsuperscript{79}

1. Do Not Judge

The first interpretation is that no person should judge another person without first being free from wrong doing themselves. This is evident in several aspects of the legal system including the jury system, rules for becoming a judge, and even to some degree the rules for becoming a lawyer. This is done for a number of reasons, but most likely the

\textsuperscript{77} Thomas Jefferson was the first to discuss a separation between church and state in his 1802 letter to a group of Baptists that were seeking his help when he was President of the United States. \textsc{Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State} 25 (2002).


\textsuperscript{79} Within the civil context, the story could lead one to interpret the need for more lenient remedies or could also lead to the parties forgiving each other instead of taking each other to court, aiming for a less litigious society.
main reason is to make sure that the defendant receives a fair trial and that there is no bias in the system either for the defendant or against the prosecution.

The jury system is the most evident place where a criminal defendant is given protection from being judged by people who themselves are without criminal convictions. The Sixth Amendment grants a defendant a trial by a jury of peers, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”\(^{80}\)

While the Amendment does not say anything about who may sit on the jury, most states and jurisdictions have laws or rules of court that disqualify an individual who has been convicted of a crime from serving on a jury.\(^ {81}\) Similar to those in the rules of Federal Rules of Evidence, a person must not have been convicted of a crime of moral turpitude. There has been a great deal of case law stating that persons convicted of a crime are not allowed to serve on a jury and if they inadvertently served, then there should be a new trial.\(^ {82}\) Similarly, there has also been case law in which criminal defendants have brought suit stating that their due process rights were violated because a convicted felon was not allowed to serve on a jury, therefore not allowing a representative same of a trial by his or her peers.\(^ {83}\) The court cited in \textit{U.S. v. Greene} that the government has a legitimate

\(^{80}\) U.S. Constitution, Sixth Amendment.
\(^{82}\) See, e.g., \textit{Fleming v. State}, 687 So.2d 146 (Miss. 1997).
\(^{83}\) See, e.g., \textit{U.S. v. Greene}, 995 F.2d 793 (8th Cir. 1993).
purpose in disqualifying convicted criminals from serving as jurors, including the potential bias against the government.\textsuperscript{84}

This interpretation may also have spawned rules for judges and the judiciary. The role of a judge in any trial is critical, but it is particularly important in criminal trials because a defendant’s freedoms may be suspended if they are convicted. Since a judge is critical to a trial, there are rules, or Canons of Judicial Ethics that are advanced by the American Bar Association. The canons are very specific about behaviors that judges must maintain. One of the most important, listed within Article 4 states that a judge “should avoid infractions of law; and his [or her] personal behavior … should be beyond reproach.”\textsuperscript{85} There are no known prohibitions against a person, having been convicted of a crime not being allowed to be a judge; however, most judges in the United States have to be attorneys admitted to practice within the jurisdiction in which they will sit. However, there are specific rules for being admitted to the practice of law in every state of the Union.

Becoming a lawyer is sometimes seen as an arduous path. This entire process can take upwards of seven years, depending on the dedication of the individual, but sometimes can take several years longer. In most instances an individual must obtain an undergraduate degree; then obtain a juris doctorate degree; after, or during law school, one must apply of admission to the state bar in which they intend to practice and that application includes a section for moral character.\textsuperscript{86} It is this application of good moral

\textsuperscript{84} Id. at 795-796.
\textsuperscript{85} American Bar Association, Canons of Judicial Ethics, Article 4. See also Article 24.
character that may have been influenced by the Biblical text and interpretation. This does not mean that a person that has been convicted of a crime cannot serve as a lawyer, but the individual must demonstrate that they have reformed and are of good moral character and trustworthiness to be a lawyer.\textsuperscript{87} Justifications for these applications may vary, but it is worth noting that these applications became required in a majority of states by 1927 and has not been a longstanding requirement to enter the practice of law.\textsuperscript{88}

2. Forgiveness

The interpretation of forgiveness came up in several of the theories as applied above, and forgiveness has certainly had some influence on criminal law in the United States. To some individuals, it may sound odd to discuss forgiveness within the context of criminal law because most of society wants to see the individual punished for the crimes that he or she commits. It is exactly this thinking that created the “three strikes” law in California, but not all of the American criminal system is based on this same belief. In fact, there are a number of programs that grant forgiveness to individuals and will in some cases even let their criminal record remain clean.

One such program is the Adjournment in Contemplation of Dismissal. New York Criminal Procedure provides that either the defendant or the prosecution, with the consent of the other party, can motion for an adjournment in which the defendant will be released from custody and the charges officially dropped.\textsuperscript{89} The reason for this type of system is that it would let the defendant who has a clean record and is not a repeat offender who may have made a mistake be forgiven for a one-time offense. This is a type

\textsuperscript{88} Id. at 1041.
\textsuperscript{89} N.Y. CRIM. PROC. Art. 170 § 170.55.
of forgiveness within the criminal justice system. A similar type of program is traffic school within the traffic court system in which an individual who has a vehicle citation would be allowed to take six to eight hours of traffic school in return for a dismissal of the ticket. Almost every state allows for a similar program and it acts as a forgiveness system in the justice system.  

Another program is the Community Court system within California. This program began in San Francisco in 1998 with the help of the U.S. Department of Justice. This program allows individuals who are facing misdemeanor offenses to go to a community, volunteer, mini-court to work out retribution for their minor offense and in some cases have the offense removed from their record. This is similar to Christian forgiveness within the Catholic Church where the individual admits their sin to the priest, receives penance for the sin, and when the penance is completed receive absolution from the sin. In the Community Court program there are no recordings and statements made within the Court cannot be used later if the prosecutor decides to bring formal charges in Superior Court. Several other states and cities have now enacted similar programs including New York City, Austin, and Indianapolis.

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3. Forgiveness Along With Deterrence

The third interpretation is that of forgiveness but also creating a system of deterrence so that the individual does not repeat the same transgression. Individuals more easily identify with this type of system because there is a need to see punishment of some sort for an offense, regardless of how minor. Such programs within the criminal justice system may include probation and parole.

Parole is defined at the conditional release of a prisoner from prison before the full sentence has been served. In California, the parole system is one of “supervised freedom” in which individuals who have both been in custody and served time in prison are released from prison. This system was created to assure that individuals would serve out the remainder of their jail term, but would be allowed a degree of freedom in rejoining the community while making sure that the individual did not recommit the offense. The first parole laws were introduced in Massachusetts in 1937. In Massachusetts the goal of the parole system is to also provide a type of support in helping to locate housing, job assistance, and continuing risk reduction programming. This acts as a type of deterrence to the individual in that there is the constant threat that they could go to prison if they do not refrain from illegal actions or if they do not abide by the terms

95 Black’s Law Dictionary 521 (3rd Pocket Ed. 2006).
99 Id.
of the release, such as going to see the parole officer. This then is a type of forgiveness in allowing a shorter jail term.

Probation on the other hand is defined as a court-imposed criminal sentence that is subject to conditions but allows an individual to go back into the community without having to serve a jail term.\textsuperscript{100} The system of probation has its roots in medieval England in which individuals were allowed to be released from prison in order to secure pardons for their offenses or their sentence was suspended.\textsuperscript{101} This was the precursor to the modern probation system, which began in Massachusetts under John Augustus in 1841.\textsuperscript{102} Probation allows a judge to place any conditions that he or she believes is reasonable and necessary and also allows the judge to set the period of time that an individual is to remain on probation.\textsuperscript{103} However, a judge is usually limited by statute in the types of offenses that an individual may receive probation as opposed to a jail term. In addition, some states require the individual to pay restitution as part of the probation process, but it is not always required. Probation also generally comes with the condition that if the individual does not conform to the probation terms then a jail term will be imposed but the probation can also be extended for a longer period of time.\textsuperscript{104} Despite these harsh conditions that can be imposed, this is also a type of forgiveness and deterrence similar to what Jesus was referring to because an individual is allowed to keep their freedom and in a sense forgiven the transgression but they are put into a program that will help to deter them from committing the offense again. Whether or not this has

\textsuperscript{100} Black’s Law Dictionary 567 (3rd Pocket Ed. 2006).
\textsuperscript{102} Id.
\textsuperscript{103} See, e.g., WI ST § 973.09 (West 2011).
\textsuperscript{104} See, e.g., CT ST § 53a-32 (West 2011).
been a direct result of the Biblical passage, the meaning of the passage has had a
resounding effect on the criminal justice system in the United States because it has
influenced the thinking of the individuals who have helped to create the above-mentioned
systems of forgiveness, punishment, and deterrence.

IV. CONCLUSION

While today’s American law schools are focused on turning out practice ready
lawyers, there is something to be said for teaching jurisprudence and statutory
interpretation to future lawyers. Many people within the law school community, lawyers
included, take the view of jurisprudence that jurisprudence is for the academics and that it
is not relative to practice or clients. However, without these theories, a lawyer cannot
understand the best way to interpret a statute or how to make the best argument for their
client. Teaching jurisprudence would make students practice ready when they graduated
because they would understand the theories behind interpretation and would then is able
to choose which theory is the best for any particular situation and circumstance.

This is akin to a map. On that map is a destination, a destination that the lawyer
needs to arrive at for her particular client. The lawyer knows where her starting point is
located and her ending point, but she was never trained in how to read maps precisely,
only to be able to find locations. With some vague ideas, she begins to chart out her route
to the final destination, but she isn’t entirely clear on which line is a highway, which is a
freeway, which is a city street, but she maps out the route to get her where she needs to
go. How did she choose the route? There were most likely any different number of
combinations that she could have taken to get her final destination, but without the
training to discern where the freeway is located or what times are best to get on the
freeway and when it is best to avoid the freeway, she may not take the most advantageous route.

Yet, it is important to note that jurisprudence and statutory interpretation does not only apply to legal careers but can be applicable in any context and any area that requires interpretation including theories, rules, songs, plays, literature, and even everyday actions of other individuals. It would be worthwhile to teach jurisprudence, statutory interpretation, and the history of jurisprudence in every law school, but also in undergraduate programs studying political science, pre-law programs, and administration of justice programs. Regardless whether or the student taking the class goes into a career in law or not, it would go a long way in preparing those students to better interpret the everyday world around them.