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The New Legal Hermeneutics

Francis J. Mootz III
Pacific McGeorge School of Law, jmootz@pacific.edu

REVIEW ESSAY

The New Legal Hermeneutics

LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE. By Gregory Leyh. University of California Press, 1992. Pp. xix, 325. [$16.00.]

Francis J. Mootz III[*]

I. INTRODUCTION

Incorporating the Continental philosophical tradition of hermeneutics into legal scholarship appears to be a project relevant only to a few jurisprudes locked away in the uppermost reaches of the ivory tower. Many scholars undoubtedly would argue that the tradition and focus of twentieth-century German philosophy is far removed from the troubling interpretive issues that arise in the American legal system, regardless of any interesting parallels or comparisons that might be

* Associate Professor of Law, Western New England College. B.A., University of Notre Dame; A.M. (Philosophy), Duke University; J.D., Duke University School of Law. Jim Gardner and Caren Senter helped by reading and commenting on a draft of this Review Essay. I acknowledge the generous research stipend that made this Review Essay posible, and thank Dean Howard I. Kalodner for his continuing support of my scholarship.

drawn.[1] From this perspective, the renewed attention to hermeneutical philosophy by legal scholars is viewed as just one of an increasing number of esoteric, intellectual cul-de-sacs that have diverged from the boulevard of traditional jurisprudence.

This not-so-hypothetical attitude toward hermeneutics is interesting for the very reason that it is erroneous. Those who argue that contemporary philosophical hermeneutics holds little practical significance for legal practice demonstrate that they are unmindful of the genealogy of the traditional principles of legal interpretation that they hold so dear. The publication in 1837 of Francis Lieber's *Legal and Political Hermeneutics*[2] was an important contribution to the effort to define principles of interpretation that could justify and guide the newly created American practice of written constitutionalism. Lieber, a native of Germany, related his knowledge of German hermeneutical philosophy to the political and legal questions facing the young republic.[3] Lieber's attempt to describe a science of textual interpretation that would ensure rule-governed consistency in politics and adjudication helped to formulate the traditional views of interpretation espoused by judges and theorists during the past century.[4] The nineteenth-century hermeneutical tradition in Continental philosophy

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1. I purposely narrow the "Continental philosophical tradition of hermeneutics" to "German philosophy." Leading German philosphers of the past two centuries, including Friedrich Schleiermacher, Wilhelm Dilthey, Martin Heidegger, and Hans-Georg Gadamer, have principally shaped contemporary hermeneutical philosophy. Although Paul Ricoeur is French by hirth, his hermeneutical philosophy is perhaps best characterized as "German" in this regard. French structuralist and poststructuralist philosophy represents an opposing strand of Continental philosophy. Jacques Derrida, the leading post-structural theorist, regards his work not as a development of the hermeneutical tradition, but as a suhversion of hermeneutics.

2. Francis Lieber, *Legal and Political Hermeneutics* (F.H. Thomas & Co., 3d ed. 1880).

3. Specifically, Lieber's work replicated the tensions hetween the efforts of philosopher Friedrich Schleiermacher to outline a general hermeneutics and the traditional hermeneutical "fixation on words, contexts of use, and authorial intent." James Farr, *The Americanization of Hermeneutics: Francis Lieber's* Legal and Political Hermeneutics, in Gregory Leyh, ed., *Legal Hermeneutics: History, Theory, and Practice* 83, 88 (U. Cal., 1992) ("*Legal Hermeneutics*"). In *The Americanization of Hermeneutics*, Farr describes Lieher's important contribution to American legal practice. See id. at 98. See also Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. Legal Educ. 339 (1992). The significance of Schleiermacher's philosophy for contemporary hermeneutics is described in Hans-Georg Gadamer, *Truth and Method* 184-97 (Crossroads, 2d rev. ed. 1989) (Joel Weinsheimer and Donald G. Marshall, trans.).

4. In the Preface to the enlarged edition, Lieher conjectures that everyone would agree that principles of interpretation are necessary to ensure "the exact administration of the laws," and that these "immutable principles and fixed rules for interpreting and construing [laws] should he generally acknowledged, or if they exist already, in a scattered state, should he gathered and clearly represented, so that they may estahlish themselves along with the laws, as part and branch of the common law of free countries." Lieber, *Legal and Political Hermeneutics* at viii (cited in note 2). Paul Carrington argues that "Lieber was the first American to apply the techniques of literary criticism to law" as part of his effort to define the principles of legal interpretation. Carrington, 42 J. Legal Educ. at 357. See also id. at 362, 383-85.

has had an enduring effect on American legal theory and practice through Lieber's scholarship. No sound reason exists to reject out of hand the lessons that contemporary hermeneutics might hold.

Contemporary hermeneutical thought is too important to allow legal scholars simply to cull its fancy jargon with the intent of adding some sparkle to familiar and ossified jurisprudential debates. The transformation of hermeneutics in this century has generated excitement among philosophers precisely because this transformation has the liberating potential of presenting traditional problems in a new light, whether they be problems of theology, history, literary criticism, or aesthetics. The growing number of legal scholars exploring the themes of contemporary hermeneutics do so with equal excitement; their aim is to rethink traditional jurisprudential debates and to reveal more faithfully the phenomenology of legal practice. Contemporary hermeneutics is especially relevant to the legal profession, whose practice reveals a commitment to the centrality of interpretation but also an awareness that interpretation cannot be cabined as a set of procedures or methods without obscuring the inherent connections of law, morals, politics, and history.

Gregory Leyh has edited a volume of essays commissioned "to examine the intersections between contemporary legal theory and the foundations of interpretation"[5] as explored in contemporary hermeneutics. The essays are diverse and multidisciplinary, but each sheds light on perplexing issues of legal interpretation that have exhausted commentators in recent years. The contributors share a broad agreement that we must reject the picture of law as an autonomous, insulated discourse and instead must regard legal discourse as one of many interrelated practices rooted in our character as interpretive beings.

Each contributor addresses the central concerns defined by the leading philosopher of hermeneutics, Hans-Georg Gadamer: What are "the irreducible conditions of human understanding" and what do these conditions tell us about the grounds of judgment?[6] As Leyh relates in his Introduction, Gadamer explores how we reconstitute meaningful traditions as part of an ongoing interpretive relation. Gadamer views legal practice as an exemplary form of interpretive activity that reveals a great deal about how we acquire knowledge, but he also asserts that traditional jurisprudence misunderstands this activity.[7] Leyh notes that Gadamer defines our interpretive relation

5. *Legal Hermeneutics* at xi (cited in note 3).
6. Id. at xii.
7. Gadamer, *Truth and Method* at 324-41 (cited in note 3).

in a manner that acknowledges our experience of critique and change, even while emphasizing our inherence in tradition:

> 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. . . . It is worth noting, however, that the activity of questioning and 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.[8]

Contemporary (that is, post-Gadamerian) hermeneutics suggests that it is possible to view law as politics without succumbing to nihilism, and that it is possible to accept deconstructive critique within legal practice without abandoning all notions of truth.

Leyh would have greatly assisted legal scholars if he had provided a more substantial Introduction identifying these themes. Leyh's omission is understandable considering the excellent essays that, taken together, develop many of the important connections between contemporary hermeneutics and legal practice. Nevertheless, the inevitability of the "hermeneutical circle" suggests that a more substantive Introduction would have been appropriate.[9] Gadamer's philosophical hermeneutics, and the debates that it has engendered, are only now being examined in American legal scholarship.[10] Additionally, hermeneutic philosophers are removed from the intricacies and practical significance of contemporary issues in legal interpretation. Leyh's interdisciplinary endeavor would have been better

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8. *Legal Hermeneutics* at xvii-xviii (cited in note 3).

9. The famous "problem" of the hermeneutical circle, the recognition that interpretation is not based on bedrock, but rather is dynamic, is revealed by the fact that a person is unable to understand a particular aspect of a text without relating it to the text as a whole, although the text as a whole can be understood only by understanding its particulars.

10. Detailed examinations of Gadamer's philosophy in the legal literature include William K. Eskridge, *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609 (1990); David C. Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. Cal. L. Rev. 135 (1985); David C. Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. Ky. L. Rev. 479 (1988); Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 Iowa L. Rev. 661 (1991); Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. Rev. (forthcoming April 1994); Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration that the Obvious Is Plausible*, 61 Tenn. L. Rev. (forthcoming Fall 1993); Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 Wash. L. Rev. 249 (1993); Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U. L. Rev. 523 (1988); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 Cal. L. Rev. 889 (1992).

framed had he first provided a context for the "conversation about legal hermeneutics" that the essays embody.[11]

This minor criticism aside, the volume is an excellent addition to the literature. The essays uniformly provide rewarding reading for scholars, and many of the essays are suitable reading for a jurisprudence seminar. Although Gadamer's view of interpretation as something other than a rule-governed, methodologically defined practice figures prominently in the volume, Leyh selected the essays to reveal the contested nature of many issues raised by Gadamer.[12] The essays do not define a single strategy of legal interpretation so much as they delineate the issues of concern and suggest a more productive vocabulary for addressing these issues.

Leyh organizes the essays into five chapters. The volume begins with two essays designated as General Perspectives and concludes with a Commentary by Stanley Fish. As suggested by the title, the body of the volume is separated into three parts: History, Theory, and Practice. This organizational approach is ironic, given the important lesson of contemporary hermeneutics that it is illegitimate to regard theory, practice, and history as separate and unrelated modalities, but the organization permits readers unfamiliar with the literature to focus on major themes. This review follows Leyh's general organization by incorporating the General Perspective essays and Fish's Commentary into separate discussions of History, Theory, and Practice. I do not describe, much less critique, all of the subtle and diverse perspectives contained within the volume, nor do I attempt to disguise my bias in favor of Gadamer's hermeneutical approach. By necessity I limit my review and critical appraisal to the broad themes shared by the contributors. By conviction I defend the

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11. *Legal Hermeneutics* at xvii (cited in note 3). Leyh adopts a properly humble posture by suggesting that answers to the questions of what philosophical hermeneutics is and what contribution it can make to legal interpretation are always tentative conclusions in an ongoing conversation. Id. at xvii-xviii. However, those seeking to join the conversation would benefit from an admittedly simplified outline of the paths this conversation has taken. For helpful overviews of the history and significance of contemporary hermeneutics, the reader should consult the excellent, though somewhat lengthy, introduction by Kurt Mueller-Vollmer in Kurt Mueller-Vollmer, ed., *The Hermeneutics Reader* 1-53 (Continuum, 1989), and the succinct presentation by Joel Weinsheimer in Joel Weinsheimer, *Philosophical Hermeneutics and Literary Theory* 1-23 (Yale U., 1991). For a good description of Gadamer's central themes and their relationship to contemporary philosophy, see David E. Linge, *Editor's Introduction*, in Hans-Georg Gadamer, *Philosophical Hermeneutics* xi (U. Cal., 1976).

12. "[N]ot 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." *Legal Hermeneutics* at xii (cited in note 3).

general contours of the Gadamerian approach, primarily against the challenges issued by Professor Fish.

II. HISTORY

The relationship between hermeneutics and history is multifaceted. At the most obvious level, philosophical hermeneutics has its own defining intellectual history. Gadamer expressly describes his philosophy as an extension of Martin Heidegger's efforts to rebut the Enlightenment conception of knowledge after German romanticism failed to accomplish this task.[13] The relationship between hermeneutics and history, however, runs much deeper. On one hand, historical inquiry necessarily is interpretive inasmuch as the historian always is guided by her interests and prejudices and can never simply describe the "facts" of the past. On the other hand, all interpretive activities take place against the backdrop of historically defined, meaningful social practices. Although the ideal of law as a rational discourse distinct from political and social pressures is a powerful image, it is betrayed when we explore how our conceptions of legal dialogue have developed in response to multifaceted historical forces. One of Gadamer's principal hermeneutical themes is the historicity of all understanding, including legal understanding. Attuned to the historical character of understanding, the legal scholar, in an effort to free up current legal dialogue, is in a position to trace, and to some extent unravel, the ideology embedded in traditional legal theory. Several contributors to the volume explore these various ways in which history and hermeneutical practice are intertwined.

Peter Goodrich traces orthodox conceptions of legal practice to the birth of modern legal method in seventeenth-century England.[14] As described by Goodrich, English common law was formalized in response to contingent social pressures rather than as a result of developments internal to legal practice. Under the influence of Scholasticism, the "disparate strands of the legal tradition" were rationalized in jurisprudential writings that emphasized law as a univocal

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13. See Gadamer, *Truth and Method* at 173-218 (cited in note 3); Hans-Georg Gadamer, *Text and Interpretation*, in Diane P. Michelfelder and Richard E. Palmer, eds., *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* 21, 21-23 (S.U.N.Y., 1989).

14. Peter Goodrich, *Ars Bablativa: Ramism, Rhetoric, and the Genealogy of English Jurisprudence*, in *Legal Hermeneutics* at 43 (cited in note 3). Goodrich does not pretend to objectify history from the privileged posture of the present. Instead, Goodrich employs Foucault's practice of genealogical inquiry by tracing "the contingent descent, the chance affiliations, and the alien forms from which specific, singular objects of discourse are formed." Id. at 73 n.16.

discursive logic, "an empire of truth supported by a veridical language or orthodoxy that was peculiar to the law alone."[15] With this development, legal practice came to rest on a binary justification similar to that supporting theology: the power of the unwritten word rooted in an ancient communal tradition of the common law coupled with the authority of esoteric methods of exegesis carried out by a professional elite. Continuing pressures to reduce the law to a clearly stated vernacular language embodied in accessible and stable texts were rebuffed by legal professionals who claimed that legal reasoning and argumentation were special skills enabling them to mediate the tension between the originary sacred word and the meaning of the written legal text.[16] Goodrich illustrates a powerful theme with his historical inquiry into the foundation of legal hermeneutics. The ideal of a definitive legal discourse does not flow from the nature of "law"; it is the result of particular historical forces.

James Farr carries this story forward in the American venue, where the existence of a written constitution rendered particularly important the need to formalize legal reasoning as a method for stabilizing the contestable meaning of governing texts.[17] Farr emphasizes the important impact of Francis Lieber's *Legal and Political Hermeneutics*, which was published at a time when the idea of a written constitution was still subject to debate and when political conceptions were in transition in response to positivist and utilitarian influences.[18] Lieber proposed a scientific approach to interpretation, but he did not succeed in segregating legal decisionmaking from the powerful influences of social conflict. Farr exposes the contradictory impulses in Lieber's supposed science of interpretation, exemplified by Lieber's simultaneous commitment to the author's intent as the one true meaning of a text and to the importance of incorporating common sense, good faith, and the public welfare in every interpretation.[19] Nevertheless, over time the American experience levelled the rich tension of English jurisprudence to a vision of legal dogmatics supplying the correct answers to questions about the meaning of the

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15. Id. at 44.

16. "Only those who hold the key to tradition and guard the unwritten meanings can properly determine whether or not the text is to be taken in its 'plain signification' or whether it is rather to be understood in an esoteric sense that accords more accurately with the hidden and immemorial reason of the oldest and most excellent of all laws." Id. at 69.

17. Farr, *The Americanization of Hermeneutics*, in *Legal Hermeneutics* at 83 (cited in note 3).

18. See id. at 98; Carrington, 42 J. Legal. Educ. at 362 (cited in note 3).

19. Lieber's commitment to a republican vision of politics explains his hesitancy to offer a truly abstract, scientific account of interpretation. See Carrington, 42 J. Legal Educ. at 339 (cited in note 3).

Constitution. The failure of this dogmatic project has resulted in our contemporary jurisprudential anxiety.

The essays by Goodrich and Farr chart our present predicament in a way that puts current jurisprudential trends into context. For example, Professor Thomas Grey's long-standing effort to rehabilitate the legitimacy of an unwritten, fundamental constitutional law is an attempt to recapture the more diverse conceptions of law arising from the English common-law experience without surrendering the reasoned articulation of the written Constitution's meaning.[20] But any such strategy is insufficient once we recognize that our conceptions of law are not grounded on any bedrock tradition; the English experience, no less than American textualism, is the product of historical chance and social contingency. The jurisprudential dilemma posed by the collapse of traditional pictures of legal practice is now quite familiar. Either we invite legal nihilism by acknowledging that legal practice irretrievably is the product of an ungrounded social flux, or we cling to law's rhetorical posturing as a distinct reasoned discourse despite the implausibility of such a position. The important contribution of historically attuned hermeneutical inquiry is to dissolve this dilemma.

Fred Dallmayr's essay answers the criticism that hermeneutics is an invitation to nihilistic arbitrariness by exploring the historical development of the doctrine of the rule of law.[21] Dallmayr argues that the political struggle to implement rule-governance is not undermined by the hermeneutical thesis that all understanding is a historical project. Although the interpretive insularity of traditional legal dogmatics ignores our hermeneutical situation and must be discarded, we are not thereby consigned to surrender to arbitrary rule. Dallmayr recounts the history of the doctrine of the rule of law, but his theme is historical in a more important sense. Dallmayr argues that the historical character of interpretation permits us to resuscitate rule-governance in the face of nihilistic challenges.

Dallmayr links current apprehensions about the possibility of the rule of law to an aporia first acknowledged in ancient Greece: the competing and apparently irreconcilable claims of universal natural

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20. See Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 Chi.-Kent L. Rev. 211 (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975). For a critique of Grey's thesis, see Mootz, 61 Tenn. L. Rev. (forthcoming Fall 1993) (cited in note 10).

21. Fred Dallmayr, *Hermeneutics and the Rule of Law*, in *Legal Hermeneutics* at 3 (cited in note 3).

law and positive human law. Modern legal theory rejects the idea of substantive natural law ("material law") in favor of the positivist thesis that law is an autonomous and rational discourse that may be practiced independently of communal efforts to define the good life.[22] However, the attempt to segregate law from the influence of ongoing substantive politics has invited the blistering post-Nietzschean deconstructive critique of the possibility for obtaining objective and uniform interpretations even of the most formal, stylized discourse.[23] We have come to recognize that the "more normativity is formalized and elevated above contingencies, the more its content appears in need of interpretive retrieval and assessment."[24] All attempts to define the rule of law in positive law terms divorced from substantive notions of the public good have failed; the might of state power always implicates the right of the law.

Dallmayr contends that Gadamer's philosophical hermeneutics avoids this apparent impasse. Gadamer stresses that understanding is always a historical project of rearticulating the tradition in response to the practical demands of the present. We understand a legal rule only by means of practical exegesis: understanding and application are a unified act. By conjoining rule-knowledge and rule-application, Gadamer emphasizes that a rule is never something given in the past and then later applied to a problem in the future. Rather, a rule emerges in the resettling of tradition within our present context.[25] Dallmayr argues from this perspective that rule-governance is possible once we recharacterize it as the prudent elaboration of a historically situated common reasonableness. Consequently, modern society must repair "deep ethnic, economic, or other fissures" and alleviate the

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22. "By solidifying into a doctrine, rule-governance or the rule of law also underwent a subtle change: namely, in the direction of a steady formalization and legalization . . . . In earlier formulations law and lawfulness were still closely linked with notions of the common good and thereby with broader substantive concerns." Id. at 9.

23. Dallmayr notes that Nietzsche's "iconoclastic inquiries" challenged the notion that a positive rule could be understood objectively in a manner that permitted uniform application. Id. at 12. "Nietzsche in the end arrived at an agonal perspectivism, a view of reality as refracted into a multitude of conflicting construals and interpretations." Id. at 13. Phillipe Nonet offers a detailed indictment of Nietzsche's nihilism as a generative influence on legal positivism in Phillipe Nonet, *What Is Positive Law?*, 100 Yale L. J. 667 (1990).

24. Dallmayr, *Hermeneutics and the Rule of Law*, in *Legal Hermeneutics* at 13 (cited in note 3).

25. Gadamer expressly defines understanding as application: "[A]pplication is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning. . . . [Application does] not consist in relating some pregiven universal to the particular situation." Gadamer, *Truth and Method* at 324 (cited in note 3).

"widespread sense of corruption, unfairness, and inequity"[26] in order to sustain the common reasonableness essential to the rule of law.

Although legal interpretation inevitably is a political event under Dallmayr's definition, it does not devolve into a radically free application of a traditional text by a subject rising above the shared boundaries of tradition. Every interpretive recovery of a positive law is grounded in the interpretive horizon of the community and thus entails a simultaneous articulation of (historically conditioned) material law. Dallmayr describes the hermeneutical ethic implicit in his account by borrowing an example from Gadamer. A despotic leader who governs according to subjective whim destroys the rule of law by turning a deaf ear to the "common reasonableness that is the nourishing soil of legal rule-governance."[27]

Stanley Fish rebuts Dallmayr by arguing that even despots necessarily act within the interpretive bounds of the community, and therefore despots equally are exposed to the destabilizing effects of shared meanings regardless of their attentiveness to public reasonableness.[28] Fish explains that despotic rule maintained through a violent reign of terror "energizes and authorizes resentments," and therefore the "possibility of correction and reform . . . can never be foreclosed."[29] Fish correctly observes that the despot can never escape from the intersubjective web of his community, but surely Fish cannot seriously be arguing that *The Federalist Papers* and Orwell's *1984* describe societies that are equally hermeneutically grounded. To do so would embrace what Dallmayr characterizes as "placid consensualism."[30] The bloody historical battle to secure the rule of law, the agonies of Nazi Germany and Soviet Russia, and the prepackaged public discourse of advanced capitalism all militate against adopting the comforting vision that the only matter of importance is the (unavoidable) existence of an overriding interpretive community.

The disagreement between Dallmayr and Fish grows out of their polar conceptions of the historical dimension of interpretation. Dallmayr follows Gadamer by arguing that history is always an unfolding event that can take new and unexpected turns. In contrast,

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26. Dallmayr, *Hermeneutics and the Rule of Law*, in *Legal Hermeneutics* at 19 (cited in note 3).

27. Id. at 20.

28. Stanley Fish, *Play of Surfaces: Theory and the Law*, in *Legal Hermeneutics* at 297, 305-06 (cited in note 3).

29. Id. at 305-06.

30. Dallmayr, *Hermeneutics and the Rule of Law*, in *Legal Hermeneutics* at 19 (cited in note 3).

Fish regards the legal tradition as a "complex mechanism"[31] that regenerates itself by following through on present potentialities in undetermined ways. Dallmayr recognizes that something dramatically new can intervene in history, whereas Fish believes that the (admittedly undetermined) future is already contained within the present. Although Fish properly notes that legal change never comes from an outside agent, a hermeneutical approach to the rule of law suggests ways to promote a more authentic renewal of tradition than would occur under a despotic regime. Fish's theoretical claim that there is always "room for the interpretive maneuvering that produces change"[32] is meaningless without a corresponding political commitment to actualize this potentiality.

Drawing from the essays by Goodrich, Farr, and Dallmayr, one can distill the historical dimension of contemporary hermeneutics into two general lessons. First, our attitudes about legal interpretation must be viewed as historically defined perspectives rather than as components of a rationally compelled edifice. Descriptions of how we interpret legal texts necessarily are the product of past socio-political contexts, in which our legal tradition developed, and the ongoing process of reinterpreting this culture. By concluding with Goodrich and Farr that our current dogmas are defined historically, we already have adopted a critical posture that can lead us to accept a different range of activities as legitimate within the ongoing practice.

A second lesson of contemporary hermeneutics is that practical interpretive acts are historically defined no less than our theoretical self-understanding. Every interpretation is a historical event because an existing text is redefined in the context of the present. We never read a text as if for the first time, outside of all contexts. We are always in the process of giving shape to a historical trajectory of meaning. Dallmayr demonstrates that this characteristic of interpretation enables law-governed activity, which is something different than adherence to a predefined positive rule. This theme is pursued in greater detail and with regard to a wider range of issues in the essays that discuss the theory of contemporary hermeneutics.

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31. Fish, *Play of Surfaces*, in *Legal Hermeneutics* at 306 (cited in note 3).
32. Id.

III. THEORY

A. The Universality of the Hermeneutical Situation

The hermeneutical situation of the interpreter that opens the possibility for the rule of law should not be regarded as a feature peculiar to legal interpretation. If a core theoretical premise of contemporary hermeneutics exists, it is the universality of the hermeneutical situation. Leyh, therefore, appropriately includes contributions from the domains of literary, theological, and legal hermeneutics in the volume. Contemporary hermeneutics describes how understanding occurs and therefore is relevant to each of these disciplines, although theorists traditionally have regarded them as discrete subjects dealing with particular concerns.

Gerald Bruns poses a question familiar in the domain of literary theory—what is a "text"?—in an effort to advance the current stalemate in legal theory.[33] Bruns characterizes current legal theory as a bipolar opposition between scholars in the mold of Ronald Dworkin and those in the mold of Peter Goodrich. To address the threat of relativism, Dworkin defends the idea that right answers exist for every legal dispute; in contrast, Goodrich argues that slavish adherence to past practice is never compelled because legal language is thoroughly indeterminate.[34] Bruns rejects both of these approaches because they are predicated on unrealistic assumptions about legal texts. Bruns follows Dallmayr by arguing that every interpretation involves application and links this insight to a general theoretical approach to textuality.

Bruns emphasizes that the dissemination of culture occurs through language and that language is open and indeterminate rather than a monological unfolding and clarification of static ideas. Reducing language to a written text does not stabilize the dynamic openness of language. The text always remains provocative; it never becomes a transparent carrier of past cultural resolutions. In particular, our textually based legal tradition is "an always highly charged environment of intersecting (bisecting and dissecting) dialogues in which the very idea of law itself is in constant revision—in play as hermeneuticians say, contested, irreducible, resistant to conceptual determina-

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33. Gerald L. Bruns, *Law and Language: A Hermeneutics of the Legal Text*, in *Legal Hermeneutics* at 23 (cited in note 3).

34. Id. at 23-25.

tion, always in question, open to unforeseen contextualizations."[35] Consequently, legal hermeneutics is best regarded as an *event*, the exploration of the rich openness of language in different contexts, rather than a *theory* that can determine for us what the interpretation of a particular text will reveal.[36] In response to Goodrich's claim that legal texts are repressive because they paper over indeterminacy, Bruns argues that legal texts are the embodiment of this "freedom of linguisticality"[37] inasmuch as they are sites of unsettling hermeneutical events rather than vessels for predefined concepts.

Contemporary hermeneutics establishes a shared ontological description of the manner in which interpreters of both literary and legal texts reach understanding. However, hermeneutics originally developed as a methodological subdiscipline of theology. Although the stakes may appear higher when one is interpreting sacred scripture rather than novels or statutes, contemporary hermeneutics nevertheless has had a profound influence on biblical hermeneutics by questioning even this doctrinal boundary. Jerry Stone brings Gadamer's philosophical hermeneutics to bear on one of the central debates in theology: the significance of scripture for religious belief and action.[38] Current theological debate coalesces around a bipolar opposition similar to that found in legal theory, an opposition pitting the tradition of exegesis against that of interpretation. Biblical exegesis attempts to recover the closed historical meaning of the resurrection, treating it as an object of reflection for contemporary believers.[39] In contrast, biblical interpretation involves demythologizing the text from its prescientific linguistic meaning so that it can speak to the existential distress of the enlightened contemporary believer.[40]

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35. Id. at 31.

36. Id. at 32.

37. Id. at 34.

38. Jerry H. Stone, *Christian Praxis as Reflective Action*, in *Legal Hermeneutics* at 103 (cited in note 3).

39. Stone regards Karl Barth's theology as exemplary of this approach because Barth insists that praxis as reflective action respect the object on which it reflects. . . . Whereas culture and language are the necessary forms through which the Christian subject matter is conveyed, for Barth no such culture and language - biblical, modern, or otherwise - can circumscribe the divine subject matter to which it points. . . . Barth distinguishes between the meaning to which the biblical text points and its particular significance for the Christian community at any one time.

Id. at 111, 113, 114.

40. Stone regards Rudolph Bultmann's theology as exemplary of this approach. Bultmann argues that the "modern vision of a closed physical universe governed by natural law permeates the modern horizon, which means that the biblical description of supernatural spirits as entities who intervene in daily human affairs can carry no real meaning for the modern interpreter. The text cannot *mean* until it is re-presented in terms of existentialist experience." Id. at 109 (emphasis in original).

Stone argues that Gadamer's hermeneutics rejects the transcendental elevation of either subjective angst or historical event by recognizing that every exegetical act is interpretive. According to this view, we can never abruptly distance ourselves from the traditional text by achieving a thoroughly contemporary interpretation, but neither can we look through the text to the historical Christ event. Gadamer's hermeneutics suggests that Christian reflective action (praxis) might "bring the past into the present in a way that on the one hand does not present it as a heteronomous authority abstracted from another age and on the other does not relativize it in the excessive desire to join the modern age."[41] This mediation, though, presumes a common strand of culture subtending the interpretive effort, which is captured in the notion of the "communal body of Christ."[42] Once again, the historicity of understanding locates interpretation as an event between the text and reader and discredits every attempt to privilege either of these (wrongly) presumed distinct entities.

Finally, Drucilla Cornell writes as a legal academic drawing on themes of contemporary French philosophy and psychology.[43] Cornell identifies with poststructuralist thought rather than hermeneutics, but she challenges the Americanized practice of deconstruction that destroys the possibility of ethics as part and parcel of rejecting any manner of foundationalism. In response to deconstructive nihilism, Cornell rehabilitates ethics as a call to the "Good" within historical practice, but she rejects a neo-Hegelian approach that would posit an immanent rationality unfolding in history. Rather, legal practice is the use of practical reason to balance competing demands and perspectives by proposing legal principles as articulations that define the Good within a particular context. If "we cannot escape the appeal to the Good as we interpret legal sentences,"[44] then every interpretive event involves an unsettling of received wisdom and involves an ethical responsibility on the part of the interpreter. "Interpretation is transformation, and as we interpret, we are responsible for the direction of that transformation."[45]

The essays by Cornell, Stone, and Bruns demonstrate that literary, biblical, and legal hermeneutics are united ontologically by the experience of understanding within language. Each discipline is simply a different manifestation of the manner in which we under-

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41. Id. at 121.
42. Id.
43. Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, in *Legal Hermeneutics* at 147 (cited in note 3).
44. Id. at 150.
45. Id. at 170.

stand. Contemporary hermeneutics is defined by the claim that understanding is achieved only through application; there is no free-floating interpretation that only later is brought to bear in a particular context. Whether we seek the meaning of a literary text, the meaning of scripture, or the meaning of a law, the hermeneutical situation of the interpreter remains the same. The interpreter is pulled beyond the status quo toward an evolving tradition at the same time that the tradition finds a home in the interpreter's world of concerns. This universal character of understanding leads us to view texts, faith, and ethical judgment in a new, shared light.

Stanley Fish responds to the universal claims of contemporary hermeneutics with his signature observation that our theoretical interpretation of a particular practice is distinct from and holds no power over that practice. Fish criticizes Bruns for acknowledging that law is the play of linguistic surfaces, but then asserting that this position is deeply insightful and holds methodological consequences. In reply to Cornell's supposition that the never-realized Good transforms legal practice, Fish argues that there is no "need for anything outside the system to impel it forward."[46] He describes legal practice as a pre-existing ensemble of transformative possibilities[47] that does not depend on theoretical approaches to legal practice. Although Fish admits that theoretical claims are important to the extent that they might carry rhetorical weight within legal practice, he rejects the power of theory to justify, regulate, or change the practice.[48] Careful reflection leads Fish to conclude that all understanding is historically conditioned and linguistically mediated, but this flash of insight immediately dissolves the point of further reflection. According to Fish, theory is one bold thought: a recognition of its own impotence.

Bruns, Stone, and Cornell are little more than suggestive in drawing their conclusions, but Fish's criticism levels the important and interesting issues raised in their essays. Although his attacks on theory are well taken, Fish mistakenly equates the philosophical project of contemporary hermeneutics with interpretive theory. We can distinguish the two by regarding theory as the effort to stand outside the flux of a practice and to devise a methodological key to the practice, and philosophy as the labor of thinking within the practice.[49]

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46. Fish, *Play of Surfaces*, in *Legal Hermeneutics* at 312 (cited in note 3).
47. Id.
48. Id. at 309.
49. See Weinsheimer, *Philosophical Hermeneutics and Literary Theory* at 24-40 (cited in note 11); Steven Mailloux, *Rhetorical Hermeneutics*, 11 Critical Inquiry 620, 621, 631, 639 n.26 (1985) (arguing that a rhetorical hermeneutics drawing from Gadamer's work resists the

Contemporary hermeneutics is a philosophical effort to recover the act of understanding, working within the admittedly narrow confines of postmodern philosophy.[50] Contemporary hermeneutics does not deliver a theoretical picture of how we understand texts as a prologue to developing a methodology for acquiring knowledge about particular texts. Rather, contemporary hermeneutics recognizes that truth is an ongoing project structured by dynamic, unfolding historical practices and therefore concludes that no methodology can ever stand apart from ongoing practices to guarantee truthful knowledge.[51] One can best explain how contemporary hermeneutics proposes to energize interpretive practice without claiming to provide a theoretically grounded methodology by turning to a familiar debate in legal hermeneutics: the debate over originalist jurisprudence.

B. Legal Theory: The Dispute Over Originalism

Legal scholars have grown accustomed to an apparently intractable political battle. On one side of the battlefield, conservative partisans urge that constitutional restrictions on government authority should be interpreted to mean what the white, male, propertied framers intended them to mean when they were drafted and ratified. Squared off against the conservatives, liberals urge that the Constitution holds enlightened meaning for our contemporary society that can rise above the prejudices of the past. It should be obvious that Bruns's description of legal texts, Stone's outline of Christian praxis, and Cornell's affirmation of the transformative character of interpretation all describe the activity of understanding in a way that holds significance for this battle over originalism. Contemporary hermeneutics rejects the false alternative of construing meaning either as a closed historical fact or the product of contemporary creative reconstruction. Describing the new path charted by contemporary hermeneutics reveals numerous potential pitfalls. Several contributors to the volume assess the value of contemporary hermeneutics by discussing the problems posed by originalism.

"theoretical urge"). I understand Gregory Leyh's use of "theory" to be synonymous with the use of "philosophy" in the text.

50. I have suggested this role for postmodern legal philosophy. See Francis J. Mootz III, *Postmodern Constitutionalism as Materialism*, 91 Mich. L. Rev. 515 (1992).

51. The title of Gadamer's magnum opus, *Truth and Method*, is therefore somewhat deceptive inasmuch as the point of his book is to demonstrate that the methodological approach of science does not grant privileged access to truth.

Terence Ball criticizes originalism as an imprudent, although plausible, interpretive methodology.[52] Ball agrees that judges can recover the original meaning of the framers' words by resuscitating the "particular view of politics and human nature" that subtended "the world of words within which intentions were initially framed."[53] But even if this historical inquiry is successful, Ball argues that judges are unjustified in attempting to use these foreign intentions from the past to guide current legal practice.[54] Ball's normative argument is familiar to legal scholars and practitioners: we should disregard the framers' intentions because in many cases they are the product of an outmoded worldview that no longer can serve as a legitimate guide for modern society.

The familiarity of his argument should give reason to pause: if Ball correctly describes the significance of contemporary hermeneutics, it is unclear whether hermeneutical insight adds anything to the legal battle over originalism. In fact, Ball's argument diverges from contemporary hermeneutics by accepting the premises of nineteenth-century romantic hermeneutics (an empathetic appropriation of past eras avoids misunderstandings) and historicism (historical facts are closed and determinant entities), although he does argue that a prudent legal practice should not pursue these hermeneutical strategies. In sharp contrast, contemporary hermeneutics represents a break from these related traditions and suggests a new attitude toward all historical knowledge, including an attempt to understand what the drafters of a document intended it to mean.[55] As Gregory Leyh notes, from a Gadamerian perspective originalism is not simply an imprudent methodology; it is a "hermeneutical howler."[56] Viewing original intent as an immutable historical fact that can be recovered

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52. Terence Ball, *Constitutional Interpretation and Conceptual Change*, in *Legal Hermeneutics* at 129 (cited in note 3).

53. Id. at 133, 137. Ball contends only that it is possible to recover and reanimate past conceptual schemes as a theoretical matter. He notes that constitutional originalism still faces a number of thorny practical problems. Id. at 138-43. Ball concludes that "[o]riginalism is not so much impossible as it is misguided in its aims and unworkable in practice." Id. at 136.

54. Ball writes that we "can recover those intentions, but we cannot return to them and make them our own" because to do so is "a retrograde move that we cannot rationally make." Id. at 135, 130. Ball makes the familiar argument that judges and legal historians pursue hermeneutically distinct inquiries, a claim that Gadamer challenges directly. Gadamer, *Truth and Method* at 325-27 (cited in note 3).

55. Gadamer's efforts in *Truth and Method* focus primarily on redefining hermeneutics in an effort to expunge the effects of romanticism, which was closely intertwined with historicism. Gadamer, *Truth and Method* at 171-264 (cited in note 3) (arguing that the historicity of understanding renders romantic hermeneutics fundamentally suspect because of its historicist underpinnings).

56. Gregory Leyh, *Legal Education and the Public Life*, in *Legal Hermeneutics* at 269, 285 (cited in note 3).

by a contemporary interpreter ignores the historical dimension of all understanding. Ball discounts the original intentions and instead lodges all authority in the contemporary demystifying cogito of the critical historian. This approach is precisely the move that Gadamer regards as symptomatic of the Enlightenment's denigration of the force of tradition.

At first glance, it may appear that even those who are attuned to the lessons of contemporary hermeneutics add nothing to the existing debate because they tend simply to replicate the political battle with fancier terms. On one side, Steven Knapp, Walter Benn Michaels, and Stanley Fish argue that the meaning of a text is defined by authorial intent; therefore, they conclude, the idea of an evolving meaning simply is incoherent.[57] On the other side, David Hoy argues the Gadamerian response: no fixed authorial meaning is possible because meaning is known only in the application of the text by an interpreter in the present.[58] However, a closer inspection of the debate reveals that the contestants have moved beyond the romantic and historicist assumptions of nineteenth-century hermeneutics, which underlie the unproductive traditional views that continue to frame the debate about originalism in legal circles.

Knapp and Michaels effectively demonstrate that their position is far removed from conservative legal theory and its efforts to rehabilitate and enforce the original meaning of legal texts. They argue that textual meaning is equivalent to authorial intention, but they deny that any distinct political or methodological consequences flow from their theoretical position. Knapp and Michaels contend that the lack of a "useful interpretive method" makes "deciding what counts as the best historical evidence" of the author's intent impossible.[59] In this respect they echo Gadamer's principal theme: the truth of a textual tradition can never be secured by rigorous application of a neutral methodology. Although contending as a theoretical matter that the author's intent fixes the meaning of a legal text, as a practical matter they acknowledge that the application of

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57. Steven Knapp and Walter Benn Michaels, *Intention, Identity and the Constitution: A Response to David Hoy*, in *Legal Hermeneutics* at 187, 187 (cited in note 3) (arguing that "what the interpreter wants to know, if she wants to know the meaning of 'equal' in the equal protection clause, can only be what its authors meant by it"); Fish, *Play of Surfaces*, in *Legal Hermeneutics* at 299-300 (claiming that "there is only one style of interpretation—the intentional style . . . interpretation always and necessarily involves the specification of intention").

58. David Couzens Hoy, *Intentions and the Law: Defending Hermeneutics*, in *Legal Hermeneutics* at 173, 178 (arguing that "since textual meaning is not reducible to intended meaning, there are many other kinds of questions that can be asked about texts").

59. Knapp and Michaels, *Intention, Identity and the Constitution*, in *Legal Hermeneutics* at 196 (cited in note 57).

the text to certain cases will reflect the beliefs of the contemporary interpreter. As an example of this distinction, they argue that the meaning of the Fourteenth Amendment guarantee of equality is synonymous with the drafters' intentions (for example, government schools should provide equal education). However, they argue further that contemporary interpreters are not constrained to apply the text according to the drafters' beliefs (for example, segregated schooling is not inherently unequal). According to this view, it makes sense to argue "that a court remains faithful to the authors' intentions even while going *against* the authors' beliefs."[60]

In his challenge to Knapp and Michaels, Hoy does not simply side with liberal legal theorists who argue that courts must consciously refashion outmoded laws if the law is to serve progressive social interests. Hoy rejects the idea of a fixed textual meaning defined by the author's intent that is later subject to varying applications in different contexts. Hoy follows Gadamer's ontological argument that textual meaning can never exist outside of a context—that is to say, outside of an application of the text. He also charges that Knapp and Michaels forsake this actual practice in order to defend "an abstract, theoretical picture" of interpretation.[61] A contemporary interpreter seeking to understand the author's intent embedded in a written text is not seeking to apprehend a brute fact sealed in the past; instead, the interpreter reanimates the text within her own context of concerns and questions. Every interpretation is shaped by intervening history. We should acknowledge that this fact is not a limitation on knowledge but rather is an unavoidable constitutive feature of understanding that holds normative implications for practice.[62]

It is difficult not to conclude that the contestants are talking past each other. For example, each side considers whether marks in the sand randomly created by ocean waves should be considered a meaningful text if the marks happen to replicate intelligible sentences. Hoy argues that these improbable marks indeed are meaningful to the interpreter, notwithstanding the complete absence

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60. Id. at 193 (emphasis in original). Stanley Fish goes so far as to claim that the "originalist" position is vacuous in practical terms because the authors' intentions in drafting a legal text could be defined to mean almost anything. Fish, *Play of Surfaces*, in *Legal Hermeneutics* at 298 (cited in note 3). More importantly, the authors' interpretation of past intentions are accorded no privilege in the effort to recover those intentions. Id. at 300.

61. Hoy, *Intentions and the Law*, in *Legal Hermeneutics* at 174 (cited in note 3).

62. Id. at 184.

of authorial intent.[63] Knapp and Michaels counter that without an intended meaning there is no meaning: the interpreter comes to realize her mistake and then acknowledges that the marks apparently forming words are in fact meaningless.[64]

This apparently silly dispute underscores that the essays undertake two different projects. Hoy plainly regards textual interpretation as a particular interpretive comportment that is subtended by a broader, open hermeneutical situation productive of all knowledge. Even if the marks in the sand appeared as random lines, the perception of them relies upon a prefiguring interpretive relationship that is operative in all understanding.[65] This prefiguring relationship thoroughly affects all understanding, including the explicit interpretation of ambiguous texts, rendering it impossible to speak of meaningful authorial intentions that remain immune from this relationship.

In contrast, Knapp and Michaels appear to focus on the more limited question of the theoretical bounds of legitimate textual interpretation, recognizing that an understanding of the text is dependent on determining, at some level of generality, what the author meant. As Stanley Fish emphasizes, a judge who utterly disregards the intended meaning of a legal text and instead exploits its linguistic ambiguity has abandoned the effort to understand the text. For Fish, the concept of authorial intent secures the legitimacy of a local interpretive practice rather than providing an ontological description of understanding. The judge who abandons authorial intent is "not trying to figure out what [the text] means but trying to see what meanings it could be made to yield,"[66] which is to say that the judge is not engaged in a legitimate (originalist) interpretive activity.[67]

One might be tempted, then, to accept Hoy's argument that philosophical hermeneutics extends beyond the limited domain of textual interpretation without discrediting Knapp and Michaels's insistence that, in the limited case of textual intrpretation, legitimate

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63. Hoy explains that the hermeneutical approach "does not exclude questions about intention when these are relevant to interpretation, but it believes that since textual meaning is not reducible to intended meaning, there are many other kinds of questions that can be asked about texts." Id. at 178.

64. Knapp and Michaels, *Intention, Identity and the Constitution*, in *Legal Hermeneutics* at 190 (cited in note 3).

65. Gadamer argues that perception is a hermeneutical event as part of his efforts to discredit the empiricist tradition that underwrites much of the ideological commitment to scientific methodology as the guarantor of knowledge. Gadamer, *Truth and Method* at 89-92 (cited in note 3). See also Patrick A. Heelan, *Space-Perception and the Philosophy of Science* 1 (U. Cal., 1983).

66. Fish, *Play of Surfaces*, in *Legal Hermeneutics* at 302 (cited in note 3).

67. Id. at 303.

interpretation in principle always involves an effort to explicate the author's intent. Knapp and Michaels offer a theoretical point without methodological consequences, but framed as a question of legitimacy rather than ontology, this theoretical point carries significant rhetorical weight. According to this view, the legitimacy of the legal system is premised on the adherence to the intended meaning of authoritative texts. The texts are considered authoritative precisely because the public has consented to be governed according to the directives first enunciated in the texts. If the judge is not looking to the intended meaning of a legal text at some level of generality, is not the judge in fact abandoning the law in favor of her own prejudices and sensibilities? Hoy fails to drive home Gadamer's argument in response to this more circumscribed reading of Knapp and Michaels's argument.[68] Gadamer claims that the author's intended meaning never exists apart from the inquiries arising in the present, and thus ascribing central importance to something that does not, and cannot, exist for us as an unchanging thing-in-itself is meaningless.[69] The distinction between originalism and nonoriginalism is entirely specious because we always incorporate the text's meaning but we also never leave that meaning unchanged.[70]

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68. Hoy does not drive home the argument in the sense that he does not emphasize it. Hoy has clearly aligned himself with Gadamer's point that the supposed distinction between originalism and nonoriginalism is illusory. See Hoy, 15 N. Ky. L. Rev. at 491-95 (cited in note 10).

69. Gadamer argues that all understanding is a mediation of the "unity of meaning" displayed by the text, its historical effect, and the present-day concerns of the interpreter. Gadamer, *Truth and Method* at 576 (cited in note 3). "The real meaning of a text, as it speaks to the interpreter, does not depend on the contingencies of the author and his original audience. It certainly is not identical with them, for it is always co-determined also by the historical situation of the interpreter and hence by the tetality of the objective course of history." Id. at 296. Gadamer further argues, "When we try to understand a text, we do not try to transpose ourselves into the author's mind. . . . If we want to understand, we will try to make his arguments even stronger. . . . That is why understanding is not merely a reproductive but always a productive activity as well." Id. at 292, 296. It is important to recognize that Gadamer's point is not limited to textual interpretation, hut extends to the historicity of all human experience. Thus, the argument against authorial intent is made as a specific feature of Gadamer's general critique of historicism:

> Is it a correct description of the art of historical understanding to say that we learn to transpose ourselves into alien horizons? Are there such things as closed horizons, in this sense? . . . Everything contained in historical consciousness is in fact embraced by a single historical horizon. Our own past and that other past toward which our historical consciousness is directed help to shape this moving horizon out of which human life always lives and which determines it as heritage and tradition. . . . Transposing ourselves [into a historical situation] consists neither in the empathy of one individual for another nor in subordinating another person to our own standards; rather, it always involves rising to a higher universality that overcomes not only our own particularity but also that of the other.

Id. at 304, 305.

70. Gadamer writes:

> Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further

Knapp and Michaels are correct to focus on intentionality, Gadamer would assert, but they err by reducing intentionality from the force of received tradition to the singular person of the author. To unpack this idea, it is helpful to consider Gadamer's distinction between the idea of pure aesthetic appreciation and the experience of art.[71] Gadamer argues that it is a mistake to reduce the experience of art to an immediate aesthetic response founded on a "mysterious intimacy" between the observer and the artwork that amounts to an ahistorical "encounter with ourselves."[72] Art is meaningful because it is defined by cultural history. In contrast, "natural beauty does not 'say' anything in the sense that works of art, created by and for men, say something."[73] At first glance, one might extrapolate that Gadamer would agree with Knapp and Michaels that the random marks in the sand cannot mean anything. However, Gadamer emphasizes that authorial intent does not constitute the "saying" of art: "Naturally it is not the artist who is speaking here. The artist's own comments about what is said in one or another of his works may certainly be of possible interest . . . . [However], the experience of the work of art leaves the *mens auctoris* behind it."[74] Gadamer joins Hegel in subor-

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> determine it ourselves. . . . Not just occasionally but always, the meaning of a text goes beyond its author. That is why understanding is not merely a reproductive but always a productive activity as well. . . . It is enough to say that we understand in a *different* way, *if we understand at all.*

Id. at 293, 296-97 (emphasis in original). As the last sentence underscores, Gadamer believes that translation is a model of all understanding:

> [T]he hermeneutically enlightened consciousness seems to me to establish a higher truth in that it draws itself into its own reflection. Its truth, namely, is that of translation. It is higher because it allows the foreign to become one's own, not by destroying it critically or reproducing it uncritically, but by explicating it within one's own horizons with one's own concepts and thus giving it new vitality. Translation allows what is foreign and what is one's own to merge in a new form by defending the point of the other even if it be opposed to one's own view.

Gadamer, *Philosophical Hermeneutics* at 94 (cited in note 11).

Paul Campos recently has renewed his defense of Knapp and Michaels's strong intentionalism by claiming that Gadamer hypostatizes the text as an "autonomous entity that has escaped from both its initial author and its subsequent readers." Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 Minn. L. Rev. 1065, 1086 (1993). Gadamer's model of translation avoids this very error by demonstrating that a text never escapes either factor in the history of its effects. Gadamer's refusal to accept the autonomy of the text is the focus of his critique of Emilio Betti's hermeneutics. See Gadamer, *Truth and Method* at 324-30 (cited in note 3) (critiquing Betti's fundamental distinction between judge and legal historian as a mistaken bifurcation of intentional meaning and cultural significance); Weinsheimer, *Philosophical Hermeneutics and Literary Theory* at 11-13 (cited in note 11) (tracing Gadamer's argument that Betti's intentionalist effort to avoid "subjectivism" reinscribes the subject-object framework).

71. Gadamer, *Philosophical Hermeneutics* at 95-104 (cited in note 11). In this essay, Gadamer both summarizes and sharpens his analysis in the first part of *Truth and Method*.

72. Id. at 95.

73. Id. at 97.

74. Id. at 102-03.

dinating aesthetic appreciation to the experience of art, inasmuch as an appreciation of the aesthetics of nature belongs "to the context that is stamped and determined by the artistic creativity of a particular time."[75] The tradition of artistic creativity within which the viewer is enmeshed defines the aesthetics of both nature and the artwork. The artwork is always taken beyond the particular artist's original intent, but aesthetic meaning never exists outside the intentionalist context of human creativity.[76]

Traditional accounts of legal legitimacy are rendered problematic if Knapp and Michaels are in error to suppose, even as a theoretical matter, that the intentions of the text's author are the focus of interpretation. Ken Kress directly addresses whether legal interpretation retains its legitimacy once we accept the lessons of contemporary hermeneutics.[77] Drawing from Gadamer's philosophy, Kress contends that legal texts are only moderately indeterminate because the shared context of an evolving tradition limits the range of interpretive options.[78] However, Kress concedes that even moderate indeterminacy destroys legal legitimacy if legitimacy is premised on a hypothetical original consent to the meaning that a legal text holds at the time it is created, because subsequent governmental action can always exceed the limits of the articulated consent by exploiting the linguistic indeterminacy of the governing text.[79] Consequently, legal legitimacy is threatened by the demise of originalism only because traditionally we link legitimacy with a consent theory of government. Kress argues that consent is only one route to legitimacy; alternative theories such as the duty to uphold just institutions, fraternity, and social utility also legitimize government power.[80] Although contemporary hermeneutics requires us to rethink legal legitimacy, it does not foreclose legal legitimacy.

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75. Id. at 98.

76. Gadamer explains that when "something natural is regarded and enjoyed as beautiful, it is not a timeless and wordless givenness of the 'purely aesthetic' object that has its exhibitive ground in the harmony of forms and colors and symmetry of design, as it might seem to a Pathagorizing, mathematical mind." Id. at 98. This argument derives from Gadamer's central premise that "being that can be understood is language." Id. at 103. See also Gadamer, *Truth and Method* at 383-491 (cited in note 3).

77. Ken Kress, *Legal Indeterminacy and Legitimacy*, in *Legal Hermeneutics* at 200 (cited in note 3).

78. Id. at 202-03.

79. Id. at 205. Compare James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. Rev. 1 (1991) (arguing that a Lockean notion of popular sovereignty as government by consent of the governed does not require adherence to originalist interpretive methodology).

80. Kress, *Legal Indeterminacy*, in *Legal Hermeneutics* at 206-10 (cited in note 3).

What, then, is the ramification of contemporary hermeneutics for legal practice, especially with regard to the debate over originalism? Just this: the originalist debate must be scuttled in law reviews and court opinions alike, and a new discussion of legal practice that is attentive to the hermeneutical situation must renew the legitimacy of legal practice by describing the dynamic tension of that practice. Although Gadamer is famous for his invective against the Enlightenment prejudice that true knowledge only comes as the product of a rigorous application of scientific method, we should not equate his challenge of methodology with an accepting quietism of the status quo. Gadamer argues that understanding is a function of our historicity, defined by the finitude of human existence, and involves a fusion of the horizons constituting the text and reader. Understanding involves the fusion of these horizons and, therefore, is never the passive reception of past meanings. Instead, understanding approaches the full realization of conversation, "in which something is expressed that is not only mine or my author's, but common."[81] Informed by this hermeneutical insight, lawyers, judges, and scholars can realign legal rhetoric to comport with its hermeneutical basis. The goal of such a project is not to prescribe the proper way to practice law, but to reinvigorate the ongoing practice of law. The essays regarding hermeneutical practice provide indications of how this modest yet important goal might be pursued.

IV. PRACTICE

Michael Perry contends in his essay that the theoretical dispute over the merits of originalism holds real world consequences for the practice of law; in short, that "constitutional theory matters to constitutional practice" because it "can make a radical difference in constitutional doctrine."[82] Perry admits that a simplistic view of constitutional theory as an algorithm dictating specific decisions is misplaced, but argues that competing schools of interpretive theory shape legal practice to the extent that judges and lawyers rely on these schools to legitimate their practice.[83]

Stanley Fish challenges Perry's thesis as part of his broader attack on the efficacy of any theory. Fish claims that originalist

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81. Gadamer, *Truth and Method* at 388 (cited in note 3).

82. Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, in *Legal Hermeneutics* at 241, 241, 253 (cited in note 3).

83. Id. at 256-57.

judges are criticized for the consequences flowing from their actual decisions, not because the theory of originalism means anything determinate or is in some way incorrect.[84] But this response highlights the very point that Perry makes. When a mode of legal practice is discredited, the underlying theory of interpretation also is questioned, because theory is useful only to the extent that it legitimates the features of good legal practice.[85] If adjudicative practice renders originalist justifications suspect, the unavoidable effort to articulate better justifications for future legal decisions in turn affects legal practice. Perry argues that there is continuous feedback between legitimating theory and legal practice. Each shapes the other when participants in legal practice use the anticipated results in future cases to justify their adherence to a particular interpretive theory or when they use a particular interpretive theory to justify their conclusions about a particular case.[86]

Perry's argument is strengthened by invoking Gadamer's more detailed analysis. Perry falls victim to the idea that originalism and nonoriginalism describe two different, equally plausible, phenomenological accounts of judging, and that prudence commends the latter approach.[87] Gadamer persuasively demonstrates that no judge can recover pristine original intentions unaffected by the intervening effects of the tradition of interpreting these intentions, but neither can a judge distance herself from the tradition that quite literally is embodied by the text. Choosing nonoriginalism over originalism often is an empty act because neither theory captures the hermeneutical situation. However, the practical effect of acknowledging the hermeneutical situation and eschewing the originalism debate altogether promises to be significant. The practice of law might be transformed if judges and lawyers acknowledge and espouse what they exhibit in their performative comportment within legal culture: legal meaning is a historical project rather than an independent essence or the product of an assertion of subjective will. Contemporary hermeneutics counsels participants in a tradition to put themselves at risk before the tradition, which results, of course, in also putting the tradition at

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84. Fish, *Play of Surfaces*, in *Legal Hermeneutics* at 298 (cited in note 3).

85. Perry, *Why Constitutional Theory Matters*, in *Legal Hermeneutics* at 257.

86. Id. at 258.

87. See Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. Cal. L. Rev. 551, 569-71 (1985). See also id. at 602 (asserting in an appendix to the article that "[o]riginalism *is* a real option") (emphasis in original). Gadamerian critiques of Perry on this point include Mootz, 68 B.U. L. Rev. at 545-56 (cited in note 10); Fred Dallmayr, *Nature and Community: Comments on Michael Perry*, 63 Tulane L. Rev. 1405, 1414 (1989); Hoy, 15 N. Ky. L. Rev. 479 (cited in note 10); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 Tulane L. Rev. 1599, 1603-21 (1989).

risk before their prejudiced horizons. Gadamer declares that contemporary hermeneutics describes a way of experience rather than a method of inquiry, and that the highest hermeneutical principle is "holding oneself open in a conversation."[88] This position undercuts both the crude traditionalism of avowed originalists and the subjectivist chutzpa of avowed nonoriginalists.

In his article, Lief Carter demonstrates that embracing the hermeneutical situation may not require a profound revolution but rather simple self-reflection within existing legal practice.[89] Carter recounts his experience of serving as a discussion facilitator at a retreat of fourteen state court trial judges to confirm the pragmatic character of adjudicative practice. Carter found that the judges were quite uninterested in discussing abstract theory as a foundation for their practice; instead, the practice itself was the topic of conversation and concern. Although the self-selected group admittedly is not statistically significant,[90] Carter concludes generally that judges are more thoroughly pragmatic in their outlook than legal scholars suppose.[91] Judging is the practice of rearticulating the community's tradition in response to the case at hand, which requires a creative discernment of "community values and experiences."[92] Carter's description of the judges' attitudes bears striking resemblance to Gadamer's hermeneutical ethic of putting oneself at risk, although Carter conceptualizes this attitude in terms drawn from the pragmatic tradition in philosophy.

Finally, Gregory Leyh writes convincingly that hermeneutical themes imparted as part of legal education could bring about significant changes in legal practice.[93] Leyh chronicles the demise of humanist legal education as reflecting important shifts in our conception of good lawyering. Leyh recounts how our current method of assessing lawyers according to "the technical proficiency with which they can work the law" has supplanted the older ideal of the lawyer as an important participant in the intellectual and political life of the commu-

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88. Hans-Georg Gadamer, *Philosophical Apprenticeships* 189 (MIT, 1985) (Robert R. Sullivan, trans.).

89. Lief H. Carter, *How Trial Judges Talk: Speculations About Foundationalism and Pragmatism in Legal Culture*, in *Legal Hermeneutics* at 219 (cited in note 3).

90. Id. at 222-24.

91. Carter summarizes this point by recalling that "storytelling more than analytical debate marked our conversations." Id. at 221. I interpret this evaluation to mean that judges, as a community, develop shared narratives about their exercise of power that reflect the hermeneutical situation described by Gadamer much more than the formalist pretense of traditional jurisprudence.

92. Id. at 228.

93. Leyh, *Legal Education and the Public Life*, in *Legal Hermeneutics* at 269 (cited in note 3).

nity.[94] Leyh seeks a renewed understanding and emphasis on the deep interconnections of legal discourse and the socio-political community in which this discourse takes place. Legal realism was wholly inadequate to foster such an understanding, in Leyh's estimation, because it sought only to describe practice rather than to transform it.[95] Leyh argues that contemporary hermeneutics could form the core of a revised curriculum that is oriented toward fostering the development of practitioners who have "acquired an understanding of law's past and of the constitutive connections between law and wider culture."[96] Leyh regards such practitioners as the epitome of good lawyers, freed from the current pseudo-technical ideology:

> Hermeneutics is not a method or program or substantive doctrine. It is a philosophical activity the aim of which is understanding the way we understand. Hermeneutics sets for itself an ontological task, namely, identifying the ineluctable relationships between text and reader, past and present, that allow for understanding to take place at all. . . . As legal educators assign hermeneutical readings or address standard legal analysis from a self-consciously hermeneutical point of view, the likely result will be to enrich legal learning in a humanistic way. In addition, this approach will promote the development of the good lawyer described above.[97]

Leyh questions the suggestion that the legal academy be divided into a two-track system of training Hessians and promoting academic contemplation.[98] It is this bifurcation that contemporary hermeneutics seeks to repair.

Leyh elaborates his theme by describing the impact of distinct hermeneutical themes on the process of legal education. In view of the polysemic character of language and the contextual nature of understanding and reasoning, the law student would be confronted with the historical character of legal discourse. He believes this approach to legal education ensures that the student "will be engaged at the level of justifying legal discourse, not simply describing or mastering it. Her understanding of the always provisional nature of knowledge will free her from thinking of legal judgments as references to black-letter rules or fixed codes."[99] Consequently, the student will learn to appreciate "a rationally defensible way of exercising judgment that neither appeals to ahistorical, independent standards nor lapses into the kind of nihilism that threatens the legitimacy of the legal

94. Id. at 278.
95. Id. at 276.
96. Id. at 281.
97. Id. at 283.
98. Id.
99. Id. at 288.

order."[100] It is productive to link Leyh's argument with Michael Perry's claims about the significance of constitutional theory. Contemporary hermeneutical philosophy is not an algorithmic method that we might choose to adopt, but instead represents a meta-narrative about the narratives of legal practice that influences and is influenced by the local narratives. Learning the law is learning to join in an ongoing conversation about the terms of social life. A hermeneutical orientation could dramatically affect the ways in which students of the law approach this conversation, just as legal practice has an important effect on our efforts to articulate a legal hermeneutics.

V. CONCLUSION

Gregory Leyh has performed an important service by compiling this volume. As related in this review, the essays frequently return to the same central themes despite their ostensible differences. This result is appropriate, for contemporary hermeneutics, in an important respect, is concerned with only a single topic: the activity of understanding is a historical practice with ontological significance, although understanding is manifested in numerous venues. So general a concern cannot be monopolized by the parochial interests of legal theorists, as attested by the multi-disciplinary approach that the volume represents. Leyh makes clear that he is interested in the critical encounters between philosopher, jurisprude, theologian, and literary theorist.[101] "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."[102]

Perhaps Leyh's essay on the possibility for the transformation of public life through law and legal education provides the best example of the edifying effect of contemporary hermeneutics. Rather than striking fear into the hearts of mainstream scholars, the bold assertion of critical legal studies adherents that "law is politics" should lead us to recall the now-forgotten link of legal reasoning and communal self-definition. Contemporary hermeneutics emphasizes that the enterprise of legal decisionmaking is never insulated from our broader social context. Unleashed from foundationalist groundings, the prac-

100. Id. at 287.
101. *Legal Hermeneutics* at xvii (cited in note 3).
102. Id. at xi.

tice and study of law become challenging engagements of constitutive politics rather than devolving into a meaningless melange of power relationships.

Traditional scholars still might enjoy the comfort of Lieber's nineteenth-century hermeneutics, but this tradition has been eclipsed by contemporary philosophy and political theory.[103] The legal system awaits the Francis Lieber of our time, who will translate contemporary hermeneutics into the idiom of ongoing legal practice. The essays in this volume provide signposts along this as yet unmapped route. Given our troubled times, it is plain that the contemporary Francis Lieber can appear on the scene none too soon.

103. Indeed, within Lieber's hermeneutics we see the tensions that are now emphasized in contemporary hermeneutics. See notes 3, 4, 19, and accompanying text.