

THE DECONSTRUCTED GROCERY LIST

There are said to be certain Buddhists whose ascetic practices enable them to see a whole landscape in a bean. Precisely what the first analysts of narrative were attempting: to see all the world's stories (and there have been ever so many) within a single structure

Roland Barthes¹

Departing Solicitor General Rex E. Lee was especially poignant in a valedictory interview with the *New York Times*: "I never thought when I was in law school that . . . I'd have to think twice in the supermarket about buying Giant brand or Thomas' English muffins."

We none of us can choose our moments of epiphany, and it is unfair to mock the Solicitor General for experiencing his in a supermarket.

Michael Kinsley²

Late night at the grocery store. K. enters confidently. The store is almost empty. Just a few things to pick up on the way home from work. Now, where is that list? Here? No. A moment of unease. Oh, there. Good. Just a short list, only ten items. Now to begin. (And then home at last.)

First, "apples." K. yawns. No problem, there they are, watch out for the bad spots. Still, a very nice crop this year, let's take six or maybe seven. Wait a second, though, what kind of apples? Mac-Intosh, in honor of the computer revolution. Granny Smith for the crisp sour taste. Golden Delicious—"res ipsa loquitur or maybe *nomine ipsa loquitur*," thinks K., a somewhat addled law professor who has just finished a very long day at the office. But what kind of apple to get? K's favorite? Or that preferred by the list's author? Or the kind some prospective guest may prefer? The possibilities are mind boggling, at least for K., whose mind was pretty well boggled to begin with.

It is undoubtedly a foolish point, a trivial question. A trivial question should be easy to answer. Why get hung up on it? Still, what *is* the correct answer? Like many trivial points—this is the experience of the law professor speaking—this one gets harder and harder the more it is considered. Think of the ink spilled over the eleventh amendment or article I courts. Not to mention the old common-law chestnuts. Can a woman recover damages because fireworks knocked down the scales, which then fell on her? (K. no-

1. R. BARTHES, S/Z 3 (R. Miller trans. 1974).

2. M. KINSLEY, CURSE OF THE GIANT MUFFINS AND OTHER WASHINGTON MALADIES 174 (1987).

tices suddenly the closeness of the produce scales and moves nervously away; it seems like bad luck.) So . . . what kind of apples?

Many questions are better left unasked. Once asked, however, they must be answered. Surely a mind that can master *Pennoyer v. Neff* and *Erie R.R. v. Tomkins* can definitively resolve the mere selection of a fruit.

It is not easy, however, to see where to begin the analysis. Fortunately, K.'s briefcase is at hand. (K. couldn't bear to leave it in the car; it contains the disk of K.'s tenure piece.) Some research is in order.

Start with something easy to understand. How about an originalist? K. takes out a book and begins to read. (Just as well that the hour is late and the store is empty, otherwise even a law professor might feel embarrassed.) "When we speak of 'law,' we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires." Sounds very shrewd and very applicable. A grocery list certainly has a meaning independent of our own desires. And K. doesn't have the authority to rewrite the list. (Well, that's an exaggeration, but why risk a tiff? Better to follow the list.)

Which book is this, anyway? Ah, *The Tempting of America: The Political Seduction of the Law*. Page 143. A shrewd man, that Robert Bork. K. firmly resolves neither to be tempted nor politically seduced. The list must be followed at all costs. If we cannot be faithful to principle in small things, what hope is there for the large ones?

Now, to proceed. Bork must explain how principled interpretation is to be done. Turn the page. "What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment The search is not for subjective intent All that counts is how the words used in the Constitution would have been understood at the time."

K. feels crushed. This is no help at all. The list was written early this morning. Why is the "meaning understood" in the morning more important than the meaning understood this evening? Anyway, if K. knew the "understood meaning" (understood by whom?), there wouldn't be any problem. K. wouldn't have understood the list any better this morning than now—the problem isn't whether to use K.'s *original* or K.'s *current* understanding. The Bork book slips from K.'s fingers onto the floor.

If Bork doesn't help, his opponents might. Remember Dworkin's distinction between concepts and conceptions. Didn't Dworkin

kin say that the Court shouldn't be influenced by the framers' *conceptions* of constitutional rights? Instead, the Court should consider their *concept* of those rights. K. remembers the quote vividly:

It would be a mistake for the Court to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned. That would be decisive if the framers of the clause had meant to lay down a particular conception of cruelty, because it would show that the conception did not extend so far. But it is not decisive of the different question the Court now faces, which is this: Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?³

How would a similar analysis work here? Whatever conception of applehood that the author might have had, K. would have to analyze the concept of applehood.

K.'s mind goes blank. Maybe Dworkin can make that distinction work, but K. just doesn't feel smart enough, not at this time of night, not after a long day of bluebooking footnotes. Ely isn't going to help much either. God only knows what a "representation reinforcing" interpretation of the word "apple" might be. Try another nonoriginalist.

K. rummages again through the briefcase. Here's a non-originalist in good standing. Michael Perry, on "Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)." In the Summer, 1989, issue of *Constitutional Commentary*.

K. feels a twinge of guilt, and properly so. This is the library copy of *Constitutional Commentary*. K. really shouldn't take it home. Besides, K. reads every issue, and knows of the journal's economic struggle. Yet K. has never subscribed. For shame.

Don't think about that. What does the article say? Something about the original versus the aspirational meaning of a text. That sounds good. What is the aspirational meaning of the grocery list? Healthy tasty food, inexpensively priced. All the apples cost the same. Pick the kind that tastes best. To K. or the author of the list? This is getting silly. How about some Alternate Dispute Resolution here? Three apples for K. and three of the Author's favorites. Hurray for ADR!

By now, K. is starting to feel that both the list and its author have begun to achieve some awful transcendental presence; K. is no longer dealing with a grocery list and the person who wrote it, but rather with a List and its Author. Now the List has been obeyed; the Author should be happy.

3. R. DWORIN, TAKING RIGHTS SERIOUSLY 135-36 (1977). More recently, Dworkin has switched to a "chain novel" metaphor. R. DWORIN, LAW'S EMPIRE 224-40 (1986). It would be cruel, however, to extend K.'s travails to novel length.

With a sigh of relief, K. crosses apples off the shopping list and moves down the aisle. Alas, poor Bork is still lying forlornly on the floor, and even worse, the library copy of *Con. Comm.* is sitting in the fruit bin. K. hasn't slept well for several nights, working on the tenure piece, and the tension is beginning to take its toll. The whole thing has become quite a trial. Still, the masterpiece on "A Post-Hermeneutic Approach to the Dormant Commerce Clause" is coming along pretty well. But after spending so much time working on theories of interpretation, K. can't seem to put them out of mind.

The next items are easy. "Bnch. grn. onions," "sml. bag carrots," "5 lb. wh. potato." With a renewed sense of self-confidence, K. puts these items into the cart. For a moment, K. was beginning to worry that this whole episode was a sign of excess stress or a burgeoning anxiety neurosis or something. Must just have been a wave of fatigue.

K. jauntily wheels the cart around the corner and starts down the next aisle. This should be easy enough. Next on the list is tuna. Or, to be specific "1 can Sunburst Tuna."

Damn. The Sunburst is sold out. Now what?

The aspirational approach sounded good in the previous aisle, but now K. is beginning to have doubts, like a first year student whose confident first answer is met by the professor's steely-eyed stare. What is the aspirational meaning of tuna? Tunas don't have aspirations, except on T.V. commercials where they seek to attain good taste. And buying tuna is obviously too mundane an activity to dignify with an aspirational meaning. Besides, now that K. thinks about it again, the idea of using "cheap, healthy, tasty food" as a culinary aspiration seems awfully open-ended. K. wouldn't know whether to buy another brand of tuna, or sardines, or even tofu. Maybe Bork was right about that temptation business. This interpretation thing is getting trickier all the time.

K. isn't really surprised by these difficulties. K. knows that interpretation is a treacherous process from reading the deconstructionists:

The claim that all readings are misreadings can also be justified by the most familiar aspects of critical and interpretative practice. Given the complexities of texts, the reversibility of tropes, the extendibility of context, and the necessity for a reading to select and organize, every reading can be shown to be partial The history of readings is a history of misreadings, though under certain circumstances these misreadings can be and may have been accepted as readings.⁴

4. J. CULLER, ON DECONSTRUCTION 176 (1982), *quoted in* Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743, 774-75 (1987). As you see, after being immersed in bluebooking for many hours, even K.'s stream of consciousness comes equipped with footnotes.

"All of *my* readings seem to be misreadings, at least," K. thinks. This knowledge seems depressing but not very helpful in figuring out what K. should buy instead of Sunburst Tuna.

K. begins to feel that there is more to be said about the originalism issue. Here's a xerox that might be relevant, Tushnet's note on textualism in volume 58 of *Southern Cal.* K. thumbs through the pages and comes to page 825: "Critics of unsophisticated textualism claim that radical indeterminacy of meaning is, within a liberal community, inevitable. It is no answer to that criticism to say that indeterminacy gives boundless discretion to judges. I agree that it does . . ." Should K. become an adherent of Critical Grocery Shopping?

Boundless discretion. That sounds great. K. can buy another brand of tuna, or tofu, or—here an expression of longing passes over K.—perhaps even those wonderful chocolates. Then reality comes crashing in. All of the post-structural analysis in the world isn't going to convince the Author that chocolates are a reasonable substitute for tuna.

Anyway, wasn't there another article where Tushnet said something rather different about interpretation? It's getting easier to find things in the briefcase, somehow it doesn't seem as cluttered. Here it is:

Consider an ordinary conversation between two people. Alice hears Arthur use the word "arbogast." She thinks she knows what he means, but as the conversation continues Alice realizes that Arthur is using the word in a way that comes to seem a little strange Because Arthur's life is by definition different from Alice's, Alice finds herself left with only an illusory understanding of what Arthur says. Her task is then to identify the point at which she can, so to speak, think her way into Arthur's life, so that she can understand what he means through understanding how he has developed.⁵

But that's no help either. Working all the way through the Author's life would take hours. Besides that, what childhood or even recent experiences are going to help now? And if K. can't understand even a simple shopping list from the Author, what hope is there of understanding the Author's whole life?

K. is beginning to feel short of breath. This whole situation is not only frustrating but ridiculous. Yet to feel overwhelmed about such a ridiculously small point is almost frightening. What's to be done? K. begins furiously pacing the floor next to the canned tuna, just opposite the rice and pasta display.

Don't panic, K. thinks. After all, the whole problem is that the

5. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 825 (1983).

Sunburst Tuna isn't on the shelf. That can't be such a big problem. Don't forget Derrida's teaching: "Derrida sees his major project as exposing the bias in Western philosophy he calls the 'metaphysics of presence.' Each . . . opposition privileges a kind of 'presence' over a corresponding kind of 'absence.'"⁶ This insight isn't much concrete help, but it is pleasant to think that only a philosophical bias privileges the "presence" of Sunburst Tuna over the "absence" of Sunburst Tuna.

This comforting reflection gives K. time to calm down. After some deep breathing exercises, K. begins again to analyze the problem.

Now that K. is thinking more calmly, Tushnet's approach seems somehow familiar. In fact, isn't it a lot like . . . like Richard Posner's theory of statutory interpretation! Posner and Tushnet, what an odd pair. But Posner also says something about what to do when "imaginative reconstruction" breaks down.⁷ Where's that xerox? No, it's at the office, but K. does have some notes. Here we go: when the judge's search for intent turns up nothing, the judge must solve the problem in a reasonable way.

A reasonable solution. That shouldn't be hard to find. Sunburst Tuna is sold out. One reasonable solution might be to buy another brand, but none of them are on sale. Let's get something else on sale. Nothing here, but across the aisle there's a nice buy on pasta.

K. buys some pasta, and hurries down the aisle, leaving behind an untidy pile of xeroxes in front of the canned fish and meats.

K. is hotly pursued by nagging doubts. Can an instruction to buy Sunburst tuna really be construed as an instruction to buy pasta? Even if Sunburst Tuna is sold out? K. has the uneasy feeling that there will be some unkind words about this decision later in the evening. But it's important never to turn back.

Luckily, there isn't much left on the list. Whoops, K. is going to have to turn back, having missed the reference to "3 tomatoes" while cruising the produce aisle. This doesn't seem to be a very good omen. If the tomatoes are all sold out, K.'s nerves may now be too shakey to resort to the Posner reasonableness approach, which after all requires a certain degree of confidence (something Posner seems to have a greater supply of than poor K.). K. fervently hopes that there are still some tomatoes on the shelf.

Luckily, the tomatoes are still there. Also, this being winter,

6. Balkin, *supra* note 4, at 747.

7. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-89 (1985).

there is only one kind of tomato on the shelf—none of those tricky choices among varieties. This should be simple enough. Still, K. is no longer sure that anything is very simple. Even grocery shopping has become problematic in the post-modern age. Perhaps it would be wise to consult some authorities on interpretation before jumping to any conclusions. Probably, the Author meant for K. to buy tomatoes, but that's not decisive. After all, deconstruction has disposed of the fallacy of authorial intent:

The structural precondition of the sign is its ability to break free from the author, and to mean other than what the author meant. The very act of "meaning" something creates a chasm between the sign and producer's intention The result is that the text, as it is repeatedly understood, takes on a life of its own in a relation of *différance* with the person who "meant" it⁸

This leaves only the question of what the word "tomato" does mean, if not what the Author intended.⁹

By now, K. has nearly exhausted the briefcase's supply of legal writers, and is left mostly with works of literary criticism. Here's a standard introductory text. Perhaps it will calm K.'s nerves.

But the literary theorists seem to offer no solace. One of them is

quite happy to accept that, when you get down to it, there is no 'objective' work of literature there on the seminar table at all. *Bleak House* is just all the assorted accounts of the novel that have been or will be given. The true writer is the reader: . . . the readers have now overthrown the bosses and installed themselves in power.¹⁰

Now that K. has been installed in power, what to do next? Get the tomatoes or not, it's hard to say. Besides, K. came here to buy groceries, not to start an insurrection. Does the list call for tomatoes, or doesn't it? How much existential freedom can a grocery shopper handle?

Perhaps a structuralist approach would be better. There does seem to be a certain method to it, after all:

What a structuralist critic would do would be to schematize the story [about a boy and his father] in diagrammatic form. The first unit of signification, 'boy quarrels with father,' might be rewritten as 'low rebels against high.' The boy's walk through the forest is a movement along a horizontal axis, in contrast to the vertical

8. Balkin, *supra* note 4, at 780.

9. K. was not the first to confront the tomato issue. See *Nix v. Hedden*, 149 U.S. 304, 306 (1893) ("The single question in this case is whether tomatoes, considered as provisions, are to be classed as 'vegetables' or 'fruit'"). See also *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (Friendly, J.) ("The issue is, what is chicken?"). See generally *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (the "sick chicken" case).

10. T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 85 (1983).

axis low/high,' and could be indexed as 'middle.' . . . Flushed with triumph, the structuralist rearranges his rules and reaches for the next story.

What is notable about this kind of analysis is that, like Formalism, it brackets off the actual *content* of the story and concentrates entirely on the form . . . As long as the structure of *relations* between the units is preserved, it does not matter what items you select.¹¹

Excellent. The list began with apples, which are high, then tomatoes, and then it goes on to onions which are low. So tomatoes must be middle. And they do grow on vines. This is terrific. Everything fits.

But K. wonders if a structuralist approach to shopping will really work. If the structuralist is right, only the relationship between the items counts. So instead of getting apples, tomatoes, and onions, K. could have gotten entirely different items: first, coconuts (high), then cucumbers (middle), and then cantaloupe (low). Or chicken (representing flight, a "high" method of getting around), lamb (representing locomotion, a "middle" form of transportation), and then cod (representing swimming, a "low" form of transportation). In short, if the structuralists are right, tomatoes, cucumbers, and cod are all interchangeable. That may be philosophically true, but it probably won't play well back home.

K. is starting to hyperventilate. Desperately, K. pulls out another book, this one by Roland Barthes, opens at random and begins to read:

To read is to find meanings, and to find meanings is to name them; but these named meanings are swept toward other names, names call to each other, reassemble, and their grouping calls for further naming: I name, I unname, I rename, so the text passes: it is a nomination in the course of becoming, a tireless approximation, a metonymic labor.¹²

How very unsettling this is. The grocery list itself blurs and shakes in K.'s hand, as the shelves of produce hang suspended in this unstable swirl of signifiers and signified.

The briefcase is almost empty now. K. turns to the last xerox and then gasps. There, in the pages of the *Harvard Law Review*, is a specific discussion of K.'s dilemma by a leading feminist legal theorist. It seems almost to have been written with this exact scene in mind, with almost supernatural prescience:

Our diet is improved if the authority we trust has superior competence, our time is freed to be spent on other concerns, and our faith in the good intentions and competence of other members of our community is strengthened by their successful regulation of this aspect of our lives. Yet one can also envision an over-regulated, authoritarian nightmare in which our health, as well as other aspects of our private

11. *Id.* at 95.

12. R. BARTHES, *supra* note 1, at 11.

lives, is strictly controlled by others *Whether the world, including our own world, is better or worse because of our decisions to buy tomatoes because we have been told to purchase them, and whether our autonomy is strengthened or depleted, depends upon the nature and moral quality of this authoritarian relationship.*¹³

At last, someone who understands the deep issues involved in this simple shopping expedition. Surely, *here* must be the answer to the dilemma.

The Harvard article, it would seem, is here by divine providence, with K.'s situation in mind. This has to be meaningful; it can't possibly be coincidence. Thank God K. brought the article along in the briefcase! K. begins to read avidly.

Thumbing through the pages, K.'s eye suddenly settles on the following line, which leaps out of the page:

*But the hands of one of the partners were already at K.'s throat.*¹⁴

The next line begins: "while the other thrust the knife deep"

This is too much to bear: an article that discusses tomatoes, and then describes an act of violence against K. Who would have thought that a simple question about theories of interpretation could have such terrifying implications?

The article drops out of K.'s suddenly numbed fingers into the tomato bin. Leaving books, xeroxes, briefcase and grocery list behind, K. flees from the store, into the cold but undeconstructed night.

D.A.F.

13. West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 401-02 (1985).

14. *Id.* at 421, quoting F. KAFKA, *THE TRIAL* 254-55 (1956).