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Beyond Interpretation

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In an article written in 1996, Joseph Raz, the eminent jurisprudential thinker, asked, "Why Interpret?"[1] Specifically he asked: why do legal professionals engage in interpretation at all? The answer he proffered is as simple as it is convincing: the authority of law depends upon tracing its meaning to authoritative sources. This tracing is what we call "legal interpretation." Of course, not any kind of interpretation will do. It must be a "legal" interpretation—that is to say, the kind of interpretation authorized and laid out by the law itself.[2]

Notice we have here the embryonic form of a small hermeneutic circle. (Differentiation follows.)

In this hermeneutic circle, any number of complexities might emerge. For instance, consider the object of interpretation. As a concrete instance, take the United States Constitution. Just what is the object of interpretation here? It's the Constitution, of course. But what is it?

It's a writing.

It's a list.

It's an outline.

It's a collection.

It's a charter.

It's a legal event.

It's a political act.

It's a delegation of authority.

It's an organic whole.

It's an inscription in positive law.

It's an approximation of higher law.

It's a bridge to the past.

It's an incorporation of the past.

It's an anticipation of an inchoate future.

It's a legal document (like other legal documents).

It's the establishment of a political-legal ontology that is itself constitutive of a political community.

It's a combination of any these things and many more, some of the time, much of the time or all of the time.

Notice that any interpretive strategy you might use—"heed the plain meaning of the text" or "follow the framers' intent"—is woefully inadequate to specify which of these possibilities is really and truly the right one. Even Justice Marshall's emphatic statement, "It is a constitution, we are expounding," is of no help at all—since, as others have pointed out, just about anything follows from that particular exclamation.[3]

Not only are there difficulties specifying the appropriate "method" of interpretation, but it's not even clear what it is that is to be interpreted. This is the missing legal ontology: just what is it that is being interpreted?[4]

Notice too that if you put your mind to it (and even if you don't) any of the ostensible identities of the Constitution listed above can in the very act of reading refer you to any of the others. As you read, all sorts of hierarchies of identity can proliferate—each identity collapsing into or subsuming the others. Hence the constitution as "writing" can be subsumed within "the

political act" (or vice versa) which in turn can be subsumed within "the incorporation of the past" and so on and so forth in a terminable/interminable manner.

And it's not just "subsume" and "collapse." Those terms invite the image of Venn diagram circles that either encompass each other (subsume) or merge into each other (collapse). But in point of fact, the tumultuous combinations of the various identities do not occur simply externally at their boundaries (what boundaries?) but infrastructurally as well. In other words, the infrastructures of each identity are more or less marked by the others.

This subsuming, collapsing, and infrastructural marking is also played out at the academic level, where the practitioners of various disciplines or sub-disciplines (philosophy, religious studies, poststructuralism, etc.) can, in all disciplinary sincerity, assert the supremacy of their own ontology, methods, problematics, etc., relegating all the others to a subordinate status. Philosophers love to subsume (Queen of the sciences); theologians love to collapse (that oceanic feeling) and poststructuralists are always finding their own infrastructural traces in other people's texts (no way out).

But getting back to the Constitution: as you proceed in the reading, you may be impelled to discard any possible identity as quite simply impossible given "recent advances in . . . [academic specialty of your choice]." You may even be led to demand some degree of "coherence" or "rationality" as determinative of the identity of the instrument. On the other hand, you can also be led to jettison the touchstones of "coherence" and "rationality" in the name of some other authority.

At some point, all of this may bring into play the question of who *you* are in this reading: Each change in the identity of the Constitution possibly brings about a change in your identity as an interpreter.

Now, it might have seemed that, in law, this particular complexity has already been avoided. In the last analysis, it is "the court" who is the authorized interpreter. But, this move immediately collapses upon the realizations that

> all manner of interpreters are authorized: courts, legislatures, we the people, etc.
>
> each of the authorized interpreters will, consciously or not, incorporate the contributions of the other interpreters
>
> courts are authorized interpreters only within the limits and enablements of the law itself (whatever these may be)
>
> and so on and so forth.

Moreover, the very idea of the "court" as an authorized subject is itself a reification of a more or less stable glomming-on of professional habits, political commitments, cognitive capacities, linguistic competencies, institutional arrangements etc. etc. etc. variously congealed (or not) in a neurological site generally known as "the judge." The judge, in turn, is a creature of trained self-reification—a self-reification that is more or less enduring, depending upon the judge's own jurisprudential aesthetics, political commitments, cognitive abilities and his or her psychological location on a spectrum ranging from utter self-abnegation at one end to free-form juridical invention at the other.

This then, I would offer, as a very brief (and radically incomplete) sketch of "legal interpretation." This description may well seem positively alarming to non-legal thinkers. Rest assured, however, that in an overriding sense, the seemingly horrifying hermeneutic possibilities here need not and seldom do come to pass.

And the reason is simple: among all the dizzying ontological and hermeneutic possibilities, one of them is to reduce all the others to just one possibility. And as a contingent, but nonetheless dependable and well-entrenched psycho-sociological matter, this is the route that judges will take much of the time. In fact, most of the time, the judge does not even have to "reduce" the dizzying possibilities: he or she has been constituted not to see them in the first place.[5]

Much of this well-honed capacity for reduction—the ability to translate, consciously and not, very complex phenomena into relatively simple formulae is attributable to law school training. Law schools induct highly intelligent college students who have just experienced the intellectually

broadening effects of a liberal arts education. In law school, these students are then submitted, day in and day out, to the highly stylized reductive aesthetics of American law. When things work out really well, law schools put out intellectually sensitive and tolerant human beings who can reach out with empathy to others so as to rudely package needs and concerns to a highly stereotyped idiom known as law.[7] This process of cognitive reduction is the same process that the students will re-enact as lawyers and judges after law school.

Particularly among appellate judges, there will be a premium on reductive skills. Unlike literary critics or philosophers, judges do not have the luxury of ending on the note, "Gee, it's all so undecidable. We just don't know what to say. Isn't this decentering of the subject just too much? Judgment affirmed and not."[8] The appellate judge must end his or her legal opinion on a single monistic note—even if this monistic note has three parts, or fifty-five parts or even if it entails remanding, delegating or something of the sort.[9]

Notice, of course, that the broadening of the legal mind may well have some salutary effect on the last line of that judicial opinion. And many mandarin legal thinkers, aware of the narrowing effects of a legal education, are given over to a limited celebration of that moment of deformalization, openness, contextualization, judgment, decentering, etc. etc. etc. Still, it is not hard to see that under the pressure of the judicial job constraint (dispense justice while clearing dockets) there is not much premium for judges in taking an overly "broad view." On the contrary, if one has to end a judicial opinion on a monistic conclusion about the meaning of a text, it will help considerably if one begins with a radically simplified understanding of the hermeneutic situation.

Not surprisingly, most judges do. And the vast majority of legal academics, insofar as they pattern their professional persona and role on an image of the judge, do too. Even those legal academics who are intellectually inclined to explore the hermeneutic possibilities, will often shut down early under the sway of a far overblown and preposterously self-aggrandizing sense of "responsibility" to the profession, the law or even the nation.[10]

So both in court and in the law school, the hermeneutic situation tends to be radically simplified. Indeed, most of the discussion and thinking on the issue take place within aesthetic constraints that might be described in terms of a two-step formula:[11]

> First thing: assume an object of interpretation (i.e. the constitution)
>
> Now, how should it be interpreted?

This radical distinction between (1) a stable object of interpretation (i.e. call it a "text" for short) which all agree is the thing in issue and (2) the action of interpretation greatly simplifies the hermeneutic problem. For one thing this sharp text/interpretation distinction enables the participants to presuppose that they are all interpreting the same thing and are thus engaged in intelligible agreements or disagreements about its meaning. They may, of course, concede that like the eight blind men in the Hindu fable, their understanding of this particular elephant is partial. But they're all talking about the same elephant. Or at least, it is an elephant they are talking about as opposed to the rhinoceros of a different story or God knows what.

I want to be fair and acknowledge that very often the actual steps in the interpretive enterprise are presented in a more sophisticated manner. Thus, legal thinkers (Ronald Dworkin comes to mind) borrowing liberally from Gadamer may talk about "pre-interpretive" understandings which are revised through interpretation in light of the horizons of. . . . Typically, however, these kinds of refinements come down to two other formulae:

> Increase the sophistication of the account of interpretation by subdividing the number of steps above (i.e. put in more than two) and/or
>
> Resort to some sophisticated term such as "dialectical interaction" or "reciprocal relation" to describe the relations between text and interpretation.

The problem with the first formula is that it is not discernibly different from the parent formula (i.e. Assume an object of interpretation...etc.). Instead, it is simply the repetition of the same operation at a different level in a depth-jurisprudence that ranges from the less articulate to the more articulate.

The problem with the second formula is that while it has the aura of intellectual respectability and it is almost always deployed as if something positive were being offered, the terms (i.e. dialectical interaction...etc.) seldom mean much beyond: "There's something of a relational nature going on here though what it is, we haven't much of a clue." What's more despite the promising character of these terms (Just what kind of cad would come out against "dialectical interaction"?) there is absolutely nothing in such terms that guarantees reaching hermeneutic equilibrium as opposed to hermeneutic vertigo.

Nonetheless, for purposes of "doing" legal interpretation and representing the enterprise as coherent, the two-step is a nice move. Or rather, to be more accurate, it's not so much a move as it is something judges and legal academics just simply do.[13]

Whatever it is, the two-step has the decided advantage of shielding the legal ontology (e.g. the Constitution) from any corrosive critical inquiries such as the one being urged here: "You are trying to interpret WHAT again? Say WHAT?" The two-step conveniently refers all difficulties in ascertaining the meaning of the Constitution, away from its ontology. Instead, these difficulties are relegated to the way or ways in which the Constitution is interpreted. This yields the possibility of a more cheerful outcome. Indeed, a "bad" interpretation of the Constitution can, should the need arise, be replaced with a "good" one. It would be much harder, by contrast, to replace a deficient constitutional ontology (particularly if its born-on-date is 1789) with a new one.

But as convenient as the two-step formula and the sharp distinctions may be, they are haunted by problems. Both of these have already been adverted to at the beginning of this essay.

One problem is that the sharp text/interpretation distinction is not self-evidently plausible as a theoretical matter. Nor is it sufficient as a practical matter to allocate what belongs to the text, on the one side, as opposed to what belongs to its interpretation, on the other.

Another problem is that in order to draw such a sharp text/interpretation distinction in the first place, the legal thinker must deploy another sharp and equally implausible distinction. This other implausible distinction is one that ostensibly separates the legal thinker from consideration of all these matters. In other words, the legal thinker typically conceives the text/interpretation distinction and its problematics as if they were external to his or her own thought processes—as if they were right there in front of him or her as surely as the marks on the page or the flickers on the screen.[14] But, of course, they're not: the legal thinker is himself or herself implicated in the very theorization and the practical deployment of precisely the distinction between text and interpretation. One doesn't have to be a radical individual subjectivist (which I certainly am not) to understand then that the intellectual coherence of this enterprise called "legal interpretation" is somewhat in doubt.

But it is only somewhat in doubt. In 1997, several notable commentators devoted some [....]-odd pages of a law review symposium to the idea of fidelity to the constitution, without ever seriously facing up to the crucial question—namely: "Fidelity to WHAT?[15]

But once the text/interpretation distinction collapses and both text and interpretation go ontologically AWOL, it becomes unclear whether anything terribly definitive can be said about "legal interpretation." Instead, legal interpretation seems to be a confused, if not impossible, activity resting on a missing ontology though it is also an activity accomplished with great aplomb and confident rationality by jurists and legal academics in America everywhere. In short, legal interpretation is a lot like baptism viewed from the perspective of the atheist: it doesn't exist, and there's way too much of it.

Post-script

Academics in law do not generally like to hear any of this. This is understandable. If the diagnosis is accepted, it undermines much of the esprit serieux that attends all the highly elaborated intricate argumentation known as legal scholarship. The purported claim of legal academics to something they might wish to call "knowledge" or a "discipline" loses some its plausibility.[16]

But there is more than simply a professional discomfort produced by this diagnosis. There is

also a more generalized kind of social/psychological/ethical angst that attends this sort of diagnosis. Having offered up such diagnoses before, I have often been asked: "What should we do?" For reasons described elsewhere, I typically resist this question. One of those reasons is that the question re-establishes, in its very demand for an answer, precisely the enterprise that I have just tried to reveal as no longer intellectually credible.

What should we do? In one sense then, I am perplexed by this question. It is as if I had just spent some several pages showing that God is dead and the interlocutor were to ask me, "Yes, this is all true, but what should we pray for?" In another sense, I am not at all perplexed by the question: the question is a manifestation of the continued hold of a certain metaphysical frame or orientation that pervades our culture, language, etc. And it is hardly the case that pointing out the intellectual vacancy of this frame or orientation empowers us to simply discard it and move on. That is, of course, a non sequitur, and it is the sort of non sequitur that enables all sort of academic disciplines to establish and pursue their research agendas in the first place. This non sequitur is the supposition that having arrived at a diagnosis of our predicament, we are somehow entitled to a satisfying rational resolution. This might be cheery. But there is absolutely no reason to suppose that it is right.

Notes

[1] Joseph Raz, "Why Interpret?" *Ratio Juris* 9 (1996), 349.

[2] H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98 (1985), 885.

[3] McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1919).

[4] See Thomas C. Grey, "The Constitution as Scripture," *Stanford Law Review* 37 (1984), 1.

[5] Stanley Fish, "Dennis Martinez and the Uses of Theory," *Yale Law Journal* 96 (1987), 1773.

[6] For one such student account, see Chris Goodrich, *Anarchy and Elegance: Confessions of a Journalist at Yale Law School* (Boston: Little, Brown, 1991).

[7] Lest this seem absolutely deplorable from a social standpoint, consider that the second most likely alternative is that law schools could start out with intellectually insensitive and intolerant human beings.

[8] Nothing, of course, prevents the legal academic from ending on such a note. But since most legal academics assume the persona of clerk-to-a-judge, crypto-judge, proto-judge and ultimately, judge-manqué (in just about in that order) the fact is: they don't.

[9] If the judge does not end on a monistic note, there will be a default rule in effect deployed by some other agency that will render a determination that ends on a monistic note.

[10] The most extreme example is Bruce Ackerman who begins his book on the Constitution by addressing America itself. Bruce Ackerman, *We the People* (Cambridge: Belknap Press of Harvard University Press, 1993). It is a moment.

[11] An early and notable exception is Grey, *supra* note 4.

[12] There's nothing wrong with that last bit. Indeed, offered as a negative insight in an academic context over-saturated with positive (and wholly implausible) meaning, it's downright helpful. But that is seldom what is intended or understood.

[13] Fish, *supra* note 5.

[14] On the conflation of marks with meaning, see Steven Knapp & Walter Benn Michaels, "Against Theory," *Against Theory; Literary Studies and the New Pragmatism*, ed. W.J.T. Mitchell (Chicago: University of Chicago Press, 1985), 11.

[15] *Fidelity in Constitutional Theory, Fordham Law Review* 65 (1997), 1247.

[16] Pierre Schlag, "Law and Phrenology," *Harvard Law Review* 110 (1997), 877.