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*Allan C. Hutchinson, **Toward an Informal Account of Legal Interpretation***, New York,

Cambridge University Press, 188 pages, hb, £ 69.99

Thomas Lundmark

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As stated in its title, this book urges the legal community to embrace what the book's author, Allan C Hutchinson, describes as an 'informal' explanation of legal interpretation. Hutchinson employs 'interpretation' broadly to encompass the activities of finding the law, applying the law, and justifying the result. 'Interpretation' covers statutory and constitutional interpretation as well as judicial pronouncements of common law. Basically, then, 'interpretation' is synonymous with judicial activity and, by extension, the activity of lawyers and others involved with the law. The final chapters of the book sketch Hutchinson's 'account' of what is 'informal' in legal interpretation. It will be seen that 'informal' signifies more than a mere rejection of what Hutchinson terms 'formalist' interpretive methods.

But before Hutchinson can begin to present his explanation of legal interpretation, he must first demonstrate that the explanations of others are unsatisfactory. To do so, Hutchinson tackles the question, 'What is law?'; and in so doing, he vigorously assails the contention that the province of the law can be fenced off from ideology. Specifically, Hutchinson describes and debunks the positivism of H.L.A. Hart, the natural law theories of Lon Fuller and Ronald Dworkin, the originalism of Antonin Scalia, the incrementalism of Cass Sunstein and Melvin A. Eisenberg, and the hard-line positivism of Joseph Raz. Finally, Hutchinson drafts the blueprints for a school of thought and analysis that might be called Informalist

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Jurisprudence. Informalist Jurisprudence implies a nuanced approach to law that balances

the constraints of the legal system, including judicial collegiality, with the political and ideological views of the judges and their apprehension of contemporary community values.

Hutchinson's book cuts a very wide swath in fewer than 200 pages. This review will measure and probe that swath, and assess whether Hutchinson has achieved his goal, as stated in his Preface, of writing a book for law students.

Hutchinson begins his book with an entertaining and elucidating chapter (1. An Informal Opening) in which he exposes the inability of the law-versus-ideology dichotomy to explain how seemingly simple cases are decided. Building on Hart's imaginary example of a prohibition against vehicles in a hypothetical park, Hutchinson employs two real-life cases from Canada in which the potential violation of the prohibition orders against two convicted paedophiles turns on the interpretation of the statutory term 'public park'. Provocatively, one man is found to have violated his prohibition order by being present in a public park, and the other not. The juxtaposition of these cases and the reasoning employed by the judges serve to whet the reader's appetite for the formalist-versus-anti-formalist debate discussed in the chapters that follow.

Chapter 2, 'Among the Formalist Ghosts', warns the reader that the ghosts of discredited formalism haunt and hamper modern thinking about law and interpretation, much in the way that the common law forms of action (in Maitland's famous phrase) still 'rule us from their graves'. Hutchinson utilises Richard Posner's definition of 'formalism' as the 'belief that all legal issues can be resolved by logic, text, or precedent, without a judge's personality, values, ideological leanings, background and culture, or real-world experience playing any role' (*Reflections on Judging* (2013), 1). According to Hutchinson, positivists are formalists

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because they believe that judges in most cases can make decisions in a detached and impartial manner, although most acknowledge that this is not so for the occasional 'hard case' that occasionally arises. Naturalists are also formalists, according to Hutchinson, because they insist that law itself contains its own political morality so that judicial decision-making, though drenched in values, is a self-contained enterprise. 'Originalists' are formalists, according to Hutchinson. For while originalists are willing to let down the drawbridge to admit witnesses to the 'prevailing views and values' at the time of the enactment, they work within a formalist fortress that denies that judges bear any responsibility for the contemporary justness of their decisions. Hard positivists, Hutchinson writes, are unrepentant formalists who hold a metaphysical faith that the 'legitimacy of the whole legal enterprise' rests on the solemn mission of judges to act in an 'objective and detached' manner. Finally, incrementalists are those who embrace formalist dogma, but reserve for themselves the task of making modest revisions to the law in response to changed circumstances in society. As will be seen, Hutchinson finds fault with all of these formalist approaches and, in his conclusion, calls for 'a defiant and decisive act of ghost-busting' with the goal of contributing to a more informed and authentic account of legal interpretation and judicial decision-making.

In the chapter that follows (3. *Walking Softly: The Positivist Contribution*) Hutchinson convincingly demonstrates the weaknesses of Hart's theories. This is not a head-on, Dworkian assault on Hart, but rather the remarks of a man disappointed that 'Hart's ideas run out of steam at the very point that they are most needed' (27). Particularly successful, and important for law-student readers, is Hutchinson's criticism of Hart's 'all-important distinction between the core and penumbra of a rule', which is the same distinction made in

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1914 by Philipp Heck, who employed the terminology *Begriffskern* for the core and

Begriffshof for the penumbra (*Gesetzesauslegung und Interessenjurisprudenz* (1914) 107-

108). It is at this point that Hutchinson makes brilliant use of Hart's hypothetical prohibition against vehicles in the park and Hutchinson's own, real-life Canadian cases construing the term 'public park'. Hutchinson concludes that there is no plain meaning; it is all penumbra.

Hutchinson then turns his attention to Fuller and Dworkin (4. *Walking with Purpose: A Naturalist Turn*). Considering Dworkin's pre-eminence in North America today, it might be criticised that Hutchinson devotes only 16 pages to both Dworkin and Fuller. However, Hutchinson expertly extracts only those elements of Fuller and Dworkin's writings that are germane to Hutchinson's own search for reliable constraints on judicial discretion. Again employing his Canadian cases as examples, Hutchinson demonstrates that Fuller's solution—seeking the purpose of the rule—cannot curb judicial interpretive freedom; it simply shifts the discussion from text to context. Dworkin, unsurprisingly, suffers a similar fate. While both Dworkin and Fuller are given well-deserved credit for returning morality to legal thinking about interpretation, Dworkin's search for integrity comes in for especially harsh criticism as does Dworkin's one-right-answer article of faith. These criticisms seem persuasive, but the reading is somewhat heavy-going, particularly for students.

The chapter on originalism (5. *Back to the Future*) is both insightful and enjoyable.

Hutchinson rends the curtain of neo-originalism to expose the conservative legal wizards hiding behind it. '[T]hey preach legal theory but practice political ideology (73).' In so doing, Hutchinson also rightly criticises the failure of neo-originalism to offer any kind of legitimating justification for its approach to curtailing judicial freedom. Incrementalists are taken to task in the next chapter (6. *In a Common Cause: An Incremental Approach*).

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Incrementalists believe that they can avoid or finesse ideological politics if they develop

legal doctrine in an incremental and evolutionally fashion by taking small steps. While

Hutchinson is 'not unsympathetic' to this approach, he clearly and succinctly demonstrates

that adherents to this approach, of which there are many, offer no guidance on which

directions the steps should take, on the size of the steps, and even on whether any steps

should be taken in the first place. Hutchinson provides readers with numerous helpful

illustrations – including the legal problems to be resolved in such landmark cases as

Donoghue v Stevenson [1932] AC 562 (do manufacturers owe a duty of care to consumers?),

Griswold v Connecticut, 381 U.S. 479 (1965) (can a state prohibit the sale of

contraceptives?), *Brown v Board of Education*, 347 U.S. 483 (1954) (can states enforce racial

segregation in schools?), *Obergefell v Hodges*, 576 U.S. 1 (2015) (can states prohibit same-

sex marriage?). Hutchinson asks how ideological politics can be avoided or finessed in these

cases. He concludes this chapter by pointing out that incrementalism as a curb on judicial

discretion 'fails because it is itself held hostage to a judge's ideological orientation'.

Hutchinson relaunches his campaign against positivism in the seventh chapter (7. A Hard

Line: Further Positivist Efforts) with a vigorous assault on Joseph Raz. Whereas the 'softly-

softly' approach of Hart 'is shot through with moral terms, purposive conditions, and

evaluative standards – reasonable care, fair dealing, honesty, good faith conduct, and so

on', Raz doubles down on such terms, insisting, reminiscent of Plato's theory of Ideas, that

they are objective and autonomous from moral consideration; it is merely their application

that raises the spectre of morality. This 'sharp and crucial distinction' between law-making,

law's existence, and the application of the law is Raz's Achilles Heel, according to

Hutchinson. For this distinction to hold true, Raz must prove that law 'can be identified as a

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matter of social fact rather than as an exercise in [value-laden] moral evaluation', according to Hutchinson. But in this, Raz must surely fail, according to Hutchinson. While insightful and entertaining, students of the law will likely have difficulty with this discussion unless they are near the end of their studies.

The following chapter (8. Crossing Over: The Anti-Formalist Critique) will also probably be heavy going for the beginner, but it is one of Hutchinson's best. In this chapter, Hutchinson takes to task the superficial empirical studies of political scientists and academic lawyers who explicitly or implicitly maintain that judicial decision-making is a two-dimensional, either/or process that correlates judicial decisions with judges' political ideology. Some of these academics even maintain that judges' ideological values are the 'primary, dominant, or even exclusive factor' in judges' decision-making. Employing a series of charts, Hutchinson tackles the issue of 'ideological drift' or 'shift', as he prefers to call it. Most empirical scholars, Hutchinson notes, decline to explain the reasons for the shift.

Hutchinson argues:

If judges' ideological commitments are unstable and fluid, it behooves court-watchers to reassess the whole relationship between law and ideology. In particular, the source of the shift may well be the disciplining role of law over judges' ideological dispositions, not vice-versa. Accordingly, it is not so much that 'ideological drift' offers a twist to the received empirical wisdom, but that it puts the legitimacy of the whole empirical project under serious threat (110).

Hutchinson concludes, ironically perhaps, that those justices of the United States Supreme Court who shift the least have the most effect on the overall direction of decisions made, particularly those who straddle the ideological middle. Consequently, Hutchinson suggests

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that a more nuanced explanation of judicial decision-making is required, one that includes political values as well as a respect for legal considerations.

Hutchinson demonstrates in the next chapter (9. Moving On: An Ideological Inquiry) that law and ideology are ‘integral and mutually reinforcing features’ (136) rather than separate spheres of influence. He does this by providing a more nuanced description of law and lawyers, on the one hand, and of judicial ideologies on the other. ‘Law and lawyering’, Hutchinson writes in one of his many pithy phrases, involve more than ‘flipping coins’. Hutchinson cites *Donoghue v Stevenson* as an example of ‘the connection between law and community (ie, ideology)’ (129). In holding that a consumer can sue a manufacturer with whom she is not in privity, Lord Atkin surveyed relevant legal doctrines and concluded that they evidence ‘some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances’ (quoted at 129). Lord Atkin can be seen here making a good-faith effort to combine those legal doctrines to fashion a modern approach in consonance with what he perceived to be the ideological preferences of the community.

Judicial ideologies, Hutchinson writes, are also more nuanced than presented by the orthodox liberal-versus-conservative dichotomy. While not disputing that a judge’s ideology does have a major influence on judicial decision-making, Hutchinson argues that ideology is not a ‘template for resolving difficult moral and political issues but a framework ... for thinking about and through them’ (131). The superficial liberal-versus-conservative dichotomy fails to take account of the judges’ conception of the ‘role of a good judge in a constitutional democracy’ (131). In addition, judges are obliged to work within the legal system, which involves advocates, expert testimony, legal arguments, and collegial

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considerations that must exert some influence on the result and on how the result is

framed. In summary, Hutchinson writes that law and ideology are ‘not separate spheres of influence; they are integral and mutually reinforcing features of judicial decision-making’ (136).

Hutchinson sketches his informalist account of legal interpretation in the penultimate chapter (10. Law and Ideology: The Informalist Approach). For starters, any such account must balance the constraint of the legal system with political substance. Also, any such account must recognise that hard and easy cases are resolved in much the same way: so-called easy cases are merely cases in which the dynamic of legal interpretation is less obvious, but no less present. Hutchinson explains that there is no *a priori* quality of a rule or case that makes it easy; rather, ‘easy is a label that is applied to cases that arise out of an agreed-upon historical context’ (139).

Any such informalist approach, per Hutchinson, must also reject the distinction between theory and practice, for it tends to minimise and obfuscate the influences of history and of changing political and social values. In the final analysis, there is no measure of truth or rightness in any theory of judicial decision-making: there is only acceptance by the legal community. And acceptance can only be gained through a realisation that ideology and law are inextricably intertwined.

Hutchinson ends his book with a plea for more openness in judging and for the selection of ‘informal’ judges (11. Looking for the Informal Judge). Judges and judicial candidates should be more forthcoming about their ideological preferences. Those who are chosen as judges should not be ‘out-and-out ideologues’. They should be people who recognise that judging requires a resort to values. Good judges must also, of course, possess good technical skills.

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But they must also possess ‘a social-political vision within which and on behalf of which they can deploy those technical skills’. They cannot be allowed to stand on formality or, more accurately, to hide behind it.

Hutchinson unsurprisingly supports a more democratic selection process for judges. He urges that judges be chosen by an independent commission which is representative and diverse. Ideological diversity should be a leading component of the vetting process.

Candidates’ political views should be taken ‘out of the shadows and into open view.’ The fear that talking about judges’ political views will undermine the legitimacy of the judiciary is, according to Hutchinson, merely ‘a canard that has been promoted by formalists to further their own cherished agenda’ (161).

The matters addressed in this book go to the core of any legal system. An understanding of them is vital to an understanding of how our legal system functions. Unfortunately, if these matters are covered at law school at all, they are often taught as the nebulous opinions of ivory-tower academics or, even worse, as the absolute truths of (often conservative) formalists. Hutchinson’s book is an indispensable antidote to both approaches. There is nothing nebulous about this book: it is straight-talking and concrete. Nor is it encumbered by political polemics.

While several of Hutchinson’s contentions invite objections or dissent, this is not a weakness of the book, but a strength. For Hutchinson seeks to engage readers and force them to think critically. This quality is especially welcome in a book intended for students.

This splendid book tells a compelling story in a clear, entertaining, and inimitable style. It offers brilliant insights and irresistible conclusions that will edify students. The book’s

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elucidation of the law-versus-ideology dichotomy, its critique of relevant empirical studies,

and its nuanced account of judicial ideologies will be of special interest to the wider

scholarly community. It is destined to be a classic, and should be recommended to every law

student and law teacher.