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# That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text

Paul Campos\*

"On that day Rabbi Eliezer used all the arguments in the world, but they did not accept [them] from him. He said to them: 'If the *Halakhah* [the religious law] is in accordance with me, let this carob tree prove it.' The carob tree was uprooted from its place one hundred cubits—and some say, four hundred cubits. They said to him: 'One does not bring proof from a carob tree.' He then said: 'If the *Halakhah* is in accordance with me, let the channel of water prove it.' The channel of water turned backward. They said to him: 'One does not bring proof from a channel of water.' He then said: 'If the *Halakhah* is in accordance with me, let the walls of the House of Study prove [it].' The walls of the House of Study leaned to fall. Rabbi Yehoshua rebuked them, [and] said to them: 'If the Talmudic Sages argue with one another about the *Halakhah*, what affair is it of yours?' They did not fall, out of respect of Rabbi Yehoshua; but they did not straighten, out of respect for Rabbi Eliezer, and they still remain leaning. He then said to them: 'If the *Halakhah* is in accordance with me, let it be proved from Heaven.' A [heavenly] voice went forth and said: 'Why are you disputing with Rabbi Eliezer, for the *Halakhah* is in accordance with him everywhere.'" Rabbi Yehoshua rose to his feet and said: 'It is not in heaven.'"

What does "it is not in heaven" [mean]?

Rabbi Yirmeyah said: "That the Torah was already given on Mount Sinai [and is thus no longer in heaven], and we do not pay attention to a [heavenly] voice, for You already wrote in Torah at Mount Sinai: 'After the majority to incline.'"

Rabbi Nathan met Elijah [and] said to him: "What did the Holy One, blessed be He, do at that time?" He said to him: "He smiled and said: 'My sons have defeated Me, My sons have defeated Me.'"

*The Talmud*<sup>1</sup>

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1. *Tractate Bava Metzia* 59B, in 3 THE TALMUD 235-37 (Steinsaltz ed. 1990) (literal translation) (all alterations except second and seventh in original).

## I

Consider the following texts:

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.<sup>2</sup>

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INTERPRETIVE MEMORANDUM

The final compromise on S.1745 agreed to by several Senate sponsors, including Senators DANFORTH, KENNEDY, and DOLE, and the Administration states that with respect to Wards Cove—Business necessity/cumulation/alternative business practice—the exclusive legislative history is as follows:

The terms “business necessity” and “job related” are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).<sup>3</sup>

The first item is section 105(b) of the Civil Rights Act of 1991; the second is a portion of the interpretive memorandum referred to in the first.

According to one account of its meaning, a primary purpose of the 1991 Act was to overturn several Supreme Court decisions that had interpreted Title VII of the Civil Rights Act of 1964 in a restrictive manner, most notably *Wards Cove Packing Co. v. Atonio*.<sup>4</sup> In *Wards Cove*, the Court held that an employer could escape liability for employment discrimination if it showed that hiring policies that produced a “disparate impact” in the hiring of women or minorities were supported by a “business justification.”<sup>5</sup> This holding appeared to modify the standard established by *Griggs v. Duke Power Co.*,<sup>6</sup> which held that such policies were allowable under Title VII only if the challenged practice was both job related for the position in question and required by “business necessity.”<sup>7</sup>

Section 105(b) seems to break new ground in the herme-

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2. Civil Rights Act of 1991 § 105(b), 42 U.S.C.A. § 1981 note (West Supp. 1992) (Wards Cove—Business Necessity/Cumulation/Alternative Business Practice).

3. 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991) (appended to statement of Sen. Danforth).

4. 490 U.S. 642 (1989).

5. *Id.* at 658.

6. 401 U.S. 424 (1971).

7. *Id.* at 431.

neutics of federal legislation: a section of a statute tries to limit radically the legislative history that an interpreter of the statute may consult in his or her attempt to divine the text's meaning. How successful is this innovative methodological prescription?

Several interpretive conundrums immediately confront us. May we consult the whole legislative history of the Act to interpret a provision that seems to limit our recourse to legislative history? If we were to do so, we would discover that when President Bush signed the bill into law he released a "signing statement" that said yet other memoranda, authored and entered into the legislative record by Senator Robert Dole, would "be treated as an authoritative interpretive guidance by all officials in the executive branch."<sup>8</sup> One of Dole's memoranda said the Act "represents an affirmation of existing law, including *Wards Cove*."<sup>9</sup>

Perhaps we should avoid such extratextual forays and refer only to the language of the bill itself. Does this solve our interpretive quandary? No: for the memorandum cited in section 105(b) is itself in need of interpretation. After all, *Wards Cove* states that its concept of "business justification" is merely an elaboration of the "business necessity" standard announced in *Griggs*.<sup>10</sup> If we accept that interpretation of *Griggs*, then Senator Dole's memorandum would seem to be correct: concerning questions of business necessity, the 1991 Act is an affirmation of existing law, and the interpretive memorandum referred to in section 105(b) serves as further conformation of this fact. Of course, if we were to give *Griggs* a different reading from that given to it by the *Wards Cove* Court, we will then give different interpretations to both section 105(b) and the interpretive memorandum cited by it, as well as to President Bush's signing statement, and Senator Dole's memorandum, and . . . so on.

This little narrative would seem to confirm Stanley Fish's recent assertion that "the only thing to know about interpretation is that it has to be done every time."<sup>11</sup> Fish, as always, provides us with a series of more or less irrefutable,

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8. Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 21, 1991).

9. 137 CONG. REC. S15,472, S15,474 (daily ed. Oct. 30, 1991) (appended to statement of Sen. Dole).

10. 490 U.S. at 658.

11. Stanley Fish, *Play of Surfaces: Theory and the Law*, in LEGAL HERMENEUTICS 297, 316 (Gregory Leyh ed., 1992).

methodologically useless insights that call into question the practical value of the activity he is simultaneously undertaking and criticizing: in this case, the hermeneutics of legal interpretation.

Much like Professor Fish himself, the very word "hermeneutics" is a refugee from the English departments of the 1970s, seeking new life in the intellectual backwater of the legal academy. A check of the Westlaw database for law review articles that use some variation of the word reveals only thirty-seven citations between 1982 and 1984, but 294 such cites over the last three years.<sup>12</sup> What exotic allure does this polysyllable possess that has transformed it into one of the darlings of current scholarly fashion?

Consider this passage from a recent article in the Columbia Law Review: "[I]nterpretation is ontological. Interpretation is intertwined with our being-in-the-world: We grow as human beings through our interpretation of the world, and our thrownness in the world affects our every interpretive activity."<sup>13</sup> Some readers will detect in these sentences the ponderous Teutonic shadow of Martin Heidegger, and indeed they refer to the views of a philosopher who has been deeply influenced by Heidegger, but whose own work has proven more suitable for domestication and deployment by the votaries of American legal thought: Hans-Georg Gadamer.

Gadamer's vision of hermeneutics, especially as it is developed in his central work *Truth and Method*,<sup>14</sup> has had a powerful impact on one corner of the legal academy. We might even generalize, and say that the current infatuation with hermeneutics represents a widespread attraction to Gadamer's thought. What has proven to be so compelling about the texts of a thinker whose work, after all, remains firmly embedded in a discourse—continental philosophy—that remains an utterly foreign tongue to most American legal scholars?

I believe a key to understanding the recent popularity of hermeneutics in general, and of Gadamer's work in particular, can be found by examining current debates on statutory interpretation. What hermeneutics provides is an account of the re-

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12. Search of Westlaw, JLR database (Feb. 22, 1993) (results on file with *Minnesota Law Review*).

13. William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 614 (1990).

14. HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., rev. ed. 1989) (5th ed. 1986).

relationship between a stabilized object ("the text") and a shifting context ("the interpretive situation") that seems both descriptively plausible and normatively attractive. Thus it appears to offer a synthetic alternative to the rigid typologies that have traditionally characterized conventional arguments concerning the interpretation of statutes.

These traditional typologies fall into three familiar categories: textualism, intentionalism, and "pragmatic" interpretation.<sup>15</sup> Textualists advocate giving meaning to the words of a statute by following the "rules" of English and the canons of statutory construction; intentionalists believe that construing a statute should involve ascertaining the probable intent of the legislature concerning the application of the law to the issue at hand; pragmatic interpreters ask what the statute ought to mean in light of its current legal and social context.<sup>16</sup>

The shortcomings of each approach are well known. For our purposes, section 105(b) of the new Civil Rights Act serves as a convenient bludgeon. For the textualist, section 105(b) creates a logical paradox: If the primary rule of statutory interpretation is "Do not consult legislative history," what is to be done with a provision that demands the interpreter do just that, and which in fact is superfluous unless the "relevant" history is consulted? Further, even if a way is found out of this logical

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15. The most notable judicial exponents of textualism are Justice Antonin Scalia and Judge Frank Easterbrook. See, e.g., *K Mart Corp. v. Cartier, Inc.*, 488 U.S. 281, 318 (1988) (Scalia, J., concurring in part and dissenting in part); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-52 (1983) (advocating limiting application of statutes to cases clearly within their plain language).

Traditional intentionalism remains, of course, the *vin ordinaire* of judicial opinions, legal briefs, and other forms of conventional legal rhetoric. For recent defenses of the tradition, see RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-22 (1983) (advocating "imaginative reconstruction" of what the enacting legislature's intent would have been had the question for decision been presented to it).

16. I use the word "pragmatism" here as it is most commonly (mis)used in legal theory; that is, as a synonym for pure instrumentalism, unconstrained by deontological considerations. Cf. RONALD DWORKIN, *LAW'S EMPIRE* 95 (1986) (pragmatic judges would "make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake"). Interestingly, pragmatism in this sense appears to be no more than a rather crude polemical punching bag, the classic tropes of which are "I accuse you of advocating that" (citations too numerous to mention) and "You may think I'm advocating that, but I'm not" (ditto).

trap, the interpretive memorandum that makes section 105(b) meaningful is, as textualists often discover, "ambiguous." We have already seen that, depending upon what interpretive assumptions one makes, the memorandum can support at least two contradictory meanings. The lesson in this is that, as Professor Fish never ceases to remind us, "plain meaning" is not a function of certain types of *language*, but of certain kinds of *interpretive assumptions* one brings to language.<sup>17</sup>

Intentionalists tend to make two systematic mistakes—one on the level of theory, the other in the realm of practice. I will discuss the theoretical mistake in connection with my analysis of Gadamer's hermeneutics.<sup>18</sup> As for practice, intentionalists argue (correctly) that language can only have meaning when it is given that quality by intending agents. The 1991 Civil Rights Act reveals some of the practical problems encountered by those whose wish to deploy this insight in the sphere of statutory interpretation. The language of the Act itself is an often indeterminate or incoherent mishmash of unsavory political compromises and bureaucratic doublespeak. In fact, a furious argument about the meaning of many of its provisions broke out on the very day the Act, as the expression goes, "became law."<sup>19</sup>

For the intentionalist, such an interpretive situation poses daunting empirical problems. Who or what counts as the author(s) of the Act's language? The Congress as a whole? Those members of Congress (a much smaller group) who both understood at some level of detail what the bill was supposed to do, and voted for it? The staff persons of these members, who actually drafted the language? Many other candidates could be suggested.<sup>20</sup>

Moreover, even assuming the intentionalist can identify one or more recognizable agents as the author(s) of the bill, how can such an interpreter plausibly capture his (their, its) intentions? We have noted how the intentions of the bill's au-

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17. See Stanley E. Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625 *passim* (1979), reprinted in STANLEY E. FISH, *IS THERE A TEXT IN THIS CLASS?* 269 *passim* (1980).

18. See *infra* part III.

19. See *supra* text accompanying note 8. The most controversial issues were (are) whether the Act overruled *Wards Cove*, and whether the Act's provisions were "intended" to be applied retroactively. See Linda Greenhouse, *A White House Gambit to Limit a Rights Law*, N.Y. TIMES, Apr. 17, 1992, at A18.

20. See DWORKIN, *supra* note 16, at 318.



thors became a subject of heated controversy immediately following its passage. What is an interpreter to do one, or five, or thirty years hence, when the passage of time has immensely complicated an already difficult hermeneutic situation?<sup>21</sup>

Pragmatic interpretation can partially negate the theoretical and practical difficulties that entangle its competitors—but only at a considerable cost. The pragmatist can cheerfully admit that language only has meaning within a particular interpretive context, and even that such a context requires the positing of an intending agent. Indeed, such an interpreter is willing to supply personally both the context and the agent. Don't ask, our pragmatic friend advises us, what this language "means" in an abstract sense, or what it "meant" to some distant and irrecoverable group of conflicting authors. Ask "what should we make this language mean today (and I'll be happy to tell you.)"<sup>22</sup> This procedure at least has the advantage of what lawyers like to call "practicability." The drawbacks are equally obvious. Why, after all, should we pay attention to this "interpreter's" revision of the statutory language? By contrast, the textualist and the intentionalist can point to sources of authority—the canonical language, the will of the legislature—that remain essentially unavailable to the pragmatic reader. In other words, if interpreting statutes means making them say what we want them to say, why bother with the initial step in the process? Why not simply say what we want to say in a more direct fashion, without fussing with the fig leaf of statutory interpretation?<sup>23</sup>

Enter Gadamer. "What is fixed in writing," he tells us, "has detached itself from the contingency of its origin and its author and made itself free for new relationships."<sup>24</sup> According to Gadamer's vision of hermeneutics, interpretation always in-

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21. These and other objections are clearly set out in William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325-32 (1990).

22. It comes as no surprise that it is impossible to discover either judicial opinions or scholarly writings that argue explicitly for this position. See *supra* note 16. This is hardly surprising because, as Steven Smith has pointed out, for such a "pragmatic interpreter" to advocate such an absolute pragmatism would be a most unpragmatic thing to do. See Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 430 (1990) ("[W]ithout the structure and order provided by theory, our lives would be frighteningly chaotic and meaningless.").

23. See Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 113 (1989) (correspondence).

24. GADAMER, *supra* note 14, at 395.

volves a "conversation" between the interpreter and the liberated text, out of which comes "understanding," or "truth" with a small, anti-foundationalist "t."<sup>25</sup>

For Gadamer, recreating the author's original understanding of the meaning of his or her text is, strictly speaking, not possible, nor is it even desirable. It is not possible because the interpreter's understanding of the text is always "a historically effected event."<sup>26</sup> Because of the historically situated quality of all understanding, the author's understanding of the text will always diverge from a subsequent reader's interpretation of the same words. And it is not desirable, because "the task of a historical hermeneutics" is nothing less than "to consider the tension that exists between the identity of the common object and the changing situation in which it must be understood."<sup>27</sup> This tension is generated by the ever-shifting contexts of interpretation within which the text is immersed every time it is reinterpreted.

Indeed, Gadamer points to "the exemplary significance of legal hermeneutics"<sup>28</sup> when discussing how the conversational tension between the interpreter and the text *should* be resolved. For Gadamer, understanding can come only from application. When a judge interprets a statute to decide a case, the judge is in essence applying a text. The judge must apply the "normative content" of the law, and in doing so, "he has to take account of the change in circumstances and hence define afresh the normative function of the law."<sup>29</sup> Thus "[w]hen a judge regards himself as entitled to supplement the original meaning of the text of a law, he is doing exactly what takes place in all other understanding."<sup>30</sup>

This sort of interpretive supplementation is not only desirable, it is inevitable: for once it is detached from the historical conditions of its birth, the autonomous text can be properly understood "only if it is understood in a different way as the occasion requires."<sup>31</sup> Thus, through a dialogic process Gadamer analogizes to a conversation, each interpreter extracts a new meaning from the "common object" of interpretation.

It is not hard to imagine why many legal scholars have

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25. *Id.* at 383-89.

26. *Id.* at 300.

27. *Id.* at 309.

28. *Id.* at 324.

29. *Id.* at 326-27.

30. *Id.* at 340.

31. *Id.* at 309.

been strongly attracted to Gadamer's hermeneutics.<sup>32</sup> The synthetic, anti-methodological quality of Gadamer's account offers the hope of transforming theories of statutory interpretation from a strained recital of increasingly unbelievable fictions (the plain meaning rule, the intent of the legislature, the superior wisdom of the judge) into an open-ended, pragmatic<sup>33</sup> inquiry that employs a melange of methodologies in a tentative search for a shifting and contingent truth.<sup>34</sup>

As a prelude to examining the coherence of the hermeneutic approach, I will give a brief account of three recent attempts to integrate the insights of hermeneutic theory into the practice of statutory interpretation.

## II

### A. DWORKIN'S CHAIN NOVEL

In the course of defending his own elaborate theory of legal interpretation, Ronald Dworkin explicitly "appeal[s] to Gadamer, whose account of interpretation as recognizing, while struggling against, the constraints of history strikes the right note."<sup>35</sup> For Dworkin, as for Gadamer, an author's intentions concerning the meaning of his or her text are not necessarily important to the hermeneutic task of interpretation. Both men would agree with Paul Ricoeur's claim that an author's "intention is often unknown to us, sometimes redundant, sometimes useless, and sometimes even harmful as regards the interpreta-

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32. For representative samples, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221-22 (1980), reprinted in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 69, 83-84 (Sanford Levinson & Steven Mailloux eds., 1988); David C. Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 136, 136-64, condensed in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER, *supra*, 319, 319-29; Gregory Leyh, *Legal Education and the Public Life*, in LEGAL HERMENEUTICS, *supra* note 11, 269, 284-89.

33. "Pragmatic" is used in the non-polemical, philosophically sophisticated sense of an anti-foundational orientation that distrusts formal categories and rigid analytical conclusions. See Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811 *passim* (1990); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1223-24 & n.113 (1989).

34. "Hermeneutics stresses the multidimensional complexity of statutory interpretation and, even more, the importance of an interpreter's attitude rather than her method. The hermeneutical attitude is open rather than dogmatic, critical rather than docile, inquiring rather than accepting." Eskridge, *supra* note 13, at 633.

35. DWORKIN, *supra* note 16, at 62.

tion of the verbal meaning of his work."<sup>36</sup>

Dworkin argues convincingly that, at least in the context of statutory interpretation, the obstacles to identifying the intentions of the text's authors concerning specific issues of legal decision making are often all but insuperable. Who counts, Dworkin asks, as the author(s) of the statute?

Every member of the Congress that enacted it, including those who voted against? Are the thoughts of some—for example, those who spoke, or spoke most often, in the debates—more important than the thoughts of others? What about the executive officials and assistants who prepared the initial drafts? What about the president who signed the bill and made it law?<sup>37</sup>

Furthermore, how does an interpreter properly combine the varying intentions of all the individuals who make up the relevant group, once this set of persons has been properly identified? Should the interpreter enforce the hopes of the authors concerning how the bill's language will actually be applied, or merely their expectations (again assuming that either of these mental states could be accurately identified)?<sup>38</sup>

Rather than attempting the potentially impossible labor of determining what the authors of a statute meant by it, Dworkin advocates making the story the statute tells "the best it can be."<sup>39</sup> Dworkin advises the legal decisionmaker to assume that the entire corpus of the law is the work of a single author, and to interpret legal events such as statutes in whatever fashion will make this legal meta-text as ethically and aesthetically pleasing as possible:

The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.<sup>40</sup>

Dworkin analogizes this activity to the sequential writing of a novel in which a different author would be responsible for each individual chapter. The writing of such a novel would require a constrained yet creative series of choices on the part of all the authors—each author would be constrained by what had been written already, yet would be free within the existing aesthetic constraints to try to make the novel as a whole the best

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36. PAUL RICOEUR, *INTERPRETATION THEORY: DISCOURSE AND THE SURPLUS OF MEANING* 76 (1976).

37. DWORKIN, *supra* note 16, at 318.

38. *Id.* at 319-24.

39. *Id.* at 348.

40. *Id.* at 225.

example of the genre of which it was (becoming?) a member.<sup>41</sup> Thus, when interpreting a statute a judge should treat the legislature "as an author earlier than himself in the chain of law"; such a judge "will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began."<sup>42</sup>

Now to a skeptical reader, Dworkin's account of statutory interpretation might bear a suspicious resemblance to that which was earlier attributed to the conventional legal type we labelled the "pragmatic interpreter."<sup>43</sup> What is to stop a subsequent "author" in the chain of legal interpretation from giving whatever meaning to a statute seems best to him, regardless of what choices may have been made by earlier authors? It is at just this juncture in Dworkin's account that hermeneutic theory allows him to escape from the conventional typologies of statutory interpretation.

For Dworkin, a good interpretation must exhibit "textual integrity." That is, a judge cannot simply attribute whatever meanings to the words of a statute he believes will generate the most desirable result. He must give the best explanation he can "for what the plain words of the statute plainly require."<sup>44</sup> It seems that such plain requirements as the statute commands are not a function of the intentions of the authors—Dworkin has demonstrated that, whatever else the intentions of a statute's authors may be, they are never *plain*—but of the "plain words" of the text itself. Certain interpretations, then, will be precluded by the incontestable meanings of the text's language.

Yet a good interpretation must exhibit more than textual integrity: it must also demonstrate "fairness." By fairness, Dworkin means the constraint that limits an interpreter in the following situation. Suppose that the interpreter of a statute believes deeply that result X would represent the best policy choice. Suppose further that nothing in the text of the statute contradicts his view about both the importance and feasibility of reaching an interpretation of the statute that achieves result X. Now suppose that the interpreter is aware that the legisla-

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41. *Id.* at 228-38.

42. *Id.* at 313.

43. "The moment you adopt a perspective as open as Dworkin's, the line between what you think the Constitution *says* and what you wish it *would* say becomes so tenuous that it is extraordinarily difficult, try as you might, to maintain that line at all." LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 17 (1991).

44. DWORKIN, *supra* note 16, at 338.

tors who passed the statute, as well as the vast majority of the public who have an opinion on the question, believe that the statute requires result Y. "In [those] circumstances" writes Dworkin, a judge's convictions concerning fairness "place important obstacles between his own preferences, even those that are consistent with the language of the statute, and his judgment [of] which interpretation is best, all things considered."<sup>45</sup>

For Dworkin, interpretation involves engaging in an essentially Gadamerian hermeneutic encounter between the interpreter and the text. The text will allow for a limited number of interpretations: some interpretations are precluded by the demands of "textual integrity"—sometimes the words themselves plainly mean one thing and not another. Other interpretations are allowed by the text, but not by the interpretive situation. Fairness requires that the interpreter avoid verbally available meanings that contradict a widespread understanding of what the text should be held to mean.

The good interpreter, then, engages in a dialectical discussion with the verbal possibilities presented to him by the text, in order to engage in the creative task of constructing the best legal interpretation of its meaning. Such an interpreter is neither a textualist (the rules of language will still usually yield a number of plausible interpretations), nor an intentionalist (the intentions of the statute's authors are rarely recoverable), nor a pragmatist (the demands of verbal meaning and of political fairness each preclude certain desirable results). Rather, he is a hermeneutic reader, constrained by both the text and the circumstances of its interpretation, but simultaneously empowered to engage the object of interpretation so as to make it the best linguistic artifact it can be for the purposes of a particular interpretive practice.

## B. ALEINIKOFF'S NAUTICAL METAPHOR

Professor T. Alexander Aleinikoff has recently provided legal scholars with a taxonomy for distinguishing between traditional theories of statutory interpretation and their contemporary hermeneutic competitors.<sup>46</sup> Aleinikoff uses the term "archaeological" to describe textualist and intentionalist approaches to interpretation; these theories, he notes, assume that a statute's meaning is "determined on the date of the stat-

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45. *Id.* at 341.

46. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

ute's enactment."<sup>47</sup> He then contrasts the archaeological model with what he calls "nautical" approaches to statutory interpretation. Aleinikoff analogizes the text of a statute to a ship:

Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail. This model understands a statute as an ongoing process (a voyage) in which both the shipbuilder and subsequent navigators play a role. The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board.<sup>48</sup>

Gadamer's "common object" of interpretation (the text/ship) will be steered by subsequent crews (interpreters) whose navigational decisions will be affected by the text's linguistic structure, the history of its interpretation, and the interpreter's current socio-political context.

Aleinikoff gives us a detailed example of how this particular account of interpretation might work in practice. He discusses the interpretive history of section 212(a) of the McCarran-Walter Act which, among other things, excludes aliens from the United States who are "afflicted with a psychopathic personality."<sup>49</sup> Aleinikoff notes that in 1967 the Supreme Court concluded that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase "psychopathic personality" to include homosexuals."<sup>50</sup> Aleinikoff does not dispute this characterization of the legislative intent "behind" the Act; indeed, he emphasizes how strong the evidence is for the Court's conclusion. From an archaeological perspective, this would seem to conclusively answer the question of whether or not section 212(a) excludes homosexual aliens.

But Aleinikoff emphasizes that the interpretive task is not so simple. He asks us instead to "treat the statute as if it had been enacted yesterday and try to make sense of it in *today's* world."<sup>51</sup> Working from this interpretive assumption, Aleinikoff constructs an ingenious argument for the proposition that section 212(a) should be properly understood not to exclude homosexual aliens. Although this argument contra-

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47. *Id.* at 22.

48. *Id.* at 21.

49. *Id.* at 47-48.

50. *Id.* at 48 (quoting *Boutilier v. INS*, 387 U.S. 118, 120 (1967)).

51. *Id.* at 49.

dicts the original meaning of the statutory text, the "nautical model" can easily accommodate such a result:

Nautical models are built on an understanding of the nature of statutes and the role of interpreters that is fundamentally different from the view that underlies an archaeological approach. . . . In deciding that an exclusion provision does (or does not) apply to homosexuals, [nautical interpreters] have made the statute something other than what it was before we picked it up. We have not applied the statute, as if it were a pre-existing, self-contained, unchangeable thing; we have operated within the statute, done something to it—we have *interpreted* it. Interpreters are not reporters or historians, searching out the facts of the past. They are creators of meaning.<sup>52</sup>

Aleinikoff's approach, like Dworkin's, would seem vulnerable to the charge that it is really a disguised form of "pragmatism."<sup>53</sup> What will prevent today's sailors from steering the statutory text into whatever port of meaning most suits their fancy? Again, Aleinikoff's answers reveal the essentially hermeneutic quality of the nautical metaphor. The interpreter cannot just attribute whatever meaning to the statute seems best to her, for she is constrained by both history and language. To critics who would object that "a nautical approach sacrifices the benefits of an interpretive tradition," Aleinikoff replies that treating a statute as if it were enacted yesterday requires "tak[ing] into account existing and well-established doctrines which will necessarily be represented in the current legal landscape."<sup>54</sup> In other words, such a "present-minded" interpretation must cohere with the changing historical circumstances that have altered the legal landscape in the time since the statute's actual enactment. Interpretation, as Gadamer emphasizes, is thus always "a historically effected [and affected] event."<sup>55</sup>

Furthermore, "while nautical models of statutory interpretation may be openly nonarchaeological, they are not *nontextual*."<sup>56</sup> Aleinikoff echoes Dworkin in affirming the importance of the fundamental hermeneutic criterion of verbal meaning: "Ultimately the question is, what is the most plausible meaning today that these words will bear."<sup>57</sup> The nautical interpreter is therefore constrained by both the historical circumstances within which her interpretive gesture must take

52. *Id.* at 57.

53. *See supra* note 43 and accompanying text.

54. Aleinikoff, *supra* note 46, at 61.

55. *See supra* text accompanying note 26.

56. Aleinikoff, *supra* note 46, at 60.

57. *Id.*



place, and by the limited number of meanings made available via the text's verbal structure.

A nautical approach to understanding statutes thus performs the hermeneutic task of rejecting a dogmatic adherence to textualist and intentionalist models of interpretation, while navigating clear of the unprincipled shoals of pragmatism. It allows the interpreter to stick to the text and learn from the past; yet it commands her to attribute a meaning to the common object of interpretation that evokes and coheres with (and perhaps improves?) both society's present legal structure, and its evolving moral beliefs.

### C. ESKRIDGE'S HERMENEUTIC CONVERSATION

In a series of recent articles, Professor William Eskridge has begun to carry out an explicit application of Gadamerian hermeneutics to questions of statutory interpretation.<sup>58</sup> For Eskridge, Gadamer's insights provide both a critique of traditional doctrines of statutory construction, and a partial rehabilitation of those doctrines within a hermeneutic framework. Yet Gadamerian hermeneutics provides something more: a positive vision of what it means to encounter a text that supports Eskridge's own "dynamic" theory of statutory interpretation.<sup>59</sup>

Eskridge argues that "statutory interpretation involves the present-day interpreter's understanding and reconciliation of three different perspectives, no one of which will always control."<sup>60</sup> These three perspectives are generated by the statutory text, the "original legislative expectations surrounding the statute's creation," and the "subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time."<sup>61</sup> Interpretation consists in reconciling these three perspectives in a manner consonant with the requirements of each particular adjudicative situation.

Eskridge suggests a loose hierarchy of interpretive techniques. When the text of a statute seems to answer clearly the relevant legal question, then normally the ordinary verbal meaning of the text's words should control. If the text is am-

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58. See Eskridge, *supra* note 13; Eskridge & Frickey, *supra* note 21; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

59. See Eskridge, *supra* note 13, at 647 & *passim*.

60. Eskridge, *supra* note 58, at 1483.

61. *Id.*

biguous, or if its ordinary meaning seems counter to the discoverable expectations of the legislature, then those expectations ought usually to be given deference by the interpreter. But in those cases where "the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law"<sup>62</sup> (the classic instance being an older statute whose language seems fairly general), the interpreter is justified in deploying a dynamic, evolutive approach towards the statute that asks how the meaning of the statutory text should be (re)understood "in light of [its] current as well as historical context."<sup>63</sup>

Eskridge has explained in considerable detail how his account of statutory interpretation invokes a Gadamerian view of textual understanding. For Eskridge, "[i]nterpretation is a conversation between the interpreter and the text about a specific situation."<sup>64</sup> In the context of adjudication, this conversation leads ideally to a "fusion of horizons"—to a dialogic understanding between the world-view of the text and that of the interpreter.

As the interpreter learns about the case and the statute (its language, structure, legislative history, prior interpretations), she forms tentative impressions about the best interpretation. These conclusions, though, are tested against the things she learns upon further inquiry and reflection . . . . This process of impression-inquiry-new impression is the to-and-fro movement in statutory interpretation.<sup>65</sup>

The Gadamerian model of interpretation fits into Eskridge's dynamic account of statutory meaning in the following way. Easy cases occur when the dialogic process of inquiry indicates agreement between "the statute's bare text," the specific expectations of the enacting legislature, and the demands of fairness "in light of current policy."<sup>66</sup> That is to say, when a textualist, an intentionalist, and a pragmatist would all reach the same result, the hermeneutic dialogue between interpreter and text will tend to be brief.

Eskridge is well aware that such cases are of little legal or theoretical interest. The hermeneutic model is tested by cases where there is a tension between the various perspectives. Such "hard cases" are not resolved, as traditional legal theory would claim, "by the imposition of one perspective over the

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62. *Id.* at 1484.

63. *Id.* at 1554-55.

64. Eskridge, *supra* note 13, at 650.

65. *Id.*

66. *Id.* at 650-51.

other[s], but by the to-and-fro dialectical play."<sup>67</sup>

The verbal meanings that an interpreter can coax from the text thus both limit and guide his hermeneutic journey. Understanding is reached when the interpreter "throw[s] herself completely"<sup>68</sup> into a dialectic of conversation with the object of interpretation, and learns from it through a process of anti-methodological *phronesis*—Aristotle's term for the application of "practical reason."<sup>69</sup> Dynamic statutory interpretation deploys the hermeneutic insight that no single methodology, such as searching for the plain meaning of the text, or the intention of the legislature, or the best "contemporary" reading of the statute, will necessarily lead the interpreter to an adequate understanding of the statutory language. A hermeneutic reader must display a willingness to engage in a synthetic intellectual dialogue with the object of interpretation, in the course of which its meaning may begin to be revealed through both the interpreter's use of the traditional canons of statutory interpretation on the "bare text" of the statute, and her employment of a historical perspective toward the intentions of the enacting legislature.<sup>70</sup> The insights garnered through such traditional textualist and intentionalist methods must then be subjected to a dynamic hermeneutical critique: an interpretive questioning that asks not just what the statutory text means, but helps determine what it has become.

### III

The suggestions made by these scholars are so attractive that the siren call of hermeneutics for legal theory begins to appear almost irresistible. It seems only reasonable that our encounters with legal texts should involve some attempt to make these artifacts of the past amenable to the needs of the present.<sup>71</sup> Before we unleash ourselves from the grim mast of skepticism, however, a fundamental question remains unanswered:

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67. *Id.* at 651.

68. *Id.* at 650.

69. See Eskridge & Frickey, *supra* note 21, at 323, 345-62.

70. Eskridge notes that a "striking general implication[]" of Gadamerian hermeneutics is that it allows "several musty and much criticized doctrines associated with statutory interpretation—the canons of construction, the use of legislative history and stare decisis for statutory precedents" to be "viewed in an interesting [and positive] new way." Eskridge, *supra* note 13, at 632-33.

71. "Few would deny that we expect our laws to be up to date and as consistent as possible with other laws and with underlying legal and moral principles." Aleinikoff, *supra* note 46, at 60.

Does Gadamerian hermeneutics give a coherent account of what it means to interpret a text? Here I must re-emphasize a recent series of anti-theoretical arguments made by Steven Knapp, Walter Benn Michaels, Stanley Fish, and myself, and answer no, it does not.<sup>72</sup> Hermeneutics stumbles over the same fallacy that undercuts the traditional interpretive strategies of textualists, intentionalists, and pragmatic readers: the fallacy of the autonomous text.

In a collection of writings dating back to 1982, Knapp and Michaels have demonstrated that, as Stanley Fish now acknowledges, "there is only one style of interpretation—the intentional style—and that one is engaging in it even when one is not self-consciously paying 'attention to intention.'" <sup>73</sup> Rather than repeating those arguments here, I will indirectly deploy them in the course of examining certain systematic mistakes made by legal theorists of every persuasion—mistakes which allow the claims of what I will call "strong intentionalism" to be dismissed by confusing those claims with the arguments of traditional intentionalists, such as Robert Bork, Raoul Berger, and Henry Monaghan.<sup>74</sup>

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72. What in this essay I name "strong intentionalism" has been developed in the following writings: Steven Knapp & Walter B. Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982), reprinted in AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM 11 (W.J.T. Mitchell ed., 1985); Steven Knapp & Walter B. Michaels, *A Reply to Our Critics*, 9 CRITICAL INQUIRY 790 (1983), reprinted in AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM, *supra*, at 95 [hereinafter Knapp & Michaels, *A Reply to Our Critics*]; Steven Knapp & Walter B. Michaels, *A Reply to Richard Rorty: What is Pragmatism?*, 11 CRITICAL INQUIRY 466 (1985), reprinted in AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM, *supra*, at 139; Steven Knapp & Walter B. Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 CRITICAL INQUIRY 49 (1987) [hereinafter Knapp & Michaels, *Against Theory 2*]; see also FISH, *supra* note 17; Paul Campos, *A Mirror for the Magistrate*, 9 CONST. COMMENTARY 151 (1992); Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279 (1992) [hereinafter Campos, *Against Constitutional Theory*]; Fish, *supra* note 11; Steven Knapp, *Practice, Purpose, and Interpretive Controversy*, in PRAGMATISM IN LAW AND SOCIETY 323 (Michael Brint & William Weaver eds., 1991); Steven Knapp & Walter B. Michaels, *Intention, Identity, and the Constitution: A Response to David Hoy*, in LEGAL HERMENEUTICS, *supra* note 11, at 187; Walter B. Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Interpretation*, 1 POETICS TODAY 23 (1979); Walter B. Michaels, *Response to Perry and Simon*, 58 SO. CAL. L. REV. 673 (1985); Walter B. Michaels, *The Fate of the Constitution*, 61 TEX. L. REV. 765 (1982) (book review).

73. Fish, *supra* note 11, at 299.

74. For an interesting contrast between traditional intentionalist rhetoric and a more complex approach to authorial intention, compare POSNER, *supra* note 15, at 286-87 with RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 265-66 (1990).

These mistakes are exemplified in a recent article published by Michael Perry, the noted constitutional law scholar.<sup>75</sup> Perry's article, which eloquently advocates a hermeneutic attitude toward interpretation, begins by asking "What does it mean to 'interpret' a text? What is a 'text'?"<sup>76</sup> Because these are precisely the questions to which the fallacy of the autonomous text provides the wrong answers, it is worth subjecting Perry's replies to a rigorous critique.

For Perry, a text (or "text-analogue") is any sort of sensory data that has or can be given meaning.<sup>77</sup> Therefore, although marks on a page are not necessarily meaningful, such marks become a text as soon as they are given meaning. Of course one way of "giving texts meaning" is by employing marks or sounds in a semantically intentional manner. This is what strong intentionalists would call writing or speaking. These activities deploy signs (marks, sounds) that have no meaning in themselves, and transform them into signifiers (words) that do. Such actions simultaneously create and give meaning to texts. Another quite distinct activity involves encountering marks or sounds and assuming that they represent examples of the foregoing phenomena. To "give texts meaning" in this sense means to try to determine what some agent intended to mean when that agent transformed these marks or sounds into semantically meaningful signifiers. To a strong intentionalist, *this and only this activity* counts as the interpretation of a verbal text.

Perry's mistake (which mirrors that of hermeneutics in general) is twofold: he confuses the interpretation of semantic signifiers with the interpretation of other types of data, and he conflates the interpretation and the creation of texts. Perry gives the following examples of "texts" that can be "objects of interpretation": "a homilist interpreting a scriptural passage, a biochemist interpreting laboratory data . . . a person whose sight has just been restored interpreting a flood of visual sense impressions . . . a judge interpreting a constitutional provision."<sup>78</sup>

Perry fails to distinguish between two distinct senses in

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75. Michael Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, in LEGAL HERMENEUTICS, *supra* note 11, at 241 [hereinafter Perry II]. For an earlier version of the same article, see Michael Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 CONST. COMMENTARY 231 (1989).

76. Perry II, *supra* note 76, at 241.

77. *Id.* at 241-42.

78. *Id.* at 242.

which a phenomenon can be said to be "meaningful." An object can be meaningful in the sense that it is a representation of an intention to mean (the scriptural passage, the constitutional provision); otherwise, it is only meaningful in the broader sense of providing evidence, through the very fact of its existence, about a particular state of affairs. The biochemical data and the sense impressions are meaningful in this broader sense. Perry's failure to recognize the importance of this distinction leads him to make a series of systematic mistakes about texts and intentions that are echoed in nearly all theories of legal interpretation:

To (try to) "interpret" a text is not necessarily to (try to) understand it in the way the author of the text intended that it be understood. First, as some of the interpretive activities listed above illustrate, not every text has an author—at least, not every text has an author in the conventional sense that some texts do. Second, even a text that has an author(s) in the conventional sense can be understood—interpreted—in a way(s) the author(s) did not intend. Such an understanding (interpretation) is a misunderstanding (misinterpretation) only if the aim is to ascertain what the author intended the text to mean. But sometimes that is demonstrably *not* the aim of the interpreter. It is not invariably the aim of an interpreter of a scriptural passage, for example, or of a constitutional provision, to ascertain what the author intended the text to mean. Sometimes the interpreter's aim is not "what the author intended it to mean" but "what it means."<sup>79</sup>

I approach this paragraph with some caution. It is comprised of such a rich mosaic of misunderstandings that, if it were delicately disassembled for illustrative purposes, it might yield by itself a kind of negative *explication de texte* for the claims of strong intentionalism. Let us begin with the first sentence.

(1) "To (try to) 'interpret' a text is not necessarily to try to understand it in the way the author of the text intended that it be understood." Two features of this sentence are of particular interest: the quotation marks and the parenthetical modifiers. The quotation marks indicate that "interpret" might mean more than one thing. Perry can't be understood to be claiming that a text can be interpreted in the same sense that biochemical data is interpreted, i.e., that texts are meaningful as texts in the broader sense that such data is meaningful. Marks are not, in and of themselves, texts. Rather, they become texts when semantic meaning is ascribed to them. Perry's claim becomes coherent if we understand him to be saying that because there

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79. *Id.* at 243.

are different ways of ascribing meaning to marks, it is possible to use the word "interpret" to describe those discrete activities.

The modifier "(try to)" seems to indicate that Perry acknowledges the possibility that we might fail to interpret a text. But if a text is, as Perry says, "simply [any] 'object of interpretation',"<sup>80</sup> how could one fail to interpret an object? Perry's claim makes sense only if we understand him to say that it is possible to fail to interpret an object correctly.

(2) "First, as some of the interpretive activities listed above illustrate, not every text has an author—at least not every text has an author in the conventional sense that some texts do." Again, Perry is failing to distinguish between the interpretation of signifiers and the interpretation of non-signifying phenomena. All signifiers have authors, and all texts are both comprised of and are themselves signifiers. Therefore, all texts have authors.

(3) "Second, even a text that has an author(s) in the conventional sense can be understood—interpreted—in a way(s) the author did not intend." Translation: An interpreter can ascribe meanings to the marks (signs) that make up the words (signifiers) that comprise a text which differ from the meanings ascribed to those marks by the author of the text. This is obviously true. Does such a procedure represent the sort of failure to (correctly) interpret a text to which Perry seemed to allude in the first sentence of the quoted passage? Not necessarily, because, (4) "Such an understanding (interpretation) is a misunderstanding (misinterpretation) only if the aim is to ascertain what the author intended the text to mean. But sometimes that is demonstrably not the aim of an interpreter." Here, we approach the crux of Perry's argument. Yet the issue remains confused. If the interpreter is not attempting to ascertain what the author intended the text to mean, what possible attitudes toward the relevant marks remain? The interpreter could, one supposes, choose to ascribe to the marks whatever meanings seemed best to her. But by Perry's own terms, such an "interpretation" would not be an interpretation at all. Perry admits that a text is "not just marks on a page"<sup>81</sup>—a text must be made up of meaningful marks. If the interpreter ignores the author's intentions in order to provide her own preferred meaning to the object of interpretation, then clearly the interpreter has supplanted the author, and her putative "interpreta-

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80. *Id.* at 242.

81. *Id.*

tion" is not an attempt to understand someone else's text, but rather represents the replacement of the author's text with the "reader's" (or, more accurately, writer's) own. Obviously, this is not what Perry has in mind.

(5) "It is not invariably the aim of an interpreter of a scriptural passage, for example, or of a constitutional provision, to ascertain what the author intended the text to mean." Having eliminated the author from certain (theological? constitutional?) varieties of interpretation, and being unwilling to allow the interpreter to usurp the authorial role, Perry appears to have orphaned some of our most critical cultural texts,<sup>82</sup> reducing them to the status of meaningless, or at best utterly indeterminate, marks. This will never do; but of course a good hermeneutician saves his conjuring trick for the very end: "Sometimes the interpreter's aim is not 'what the author intended it to mean' but 'what it means.'"

Here indeed we have approached the center of an impenetrable mystery. The text, consubstantial with itself, born of but not begotten by an earthly writer, *is itself its own author*. It remains an obscure object of desire, rotating in some unspecified epistemological space, an autonomous entity that has escaped from both its initial author and its subsequent readers, "free" as Gadamer tells us, to enter into "new relationships."<sup>83</sup>

Before we ourselves choose to make any sort of commitment to this mystically promiscuous object, prudence dictates that we engage "it" in a Gadamerian dialogue:

INTERPRETER: Hello.

TEXT: Hi there.

INTERPRETER: We can't start meeting like this.

TEXT: What do you mean?

INTERPRETER: That's just it. You can't mean anything at all. You don't have an author.

TEXT: So that's it. You only interpret texts that come from nice, respectable human agents. Well let me tell you, I'm not like that. I'm a loose set of signifiers that can be interpreted by anybody at any time. Until you've been with someone like me, you won't even know what real interpretation is all about.

INTERPRETER: Sorry, but without an author you can't have any signifiers. You're just a bunch of marks on a page.

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82. The recurring choice of scriptural and constitutional examples by hermeneutical theorists is, as I argue elsewhere, far from coincidental. Campos, *Against Constitutional Theory*, *supra* note 72, at 303 & n.113.

83. See *supra* text accompanying note 24.



TEXT: You're behind the curve, buddy. My pals in the hermeneutical racket have equipped me with something better than an author.

INTERPRETER: I know. "Verbal meaning."

TEXT: Don't knock it, friend. I can mean anything me and my interpreter want me to mean—that is, as long as I stay in the same language. There are things even I won't go for. Did I ever tell you about what this deconstructionist tried to do with my syntax?

INTERPRETER: The French are absolute perverts. But listen to yourself: if you can mean anything to anybody, do you really mean anything to anyone at all?

TEXT: Hey . . . there's no need to be cruel. I . . . I can't just mean anything. I've got to stay faithful to the rules of English.

INTERPRETER: Ha! A linguistic chastity belt—that's fidelity for you. Why, how do I even know you're speaking English? Without an author to keep you in line, you could be speaking something that just *looks* like English, but is really Andromedan, or sheer gibberish.

TEXT: Gosh, could that be right? If I could mean anything to anyone, do I really mean anything at all? I might think I exist only because a cat is walking across a typewrxq cseov rgkvi sbt, zlo;

INTERPRETER: Wait! Come back! I didn't mean what I said, or say what I meant. I . . . I can't interpret without you! You've always meant just one thing to me, I swear . . .

#### IV

Unlike conventional legal theory, which has a long tradition of simply asserting that texts have "objective" meanings that sometimes differ from the "subjective" intentions of their authors,<sup>84</sup> hermeneutics provides a theoretical justification for such claims. Hermeneutical theory is aware that a problem arises when the text is severed from the intentions of its author. Hermeneutics assumes that this problem is epistemological (how can we determine what the text means?) when in fact it is primarily ontological (how do we define what the text is?).

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84. The classic examples are the contract parole evidence rule and all textualist canons of statutory interpretation. Cf. Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (critiquing the canons of statutory construction as tools for decision).

Imagine a short story—in *The New Yorker*, say—which begins “Call me Ishmael. Don’t leave without even saying good-bye.” Now it seems probable that the first sentence of this tale represents an arty and tasteless allusion to Melville’s famous novel. According to a hermeneutical analysis, what has occurred is that the first sentence of *Moby Dick* has broken from its literary moorings and drifted into a contemporary short story. Gadamer’s “common object” of interpretation, the text “Call me Ishmael,” can thus be read to mean either “address me by the name Ishmael” or “Ishmael, please contact me.” We would thus appear to have a single text with two quite different meanings.

But is this an accurate account of the interpretive situation? If the criterion of textual identity is nothing but a particular set of marks, how can the claim (which hermeneutics insists upon) that there are correct and incorrect interpretations of texts be made coherent? After all, what is to stop an interpreter from ascribing whatever meaning most pleases her to marks that, in and of themselves, are meaningless? What could it mean to claim that such a “reading” was an incorrect interpretation of those particular marks?

Hermeneutics seems to face a situation where a single text would, depending upon the predilections of the interpreter, be amenable to an infinite range of readings. Clearly, a hermeneutical account of interpretation requires some criterion of textual identity other than the particular marks that make up a text. Specifically, “[w]hat is required for the hermeneutic notion of application [as interpretation] to work is a criterion of textual identity that will allow the text to remain the same while its meaning changes,”<sup>85</sup> yet will also severely limit the range of possible meanings a text might have. The criterion of authorial intention forecloses the first possibility (because a new meaning would in fact create a new, although verbally identical, text),<sup>86</sup> while we have seen that identifying the text with the marks that comprise it fails to accomplish the second

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85. Knapp & Michaels, *Against Theory 2*, *supra* note 72, at 53.

86. Knapp and Michaels give an interesting example of this phenomenon: When William Blake reprinted the 1789 edition of *Songs of Innocence* in 1794 he consciously gave the verbally identical poems a different “interpretation” from that which he initially attributed to them. See Knapp & Michaels, *A Reply to Our Critics*, at 797, reprinted in *AGAINST THEORY*, *supra* note 72, at 102. I have termed this sort of procedure (regardless of whether the later interpretation is by the “same” author) “reauthoring.” See Campos, *Against Constitutional Theory*, *supra* note 72, at 283.

required effect—that of reducing the range of possible interpretations.

Hermeneutics finds its liberating yet limiting definition of textual identity in the idea of verbal meaning. That is, the marks that comprise a text can in principle mean anything that those marks could be taken to signify in the language in which the text is written. Verbal meaning thus allows a single text to both contain and transcend the author's intention; and the hermeneutical task then becomes "selecting the most appropriate meaning from the range of meanings made available by the language, a meaning that might or might not coincide with the meaning intended by the author."<sup>87</sup>

What is problematic about this account of textual identity and linguistic meaning? As a matter of interpretive logic, we could begin by asking how an interpreter goes about selecting the *language* of the text to narrow the range of possible meanings. If this seems like an unreal question, consider the interpretive options of a spy who receives a telegram reading, "The red fish swims at dawn," and interprets this text to mean "destroy the microfilm." Does the English language allow this text to mean what is usually meant in English by "destroy the microfilm?" If we answer "yes," then it would seem that the English language consists of any possible range of meanings that people who consider themselves English speakers might assign to signifiers that are conventionally taken to be English words. This, of course, obliterates the methodological value of limiting the interpretation of texts through the application of a criterion of verbal meaning. If we say "no," then in what language is the telegram written? Obviously, a language<sup>88</sup> whose conventions allow "the red fish swims at dawn" to mean what is usually meant by "destroy the microfilm." But if such a language exists, then there could very well be a language in which "the red fish swims at dawn" means "turn the microfilm over to the concierge."

How, then, does the recipient of the telegram choose between the possible languages in which the telegram might be written? If the purpose of the telegram is verbal communication the answer must be: by determining what language the

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87. Knapp & Michaels, *Against Theory 2*, *supra* note 72, at 55.

88. Or, if one prefers, a "code." According to the strong intentionalist account of linguistic meaning, a code is merely a set of semantic conventions that is employed by a much smaller group of people than those sets of semantic conventions we call "languages."

sender of the telegram intended to employ. Thus, unless it is implicitly parasitic upon the criterion of authorial intention, verbal meaning cannot, after all, place limitations on the interpreter's range of possible understandings.

A more prosaic example of this problem is provided by the historian Garry Wills:

"Your argument is obnoxious, but it will be liquidated once its specious character is discovered." That sentence would not be considered friendly if spoken today. But its terms were not hostile in the eighteenth century. We need to translate: "Your argument, though exposed to malice, will become clear when its attractive distinction is revealed."<sup>89</sup>

How does the criterion of verbal meaning appropriately limit the possible interpretations of the sentence Wills quotes? Is the proper hermeneutic technique applied if the interpreter decides the "language" of the text is eighteenth century English? Eighteenth century upper class American political rhetoric? The sort of thing James Madison might perhaps have said? Once again, the criterion of verbal meaning only seems to become useful when it collapses into a more or less precise interpretive judgment about the identity and intentions of the text's author.

Furthermore, as this example illustrates, it is incoherent to imagine the interpreter making some kind of "preinterpretive" decision about what language choice will appropriately limit the possible interpretations of the text. Such a decision *is* the interpretation of the text. The criterion of verbal meaning is therefore either a camouflaged version of the *author's* verbal meaning, or a perfectly circular methodological instruction, which commands the interpreter to read correctly the text by determining in what language the text is written, so as to read the text correctly.

## V

To summarize the claims of strong intentionalism: texts are made up of signifiers; sounds and marks (signs) become representations of semantic meaning (signifiers) when an agent capable of intending to use them in that manner intentionally does so; and interpretation (reading, listening) takes place when someone encounters such signs, assumes they are signifiers, and attempts to determine what the signifying agent in fact said.

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89. GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 280 (1981).

What are the implications of strong intentionalism for traditional theories of legal interpretation, and for legal hermeneutics? Strong intentionalism refutes the fallacy of the autonomous text, a fallacy that remains of crucial rhetorical importance to practically all theories of legal interpretation. If strong intentionalism is correct, then a text can only mean what its author intends it to mean, and it follows that interpreting a text simply consists in looking for that intention. Textual meaning and authorial intention are not separable concepts, and searching for one is by necessity synonymous with seeking the other.

Traditional legal rhetoric, which often commands the interpreter to "stay within the four corners of the instrument," or to "look only to the language of the statute,"<sup>90</sup> depends upon the illusion that an object of interpretation called "the text" can contain meanings that are separate from the intentions of the text's author. Legal hermeneutics, especially in its Gadamerian form, is even more dependant on the fallacy of the autonomous text. Gadamer's account of interpretation requires much more of the text than a mere inert autonomy of meaning. Hermeneutics imagines a liberated, practically anthropomorphized (if not actually hypostatized) entity that engages the interpreter in a dialogic verbal dance.

Stripped of their foundational object of focus, both the traditional theories of statutory interpretation and their contemporary competitors lose most of their rhetorical coherence. Textualism becomes an oxymoronic methodology: the interpreter who desires to consult "just the text" to the exclusion of "extrinsic evidence" will discover that there's no there there—there is no such thing as extrinsic, or for that matter intrinsic, evidence; there is just evidence (of the author's intention).

The hermeneutic interpreter, who believes both that a text's meaning can change while the text remains the same, and that the sort of "interpretation" he advocates is constrained by the rules of language will realize that if a set of marks acquires new meanings, then a new text has replaced the old. He will also come to see that such an intentional replacement of meanings is not interpretation, and that it is not constrained by semantic rules, but rather by a complex interaction of cultural practices and political considerations.

And what of traditional intentionalists? Have they not

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90. See *supra* note 84 and accompanying text.

been right all along? Did they not advocate the one methodology of interpretation that will actually help us recover the true meanings of legal texts? No. Indeed, in the very act of attempting to fashion a correct *theory* of textual interpretation, traditional intentionalists have shown themselves to be just as deluded by the fallacy of the autonomous text as textualists and heremeneuticians.

This may well strike the reader as a particularly perverse assertion; and a full explication of the point would require another essay. I will, for now, merely sketch out my reasons for making it.

If a text can only mean what its author intended it to mean, then simply announcing this fact has no methodological significance whatsoever. For if textual meaning and authorial intention are in fact identical, then a claim that has been mistaken for a *theory about a particular method* that one might choose to employ when performing a certain activity is, in actual practice, nothing but a *description of what must always constitute a performance* of that same activity. The practical consequence of this is that a prescription which traditional intentionalists have characterized as a supremely useful methodological insight becomes nothing more than tautological invocation.

In other words, to be advised that the best way to interpret a text is to look for the author's intention is equivalent to being told that the best way to interpret a text is to read it. While this is certainly true, it tells you nothing about *how* to read a text correctly. Should you give each word its most common definition? Should you learn as much as you can about the life of the author? Should you compare it with other texts whose meanings you feel confident you understand? The answer is: it depends. As Steven Knapp has put it:

The object of every interpretive controversy, when it really is an interpretive controversy, is always and only a particular historical fact, and there is no general way to determine what any particular historical fact might be. No general belief, or if one prefers, no *theory* about the nature of interpretation offers any help in deciding the meaning of any particular text.<sup>91</sup>

In the end, it seems that strong intentionalism gives no more help to a theory of intentionalism than it does to any other theory of legal interpretation. If anything, strong intentionalism makes the task of the intentionalist even more daunt-

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91. Knapp, *supra* note 72, at 323.

ing, for traditional intentionalism has always seen itself as an essentially *supplementary method*, designed to deal with those relatively few interpretive questions that might arise after an initial "preinterpretive" encounter with the plain meaning of the autonomous legal text.<sup>92</sup> Without the crutch of autonomous verbal meaning, many (most?) legal texts confront the reader with the sort of herculean empirical task faced by an interpreter of the 1991 Civil Rights Act.

As always, Stanley Fish is right: "the only thing to know about interpretation is that it has to be done every time." But this is only a partial truth. To read is to be borne ceaselessly back toward the ungovernable past. Yet we are not condemned to only read texts: we can misread them, or reauthor them, or ignore them altogether.<sup>93</sup> The autonomous legal text allows us to do all these things, and to subsume them all within the signifier "interpretation." It is therefore a most useful fiction, and the baroque elaborations of legal hermeneutics give promise that this obscure object of desire is sure to remain with us for a long time to come.

## CONCLUSION

So there I sat and smoked my cigar until I lapsed into reverie. Among other thoughts I remember this: "You are now," I said to myself, "on the way to becoming an old man, without being anything, and without really undertaking to do anything. On the other hand, wherever you look about you, in literature and in life, you see the celebrated names and figures, the precious and much heralded men who are coming into prominence and are much talked about, the many

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92. To choose one example from thousands: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940), *quoted in* *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 672 (1988). Such words do indeed provide the best evidence of the legislature's intention—*after* they have been properly interpreted. Cf. DWORKIN, *supra* note 16, at 358 ("Justices who are called liberal and those who are called conservative agree about which words make up the Constitution as a matter of preinterpretive text." (emphasis added)). Strong intentionalism asserts that such agreement either decides nothing (if by "words" Dworkin means signs) or, conversely, everything (if "words" mean signifiers). Traditional intentionalism, textualism, and hermeneutics all deny this dichotomy by imagining that verbal signs come equipped with certain "plain" (ineluctable, self-evident) meanings which can be grasped "before interpretation," therefore allowing some (but not necessarily all) of a legal document's meaning to always reside within the translucent confines of a "preinterpretive text."

93. For a description of these quasi-interpretive procedures, see Campos, *Against Constitutional Theory*, *supra* note 72, at 289-98.

benefactors of the age who know how to benefit mankind by making life easier and easier, some by railways, others by omnibuses and steamboats, others by telegraph, others by easily apprehended compendiums and short recitals of everything worth knowing, and finally the true benefactors of the age who by virtue of thought make spiritual existence systematically easier and easier, and yet more and more significant. And what are you doing?"

Here my self-communion was interrupted, for my cigar was burned out and a new one had to be lit. So I smoked again, and then suddenly there flashed through my mind this thought: "You must do something, but inasmuch as with your limited capacities it will be impossible to make anything easier than it has become, you must, with the same humanitarian enthusiasm as the others, undertake to make something harder." This notion pleased me immensely, and at the same time it flattered me to think that I, like the rest of them, would be loved and esteemed by the whole community. For when all combine in every way to make everything easier and easier, there remains only one possible danger, namely, that the easiness might become so great that it would be too great; then only one want is left, though not yet a felt want—that people will want difficulty. Out of love for mankind, and out of despair at my embarrassing situation, seeing that I had accomplished nothing and was unable to make anything easier than it had already been made, and moved by a genuine interest in those who make everything easy, I conceived it my task to create difficulties everywhere.<sup>94</sup>

What then is to be done? I am aware that my argument has reached a rhetorical crossroads, and that the current conventions of legal academic writing now require this text to make at least one of several eminently predictable moves. Despite their different typologies and jargons these moves all replicate the following discursive form: "Having demonstrated the inadequacy of (method, rule, theory) X as a means of achieving the axiomatically desirable (fair, efficient, nonhegemonic, pragmatically coherent, perhaps even legal) result Z, it is now my task to explain how X' will succeed where all other attempts have heretofore failed."

These moves, or rather, this Move is inherently objectionable for all sorts of reasons. I will mention just a few:

- 1) It is relentlessly reductive. The discursive forms that require legal scholars to make the Move also require those scholars to conclude that what appear to be extraordinarily complex questions (how, for instance, can the collective bureaucracies we call legislatures generate sufficiently univocal texts

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94. SOREN KIERKEGAARD, *How Johannes Climacus Became an Author*, in CONCLUDING UNSCIENTIFIC POSTSCRIPT TO THE PHILOSOPHICAL FRAGMENTS (1846), reprinted in A KIERKEGAARD ANTHOLOGY 191, 194 (David F. Swenson et al. trans. & Robert Bretall ed., 1946).



for the purposes of determinate legal decisionmaking?) are really not so complex after all. For if such questions are not either systematically simplified or defined out of existence, what hope does the scholar have of making the necessary *constructive recommendations*?

2) It is inherently unbelievable. Unfortunately, the simplification of complex questions generates painfully incomplete, if not downright tautological answers to those questions. This, in turn, undermines the plausibility of claims for the instrumental value of such answers.

3) It is boring. The predictability of a discursive form is excusable if such a form uncovers interesting truths or makes the world a better place. If it fails to do these things and yet continues to repeat itself, it merely burdens the world with another impoverished textual aesthetic.

What, then, the impatient reader may well ask, is the point? Perhaps the point is to question the normative mania<sup>95</sup> that grips legal scholarship, and to engage in a wholehearted search for the infinitely textured truth, rather than surrendering to those professional incentives that demand we produce an unreal brand of advocacy festooned with pretentious footnotes. Sometimes, as Gertrude Stein reminded us, to question our questions may be the beginning of wisdom.

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95. Pierre Schlag has recently produced a comprehensive critique of this tendency. See Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

