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Internationale Handelsgesellschaft mbH V.Einfuhrund Vorratsstelle für Getreide und Futtermittel (Favorite Case Symposium)

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Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel

James E. Krier*

The idea of a “favorite judicial opinion” had never occurred to me until the *Texas Law Review* planted it in my head; the *Journal of the American Dental Association* could as well have asked me to express some sentiments about my favorite toothache. I was at a loss to think of even a single candidate for what, until the event, I had apparently regarded as a nonexistent office. Why then did I decide to accept the *Review*’s invitation? The answer is, in a word, curiosity: Never mind that the editors of a law review in Texas wanted to know what is my favorite judicial opinion. Suddenly *I* wanted to know what is my favorite judicial opinion.

That done, there remained the problem of selection. As a big believer in process theory, I concluded that my problem’s solution lay not in what opinion I might choose in the end, but rather in what means I might choose for reaching that end. December’s newspapers (December is when I tackled the task) suggested a couple of possibilities that initially seemed attractive, but subsequently did not.

1. You know how in December you read those articles in the business pages in which some reporter has interviewed a bunch of stockbrokers and investment analysts and asked them each to select a favorite stock for the upcoming year? Maybe, I thought, I could do something like that.

But, I soon saw, I could not; the process wouldn’t work in this case. Whatever you think about the stock market, you know from portfolio theory that it is a *bunch* of stocks you select, yet the rules require that I put all my eggs in a single basket. (This reason also forecloses my mimicking the method suggested by the efficient market hypothesis, whereby I would simply throw a dart at a roomful of reports and pick an opinion that way. No efficient-market person that I know of says to throw just one dart but rather a whole quiverful of them, to get—once again—the portfolio denied me by the contest’s rules.)

2. December is also when nominations for Golden Globes are announced; to win a Golden Globe augurs well for the Oscars not far down the yellow brick road. It occurred to me that the *Law Review* is running

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its own Academy Awards, and literally so. Should I not then, on this model, seek out my colleagues' suggestions, the nominees, and from them select my finalists and finally my winner?

But, I realized, I should not; to do so would be self-aggrandizing. My role is to select not a winner but instead just my mere candidate for a winner, which I am then to submit for publication in these pages. The victors—as in Best Opinion, Short Subject; Best Animated Opinion; Best Adaptation of Some Earlier Opinion—are to be decided by an authority much larger and more august than I, which is to say the readers of this journal. Of course, I could solicit advice from others about what opinion I should pass on to still others, but that self-effacing I'm not.

3. What came to mind next is this: Since there is a proud view that all are created equal, then it must be (at least, I don't see why it shouldn't be) that "all" includes all judicial opinions as much as all else, so there are no grounds for preferring one over the other. Given that I must choose (I have committed myself and will not withdraw, and wouldn't withdrawal also be a choice of sorts?) but have no grounds for choosing among equals, I could on the principle of insufficient reason choose by any method whatsoever so long as it's evenhanded. The difficulty is that, in this instance, I couldn't even figure out a method that's evenhanded. For example, I couldn't flip a fair coin without first having two alternative candidates, the heads and tails of the matter, but how was I to choose those, or even choose how to choose those? Etc.

4. We could go on, I suppose, digging ever deeper into a philosophy of methodologies. I actually did consider Rawls: What would I choose were I behind a veil of ignorance? But I *was* behind a veil of ignorance, and I didn't know!

5. Until it—the method—came to me. (And I should add that "method" isn't quite right, because what came to me is more a meta-method, arguably even a metametamethod.) Why it came to me I cannot say, but the circumstances suggest divine intervention. Consider:

I was at home, frustrated at being so unopinionated. I went to turn on my stereo because it is thought that for someone in my condition music is a good paregoric. My stereo is lodged in a bookcase that stands up against a wall in the living room of my house. I approached the bookcase and reached to push the stereo's power button (and until this instant didn't realize the *significance* of that—the *power* button!), but my hand was stayed as a magnet is stayed when one tries to push it wrong-pole-to-against another. I could move my hand left and right, I could move it up and down, and I could move it back. But forth it would not go. As I stared at my hand, puzzled, I felt a force, as gentle as a breeze but irresistible nevertheless, urging me to reach upward to the bookcase's second shelf down from the top, and then to that shelf's right side, and

then, too far!, back a little, yes, that's it, that one, take that one right . . . *there!*

In my hand I held one of the weirder books I've ever read (weird enough that I'd forgotten I had; I'd repressed it as one does a disturbing dream). The book might be a put-on but my account of it is not. You can look it up.¹

In this book Richard Gilman, the theater critic and essayist, writes about a set of life experiences centered around his conversion from Judaism to Catholicism, his guilty hangup about Amazonian women (this was in the 1950s), and—the important point for us here—a very strange thing that happened to him in a library.

On a summer day of some angst, Gilman found himself in want of a book to read. This took him to the then-Cathedral branch of the New York Public Library, wherein he wandered aimlessly, selected books at random, and headed for the desk to check them out. But, Gilman goes on to say, “before I could get halfway there something came over me or took hold of me—this is the only way I can describe what happened—some impulse made me turn back, hesitate, and then walk over to a section of the library, an alcove on the far side of the checkout counter, where I hadn't been before.”²

Gilman tried to leave the section—nothing there interested him—but “was impelled back to it as though by an unseen hand pressing me gently but authoritatively between my shoulder blades.”³ “I found myself,” he continues, “standing in front of the section of books on Catholicism. . . . [S]tanding there and literally struggling in the grip of the same insistent force whose pressure I'd felt from the outset . . . I finally found myself reaching for a book and taking it off the shelf.”⁴

The book in Gilman's hand was *The Spirit of Medieval Philosophy*, “by someone I'd never heard of, a man named Etienne Gilson.”⁵ Gilman tried to put Gilson back on the shelf but couldn't, so he took it home and read it, the whole thing through, even though the “book was a big one, a real tome,” as he puts it.⁶ The tome (and, no doubt, the experience) led to Gilman's conversion. Later he learned that Thomas Merton, the poet monk, had had the same eerie experience with the identical obscure book at the exact same Cathedral branch of the New York Public Library.⁷

All I had was the University of Michigan Law Library, but I thought I'd try the obvious experiment anyway. (Actually, I felt compelled to do

1. See RICHARD GILMAN, *FAITH, SEX, AND MYSTERY: A MEMOIR* (1986).

2. *Id.* at 46.

3. *Id.* at 48.

4. *Id.* at 48-49.

5. *Id.* at 49.

6. *Id.*

7. *Id.* at 57-58.

so; and I wasn't really just then beginning an experiment so much as extending an experience that had already begun at the moment I'd approached the stereo in my living room.)

You can guess the rest. Whatever mystical force had been at work in the strange cases of Mr. Gilman and the monk Thomas Merton continued to operate on me. I was led to a certain level of the law library stacks, and then to a certain location on that level—a place I'd never been before because nothing there had ever interested me in the slightest—where I found myself moved to reach up to a certain shelf and then to a particular volume thirty-seven of some book. Mindlessly I opened it to a page, numbered 274, that turns out to be the fourth page of an item involving the parties listed as the title of this little essay. Space limitations preclude my repeating the title here, but I do have room for the citation.⁸

The whole business is in German. I am pretty sure it is a judicial opinion, but I don't have any idea what it says and frankly I don't want to know. Whatever it says, it is my favorite judicial opinion. I presume that I needn't explain.

8. Judgment of May 29, 1974, BVerfG [federal constitutional court], 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 271 (F.R.G.).