Introduction

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Legal hermeneutics is, then, in reality no special case but is, on the contrary, fitted to restore the full scope of the hermeneutical problem and so to retrieve the former unity of hermeneutics, in which jurist and theologian meet the student of the humanities.

HANS-GEORG GADAMER, *TRUTH AND METHOD*

The essays in this volume were commissioned to examine the intersections between contemporary legal theory and the foundations of interpretation. It is now commonplace to observe that the considerable social and intellectual ferment surrounding recent debates over the nature and methods of legal interpretation can be usefully understood as reflecting the presence of hermeneutical contests. There is increasing acknowledgment of this fact in the legal literature.¹ Notwithstanding some of this fine scholarship, there is a wider legal literature displaying, at its best, less than a full understanding of the configuration of law and hermeneutics. Remarking on the many divergent responses to hermeneutics in law, Brad Sherman notes that these responses “tend to be characterized by a lack of understanding of hermeneutics (that is, an unhermeneutical approach to hermeneutics).”²

One purpose of *Legal Hermeneutics* is to situate contemporary debates on legal interpretation within the broader framework of interpretation in general. The attempt to contextualize legal theory in this way assumes that hermeneutics has something to teach jurisprudence.³ To see the problem of reading the law in terms of law’s history, the linguistic constitution of law, and the political implications of the way law is read and understood is to set legal interpretation squarely within the humanist tradition. Instead of treating law as a discipline separate from the humanities because of its specialized idiom and professional ethos, law is understood here as another voice in the larger community’s conversation about how to promote a more just and humane politics. This volume, then, points in the direction of a larger unity, a unity in which, as Hans-Georg Gadamer suggests, “jurist and theologian meet the student of the humanities.”⁴

It is also hoped that *Legal Hermeneutics* offers additional evidence, if any is still needed, that borrowing from Continental philosophy to clarify legal practices does not inevitably lead to nihilism. Quite the contrary. As several of the following essays reveal, hermeneutics plays a critical role in the justification of our practical choices. Here hermeneutics helps us to see the grounds of judgment. A critical examination of how we justify our interpretive choices is a way of widening the horizons of those—perhaps especially in the law—whose practical work is so centrally interpretive.⁵

Hermeneutics is a term open to several possible interpretations.⁶ *Legal Hermeneutics* does not presuppose any single or dogmatic conception of hermeneutics, though readers will find that the philosophical hermeneutics of Gadamer figures prominently in many of the following essays.⁷ As several of the contributions explain more fully, philosophical hermeneutics is an attempt to identify the irreducible conditions of human understanding. Gadamer has often emphasized that his purpose is not to develop a set of rules or procedures for the interpretation of texts. His objective is philosophic, to identify “not what we do or what we ought to do (in interpretation), but what happens to us over and above our wanting and doing.”⁸ Thus, philosophical hermeneutics sets for itself an ontological task, namely, that of accounting for the ineluctable relationships between text and reader, past and present, that allow for understanding to occur in the first place.⁹

There is also a demystifying dimension to legal hermeneutics. Law, after all, purports to be a rule-governed activity. It is sometimes said that formal rules and legal doctrine provide the certainty and stability necessary for civil society. Hermeneutics seeks to disrupt this formalistic view of law, although not totally. As the following essays demonstrate, the description of law as rule-governed is what brings hermeneutics “into the fight.” Hermeneutics, John Caputo argues, “pits itself against the notion that human affairs can finally be formalized into explicit rules which can or should function as a decision-procedure.”¹⁰ But the reader will soon discover that not only do the contributors to this volume question the merits of the view that law is rule-governed in some strong sense, asking instead what it means to talk about law as rules; they also interrogate legal hermeneutics itself, probing critically to locate the ground on which it purports to stand. This interrogation suggests that this volume marks the beginning of a conversation and not its end.

In the volume's lead essay Fred Dallmayr explores the relationship between rule-governance and radical contingency from the perspective of philosophical hermeneutics. Dallmayr's vehicle for this exploration is the concept of the rule of law. Does hermeneutics, with its rejection of

objective reason, threaten the idea of the rule of law? After tracing several variations on the rule-of-law concept and providing a sketch of Gadamer's hermeneutics, Dallmayr probes the hermeneutical implications of the formalization of the rule of law. In Gadamerian fashion Dallmayr steers a course between formalism and anarchy by showing how hermeneutical mediation is predicated on, rather than liberated from, the traditions and conventions that enable us to understand in the first place.

What is a legal text? Gerald L. Bruns critically reviews two competing answers to this important question. According to the view associated with analytical jurisprudence and exemplified in the writings of Ronald Dworkin, a legal text is to be understood on the model of a logical proposition. On this view legal texts can be interpreted to yield right and wrong answers. Still another answer is offered by those, such as Peter Goodrich, who see the legal text as an example of historically embedded political discourse that ought to be understood in terms of its legitimization function. This critical approach to legal texts calls on us to situate the text so that the power relations it legitimates can be clearly viewed.

The real contribution of Bruns's essay lies in his suggestion that to the degree both of these answers seek to go beyond hermeneutics, they fail. Drawing on the work of Heidegger, Bakhtin, and Goodrich, Bruns asks, what would a hermeneutics of the law do? A hermeneutics of law would not seek to resolve disputes and long-standing controversies but would begin more modestly "by detaching the thing in question from its dogmatic contexts, the fixed or institutionalized ways of thinking it."

The next several essays provide some historical context for a hermeneutics of law. In the first of these essays Peter Goodrich offers readers a detailed genealogy of English jurisprudence that reveals how a sixteenth-century common law hermeneutics emerged as a result of a series of external social factors, including the advent of the printing press and the popular translation of the Bible.¹¹ In response to a series of discourses external to the law and in the hope of systematizing law and legal studies, Abraham Fraunce and others strived to produce a scientific method of interpretation. Goodrich notes that the rhetoric and logic of this methodological project has remained a feature of contemporary legal thought and education. Indeed, one implication of Goodrich's essay concerns the ways in which our own legal past continues to influence us.

Francis Lieber published his *Legal and Political Hermeneutics* in 1837. James Farr's essay on Lieber points out that this may well have been the first American work on hermeneutics. Not unlike those about whom Goodrich writes, Lieber sought to set forth in a scientific way the first principles of textual interpretation. Lieber's efforts to make interpretation scientific were aimed at popularizing and politicizing hermeneutics, making it accessible for citizens, especially nonlawyers,

at a time in American constitutional history ripe in hermeneutical controversy. Farr's contribution is instructive as it shows how the discourse of hermeneutics was connected in American history with the discourse of a developing political science and with vigorous debates about constitutional meaning.

Jerry Stone's essay, "Christian Praxis as Reflective Action," emerges from a disciplinary perspective with its own venerable hermeneutical history with which legal hermeneutics has much in common: theology. Stone's thesis grows out of his own curiosity about the extent to which praxis is the substance of all interpretation, whether in law, literature, or theology. By way of a comparative analysis of Gadamer, Bultmann, Barth, and Ricoeur, Stone identifies the centrality of praxis in these various hermeneutical theorists. Familiar questions regarding, for example, the historicity of reason and the nature of linguisticity are thoughtfully examined from the vantage point of Christian theology. Is it possible, Stone asks, to reconcile the transcendent hermeneutics of Bultmann and Barth with the historical hermeneutics so characteristic of postmodern thought?

Part 3 of *Legal Hermeneutics* takes a more explicit theoretical turn and begins with Terence Ball's spirited critique of originalism. Taking originalism seriously, Ball maintains, requires that the framers' intentions be situated in the language and worldview of their age. Two aspects of the framers' linguistic and political conventions—what Ball labels their "discourse"—come under examination: the political discourse of republicanism and the scientific discourse of faculty psychology. Neither of these discourses occupies an important place—or, in the case of faculty psychology, any place at all—in the modern intellectual landscape. Originalism, Ball concludes, thus commits us to political and scientific presuppositions that are in deep conflict with contemporary knowledge.

Drucilla Cornell puts the act of legal interpretation in a distinctly new and clearer light. Cornell criticizes those, including some members of the Critical Legal Studies (CLS) movement, who push the indeterminacy thesis too far by concluding that law is ultimately without grounding in political and ethical principles. CLS scholars have called attention to what they perceive as fundamental contradictions in the liberal legal system and in its reigning legal ideology.¹² The "irrationalists" referred to by Cornell are those whose understanding of indeterminacy leads to ethical skepticism.¹³

Cornell also challenges those who regard legal interpretation as a recovery or appropriation of the past divorced from contemporary visions of justice. Cornell's attention to the promise of redemption calls on legal interpreters to project visions of the Good that fuse the future with the past. The principle of redemption serves interpreters as "a guiding

light. . . . We can think of a principle as the light that comes from the lighthouse, a light that guides us and prevents us from going in the wrong direction. . . . If a principle cannot give us one right answer, it can help us define what answers are wrong in the sense of being incompatible with its realization."

Gadamer's remarks on the relationship between understanding and application include the observation that "interpretation is not an occasional additional act subsequent to understanding, but rather understanding is always an interpretation, and hence interpretation is the explicit form of understanding. . . . Thus we are forced to go, as it were, one stage beyond romantic hermeneutics, by regarding not only understanding and interpretation, but also application as compromising one unified process." This observation leads Gadamer to say that because understanding is always application, if a text "is to be understood properly, ie according to the claim it makes, [it] must be understood at every moment, in every particular situation, in a new and different way."¹⁴

The essays by David Hoy and Steven Knapp and Walter Benn Michaels emerge from a debate regarding the value of Gadamer's hermeneutics for law. Knapp and Michaels fired the opening salvo. In "Against Theory 2: Hermeneutics and Deconstruction"¹⁵ Knapp and Michaels attack Gadamer's conception of understanding and attempt to rebut the view, often associated with philosophical hermeneutics, that textual meaning should be understood apart from authorial intention. Knapp and Michaels defend an intentionalist account of textual interpretation. The debate is continued in these pages.

David Hoy's contribution to this volume is a defense of hermeneutics from the intentionalist critique of Knapp and Michaels and also serves to clarify what a hermeneutics of law might offer students of law and interpretation. Although hermeneutics does not deny a role for intentions in interpretation, neither does it privilege the original intentions of legal authors as textual meaning is determined. Hoy illustrates what he considers the superiority of the hermeneutical account of understanding by referring to the actual practice of judicial decision making (Gadamer employs a similar device). Hoy contends that the hermeneutical view that traditions always constrain our interpretations and that textual meaning is never separate "from the intervening tradition of interpretation . . . does greater justice to concrete legal practice."

In their response to Hoy, Knapp and Michaels renew their intentionalist assault against hermeneutics. What does an interpreter of the word "equal" in the Fourteenth Amendment, they ask, really want to know? The most plausible answer, they respond, is that such an interpreter seeks to know the authors' intended meaning. Following a defense of this response, Knapp and Michaels move on to consider its implications for

constitutional interpretation. Here they part company with other intentionalists, notably those who served in the Reagan administration and supported the appointment of conservative judges committed to one version or another of originalism. Adopting something like Ronald Dworkin's distinction between concepts and conceptions, Knapp and Michaels argue that fidelity to a general intention may be fully consistent with a judicial decision that is contrary to the beliefs of the authors of the legal principle applied. For these and other reasons Knapp and Michaels believe the methodological value of intentionalism is quite limited. Indeed, its chief advantage over Gadamerian hermeneutics is said to lie not in its usefulness but in the fact "that it is true."

In the final essay in this section Ken Kress surveys the various versions of the indeterminacy thesis in law. Kress's interest in indeterminacy is primarily in its effects on the problem of legitimacy. Hence, Kress's essay throws fresh analytical light on an issue raised by both Dallmayr and Cornell. Kress begins with the argument advanced by some Critical Legal Studies scholars that law is illegitimate because it is indeterminate. Next he considers the cafeteria of options for grounding legitimacy that are associated with liberal political and legal theory. Kress concludes by cautiously wondering about the relevance of indeterminacy for legitimacy and by suggesting some reasons for the indeterminacy of our legal system.

The volume's next three essays look, each in its own distinctive way, to the practical understandings and value of legal hermeneutics. Lief H. Carter spent one week in 1986 at a seminar with fourteen trial judges. This judicial retreat provided a unique opportunity for Carter to inquire whether academic theories of legal interpretation make sense to those who make law from the bench every day. Carter used his weeklong seminar as a way of testing the general correspondence between the daily work of judges and two competing conceptions of law: what Carter calls the "foundationalist conception" and the "pragmatic conception." Carter's necessarily tentative conclusions suggest that the practical experience of judging lends some support to the pragmatic—and one might add more hermeneutical—conception of law and interpretation.

Michael J. Perry's essay, "Why Constitutional Theory Matters to Constitutional Practice (And Vice Versa)," invites readers to think about whether or not anything of "real-world consequence" is at stake in the many recent exchanges about constitutional interpretation. It perhaps will not come as a surprise to readers to learn that Perry, a constitutional theorist with a significant body of writing already under his belt, believes theory is of great importance to constitutional practice. Although the focus of the essay is on the differences between originalist and nonoriginalist jurisprudence and on the consequences of using one or the other of these theories as a guide to interpretation, Perry's argument may be

usefully understood as an argument for the practical significance of legal hermeneutics.

Perry's protheory position sees constitutional theory as an effort to justify a particular approach to constitutional interpretation and practice. This justification is in turn only as good as the background judgments concerning the moral character of the polity and the nature of politics on which the justification depends. Like Cornell, who perceives legal interpretation as containing a transformative moment as it projects a vision of a just and humane future, Perry, too, sees constitutional theory as a species of political discourse about those human aspirations that the Constitution can be understood to promote.

In this section's closing essay I argue that legal education would be improved by making greater use of hermeneutical materials and perspectives. The conception of the good lawyer that underlies the modern legal curriculum is impoverished and in need of rethinking. No longer a generalist or person of letters, today's lawyer is a narrowly trained professional in a field that is growing increasingly pseudotechnical. Contrary to the prevailing view, the good lawyer might profitably be thought of as one familiar with the materials and ideas of the wider culture and able to apply these materials to the practice of law. In service of this revised conception of the good lawyer, legal education should be directed by a more humanistically grounded vision of law, a vision that connects law to other disciplines that are its natural allies in the university. The essay closes with some suggestions as to how hermeneutics might contribute to this deepening of legal learning.

The conversation about legal hermeneutics contained in these pages is marked by its interdisciplinarity. The guiding assumption is that more is likely to be learned about interpreting law if the subject is wrested from the exclusive control of either the lawyer or the philosopher of interpretation. It is in combination and in collaboration, especially in *critical* combinations and collaborations, that we are all most likely to see the richness of the subject and to come away with fresh insights into old problems.

Hermeneutical thinking does not produce pat answers or easy solutions to difficult legal problems. Hermeneutics neither supplies a method for correctly reading texts nor underwrites an authoritative interpretation of any given text, legal or otherwise. What, then, is legal hermeneutics? And what is the contribution of legal hermeneutics to our knowledge of law and interpretation? What work does legal hermeneutics do?

Even if I had answers to these questions, this would not be the place to test them out on readers. For these are the queries that the essayists engage in their own distinctive ways. It is worth noting, however, that the

activity of questioning and of adopting a suspicious attitude toward authority is at the heart of hermeneutical discourse. Hermeneutics involves confronting the aporias that face us, and it attempts to undermine, at least in partial ways, the calm assurances transmitted by the received views and legal orthodoxies.

This spirit of critical questioning is manifested with a vengeance in Stanley Fish's closing commentary, "Play of Surfaces: Theory and the Law." Fish offers readers a commentary on the contents of the volume that is both critical and highly suggestive. Fish collects the essays around the recurring themes of determinacy versus indeterminacy, historical versus ahistorical interpretation, and originalism versus nonoriginalism. Not only are particular arguments and conclusions challenged, but the individual essays are usefully connected to a broader framework of interpretation in general. In light of Fish's observations one might add the theme of protheory versus antitheory to his list of ideas that surface again and again in this volume. Resolution of the differences between and among contributors will require that readers enter the conversation that is only begun here, supplying their own questions and answers, however tentative they must necessarily be, to guide our thinking about law and interpretation in the future.

NOTES

1. See, for example, David Couzens Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," *Southern California Law Review* 58 (1985): 135; Hoy, "A Critique of the Originalism/Nonoriginalism Distinction," *Northern Kentucky Law Review* 15 (1988): 479; Gerald L. Bruns, "Law as Hermeneutics: A Response to Ronald Dworkin," in *The Politics of Interpretation*, ed. W. J. T. Mitchell (Chicago: University of Chicago Press, 1983); Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986); Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, Ill.: Northwestern University Press, 1988); Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press, 1989).

2. Brad Sherman, "Hermeneutics in Law," *Modern Law Review* 51 (1988): 395.

3. For a view of what jurisprudence has to teach hermeneutics, see Thomas M. Seebohm, "Facts, Words, and What Jurisprudence Can Teach Hermeneutics," *Research in Phenomenology* 16 (1986): 25.

4. Gadamer, *Truth and Method* (New York: Crossroads, 1982), 293.

5. Consider the observations of the Italian hermeneutician Emilio Betti: "Having sketched this summary outline of the general theory of hermeneutics, we may ask ourselves what reception the new science may look forward to among scholars of the various moral sciences. We should not be surprised if it gains a more favorable reception the wider the horizon and vision opened by the given

discipline, the greater the freedom from narrow prejudice, the deeper its own practitioners' awareness of their own methods." Betti, "On a General Theory of Interpretation: The Raison d'Etre of Hermeneutics," trans. George Wright, *American Journal of Jurisprudence* 32 (1987): 250.

6. For an introduction to the history and competing meanings of *hermeneutics*, see Richard E. Palmer, *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer* (Evanston, Ill.: Northwestern University Press, 1969).

7. Gadamer's philosophical hermeneutics plays an important role in the essays by Dallmayr, Bruns, Stone, Ball, Hoy, Perry, and Leyh. The essays by Knapp and Michaels and, to a lesser degree, Fish represent challenges to the picture of interpretation supplied by Gadamer. It is fair to say, then, that despite differences among the contributors in the degree to which Gadamer's ideas are embraced, all of the writers in this volume are nonetheless grappling with contemporary issues shaped by their treatment in the literature of philosophical hermeneutics.

8. Gadamer, *Truth and Method*, xvi.

9. For more on the relationship between Gadamerian hermeneutics and law, see Hoy, "Interpreting the Law" and "A Critique"; Sherman, "Hermeneutics in Law"; and Gregory Leyh, "Toward a Constitutional Hermeneutics," *American Journal of Political Science* 32 (1988): 369.

10. John Caputo, *Radical Hermeneutics: Repetition, Deconstruction, and the Hermeneutical Project* (Bloomington: Indiana University Press, 1987), 213.

11. Goodrich's essay, "Ars Bablativa: Ramism, Rhetoric, and the Genealogy of English Jurisprudence," explores the relationship between Ramism and early English law. The influence of Peter Ramus on the scholastic and humanistic traditions was especially visible in his contributions to rhetoric, dialectic, and logic. The influence of Ramism was not limited to England but was also felt in France, Spain, and Germany. Perhaps the central contribution of Ramism lies in the interest it generated in "method," a peculiarly modern subject. See, generally, Walter J. Ong, *Ramus: Method, and the Decay of Dialogue; From the Art of Discourse to the Art of Reason* (Cambridge: Harvard University Press, 1958).

12. CLS critiques extend also to the pseudo-Socratic and hierarchical character of law school teaching. See, in general, Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987).

13. For more criticism of the CLS position on radical indeterminacy, see Ken Kress, "Legal Indeterminacy," *California Law Review* 77 (1989): 283.

14. Gadamer, *Truth and Method*, 274–75.

15. Steven Knapp and Walter Benn Michaels, "Against Theory 2: Hermeneutics and Deconstruction," *Critical Inquiry* 14 (1987): 49.