

Hermeneutics, Legal and Theological: An Exercise in Integration*

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It is useful to know something of the manners of different nations," opined Descartes, "that we may be enabled to form a more correct judgment regarding our own."¹ The same is certainly true of academic disciplines. Fields other than our own may provide considerable illumination to assist in solving difficulties which appear intractable from within the discipline itself.

In the present essay, the contemporary hermeneutic dilemma in jurisprudence will be examined against the background of theological hermeneutics. The close historical relationship between the interpretation of texts in these two realms² makes such comparison not only interesting but also potentially valuable for arriving at a more satisfactory philosophy for the interpretation of legal materials.

The Legal Landscape

Canons for the proper construction of legal documents were developed early in the history of the law and remain with us to this day. The Oxford Concise Dictionary of Law lists the six "principal rules of statutory interpretation" as follows:

- (1) An Act must be construed as a whole, so that internal inconsistencies are avoided.
- (2) Words that are reasonably capable of only one meaning must be given that meaning whatever the result. This is called the literal rule.
- (3) Ordinary words must be given their ordinary meanings and technical words their technical meanings, unless absurdity would result. This is the golden rule.
- (4) When an Act aims at curing a defect in the law any ambiguity is to be resolved in such a way as to favour that aim (the mischief rule).
- (5) The ejusdem generis rule (of the same kind): when a list of specific items belonging to the same class is followed by general words (as in "cats, dogs, and other animals"), the general words are to be treated as confined to other items of the same class (in this example, to other domestic animals).
- (6) The rule *expressio unius est exclusio alterius* (the inclusion of the one is the exclusion of the other): when a list of specific items is not followed by general words it is to be taken as exhaustive. For example, "weekends and public holidays" excludes ordinary weekdays.³

In the law of contracts, the parol evidence rule sets forth the same hermeneutic philosophy : integrated writings cannot be added to, subtracted from, or varied by the admission of extrinsic evidence of prior or contemporaneous oral or written agreements; extrinsic evidence is admissible to clarify or explain the integrated writing, but never when it would contradict the writing.⁴ The construction of deeds follows the same approach : the parties "are presumed to have intended to say that which they have in fact said, so their words as they stand must be construed."⁵ And at the loftiest point of American constitutional interpretation the identical philosophy prevails; thus Chief Justice John Marshall in *Gibbons v. Ogden*:

As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.⁶

Concerning the interpretation of legal documents in general, Lord Bacon summed up aphoristically.⁷

Non est interpretatio, sed divinatio, quae recedit a litera.

Interpretation that departs from the letter of the text is not interpretation but divination.

Cum receditur a litera, iudex transit in legislatorem.

When the judge departs from the letter, he turns into a legislator.

Modernly, Sir Roland Burrows drives the same point home with admirable clarity:

The Court has to take care that evidence is not used to complete a document which the party has left incomplete or to contradict what he has said, or to substitute some other wording for that actually used, or to raise doubts, which otherwise would not exist, as to the intention. When evidence is admitted in connection with interpretation, it is always restricted to such as will assist the Court to arrive at the meaning of the words used, and thus to give effect to the intention so expressed.⁸

Now it is certainly true that among contemporary thinkers in the fields of political theory and jurisprudence (philosophy of law) the classical hermeneutic approach just described has not received uniform approbation. The most radical of today's legal philosophies, the Critical Legal Studies movement, which reached its high water mark in the 1970's in the work of Roberto Unger and Duncan Kennedy, argues in deconstructionist fashion against the face-value of virtually all legal instruments; carrying American Legal Realism's doubts about the objectivity of legal operations virtually to the point of existential solipsism, CLS regards the legal interpreter as all-important, the text as infinitely malleable grist for the mill of political activism.⁹ But CLS has been decisively shown to be incapable of practical application in the legal field, since its position undercuts the very Rule of Law.¹⁰ The impact of CLS on day-to-day judicial activity has been virtually nil.

Professor Ronald Dworkin, H.L.A. Hart's successor in the chair of jurisprudence at Oxford, maintains that interpretation, in law and other fields, is essentially concerned with purpose -- "but the purposes in play are not fundamentally those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice."¹¹ On the surface, this suggests that Dworkin is prepared to sacrifice the text to the interpreter, but he insists that "constructive interpretation" does not mean that "an interpreter can make of a practice or work of art anything he would have wanted it to be."¹² The text or object of interpretation is a residual given which limits what the interpreter can do to it.

Moreover, Dworkin is so unhappy with American Legal Realism and so horrified by Critical Legal Studies -- and quite rightly, in our view -- that he has set forth his "one right answer" thesis : the view that, in deciding cases, judges can indeed arrive at a single correct answer, based objectively on the existing legal tradition.¹³ Such a view, inconsistent though it may be with Dworkin's concept of "constructive interpretation," nonetheless shows that he is at heart an objectivist who refuses to sacrifice the integrity of the legal documentary tradition to the subjective whims of the interpreter.

The most powerful contemporary theoreticians of legal hermeneutics are certainly those in the "original intent" camp -- thinkers who argue (as did Chief Justice John Marshall) that texts must be understood in their original sense, not twisted to fit the interpreter's agenda. Robert Bork, for example, admits to the difficulty of psychoanalyzing the Founding Fathers to discover what they really "intended" in framing the American Constitution (the dilemma thrown up by liberal constitutionalists such as Laurence Tribe), and so prefers the expression "original understanding" : "What we're really talking about [is] not what the authors of the Bill of Rights had in the backs of their minds, but what people who voted for this thing understood themselves to be voting for."¹⁴

If, however, trying to determine the "original intent" of the author over and above his text poses extreme problems (Sibelius, for example, was hopeless at explaining the true intent and significance of his *Finlandia!*), the same dilemma attaches to the original audience of the text : they, too, may have misunderstood it -- for any number of personal, societal, or cultural reasons.

Thus the most sophisticated academic analysis of legal interpretation would appear to focus on the Wittgenstein-Popper approach : the analogy of the shoe and the foot (interpretation is like a shoe and the text like the foot : one endeavours to find the interpretation that best fits the text, allowing the text itself to determine this). Here, "intent" or "understanding" is decided by the text itself.¹⁵

Such an approach fully supports the principle that the text must be allowed to interpret itself -- in the sense that when different or contradictory interpretations of it are offered, each will be brought to the bar of the text to see which fits best. Interpretations therefore function like scientific theories which are arbitrated by the facts they endeavour to explain : the facts ultimately decide the value of our attempts to understand them.¹⁶

In the Wittgenstein-Popper model, the interpreter of course brings his prejudices (aprioris, presuppositions, biases) to the text, but it is the text that judges them also. And the meaning of the text is not to be established by extrinsic considerations, for that would yield an infinite regress. (If the given fact or text has no inherent meaning and one must

appeal beyond it for its true signification, then that must also be true of the extrinsic facts to which one appeals. "Bigger bugs have littler bugs upon their backs to bite them/And littler bugs have littler bugs/And so -- ad infinitum.") Of course, extrinsic considerations can be used to clarify ambiguity, but never to contradict the clear meaning of a text.¹⁷

Theological Hermeneutics

Paralleling the classic rules for the construction of legal documents is the traditional "historical-grammatical" approach to the interpretation of the Bible. As set forth in such classic treatises as Milton S. Terry's *Biblical Hermeneutics*, this interpretive philosophy holds that the scriptural text can be objectively known, that it has a clear, perspicuous meaning, and that that meaning can be discovered if the text is allowed to interpret itself, without the adulteration of the interpreter's personal prejudices. Professor Eugene F.A. Klug summarizes this approach, which dominated the field of scriptural interpretation at least from the Reformation¹⁸ to the rise of modern biblical criticism, as follows:

It is a fundamental principle to assume that there is one intended, literal, proper sense to any given passage in Scripture ('sensus literalis unus est'); also that the Scripture is its own best interpreter ('Scriptura Scripturam interpretat' or 'Scriptura sui ipsius interpres') The literal sense thus always stands first and each interpreter must guard against cluttering that which is being communicated with his own ideas, lest the meaning be lost.¹⁹

In diametric contrast -- and analogous to the Critical Legal Studies approach in the realm of jurisprudence -- is the so-called "hermeneutical circle" of Rudolf Bultmann and the contemporary followers of *formgeschichtliche Methode* and related higher-critical philosophies. Here, the text and the interpreter are locked together in such a way that a purely objective, "presuppositionless" understanding of the text is out of the question : the interpreter always brings his own understanding to the text, and interpretation is the product both of the text working on the interpreter and the interpreter working on the text.²⁰ And this will be true not only of the current interpreter vis-à-vis the text but also of the original writer or editor of it : neither the events described in the text nor the resulting description of them can ever represent objective truth in any absolute sense. A text is ultimately inseparable from its *Sitz im Leben* in the widest sense of that term.

Philosopher Roy J. Howard thus sets forth "three important aspects of contemporary hermeneutics" : (1) "There is no such thing as presuppositionless knowing." (2) "Just as there is no uniform stance from which to begin thinking, so there is no uniform term in which to end it. Hermeneutics is willing to rethink the dialectical logic of Hegel but not to accept his conclusion of an absolute mind." (3) "Hermeneutics' recognition that intentionality is present and operative and effective on both sides . . . and in a dialectical way. This effectiveness might be resident in the social condition of the researcher (cf. Habermas and Winch) or in the very logic of his research activity (cf. Von Wright), or in the choice and manner of the questions he addresses to experience (cf. Gadamer)."²¹

What have been the consequences in the theological realm of this subjectivistic "hermeneutical circle" approach? In Old Testament studies, attempts to interpret the text by the use of extrinsic Near Eastern literature and so-called "literary forms" resulted in a fragmentation of the biblical books and the claim to multiple authorship and to non-historical editing and redaction. The same approach in Ugaritic and Graeco-Roman studies produced equivalent chaos : my professor of classics at Cornell University in the 1950's observed wryly that after seventy-five years of this sort of thing in Homeric scholarship "we have finally jettisoned that approach and have concluded and that if Homer didn't write the *Odyssey*, it was written by someone of the same name who lived about the same time." An attempt to produce a "Polychrome Bible" to show the various underlying biblical sources in colours entirely failed : the higher critics themselves could not agree as to where one supposed source left off and another began.

In New Testament scholarship, efforts to attribute the words and deeds of Jesus to diverse "faith communities" of the early church have likewise come to subjective grief. Robert Funk's "Jesus Seminar" in the United States has been reduced to voting with coloured balls on the gradations of genuineness of the sayings of Jesus contained in the Gospels. Ironically, the objective historical value of these materials rests as solid as ever : the problem lies in the hermeneutic applied to them. A.N. Sherwin-White, eminent specialist in Roman law, made the point trenchantly over against the higher critics :

It is astonishing that while Graeco-Roman historians have been growing in confidence, the twentieth-century study of the Gospel narratives, starting from no less promising material, has taken so gloomy a turn in the development of form-criticism that the more advanced exponents of it apparently maintain -- so far as an amateur can understand the matter -- that the historical Christ is unknowable and the history of his mission cannot be written. This seems very curious when one compares the case for the best-known contemporary of Christ, who like Christ is a well-documented figure -- Tiberius Caesar. The story of his reign is known from four sources, the *Annals* of Tacitus and the biography of Suetonius, written some eighty or ninety years later, the brief contemporary record of Velleius Paterculus, and the third-century history of Cassius Dio. These disagree amongst themselves in the wildest possible fashion, both in major

matters of political action or motive and in specific details of minor events. Everyone would admit that Tacitus is the best of all the sources, and yet no serious modern historian would accept at face value the majority of the statements of Tacitus about the motives of Tiberius. But this does not prevent the belief that the material of Tacitus can be used to write a history of Tiberius.²²

Hermeneutic Lessons To Be Learned

Theological hermeneutics is today moving back to classical, "historical-grammatical" interpretation, based on the principle that texts must be allowed to interpret themselves.²³ Attempts to give the subjective stance of the interpreter a normative role in the hermeneutic task proved catastrophic, for they left the text at the mercy of the interpreter's presuppositions and *Sitz im Leben*.

What can legal hermeneutics learn from its theological counterpart? Let us briefly suggest several lessons in conclusion.

(1) Even if past ages -- in particular, the rationalistic, enlightened, liberal western mind of the 17th and 18th centuries -- erred on the side of neglecting the subjective dimension, our century (what the Mentor philosophy series calls "the Age of Analysis") has moving to the opposite extreme. The objectivity of the external world and of textual meaning must be recognised. Even the Heisenberg indeterminacy principle would have been undiscoverable without the possibility of an objective investigation of the external world in which that principle is embedded! To confuse the meaning of a text with the subjective stance of its interpreter will assuredly destroy the hermeneutic endeavour. This is the error of comedian Robert Benchley, who spent the laboratory sessions of his biology course drawing the image of his own eyelash as it fell across the microscopic field -- or that of the Italian astronomer Schiaparelli, whose Martian "canals" may perhaps have been the veins of his own eye projected onto his telescope lens.²⁴

(2) In the battle between the American Legal Realists and H.L.A. Hart on the one hand and Ronald Dworkin on the other, the latter is surely correct when he argues for "one right answer" in the interpretation of legal texts and in judicial decision-making. Principle, not policy, is the route to a sound jurisprudence, and the Wittgenstein-Popper test of "fit" means that among diverse and contradictory interpretations or judgments one principled answer will best accord with the text or textual tradition and thus provide the interpretation which in a very real sense may be said to have been created by the text itself.

(3) Subjectivity always remains a descriptive fact in interpretation. But it must never be elevated to normative status. Indeed, it is a mark of maturity that we learn in general to subordinate our subjective likes and dislikes to the nature of the external world as it in fact is. Texts -- in the legal realm and elsewhere -- must be allowed to say what they wish, not be forced to say what we want them to say. As classic biblical interpreter J.A. Bengel aphoristically put it : "Te totum applica ad textum : rem totam applica ad te."²⁵

NOTES

1. René Descartes, *Discours de la méthode*, ed. Etienne Gilson (6th ed.; Paris : Vrin, 1987), p. 6.
2. Cf. the brief discussion of "Theological Interpretation" in Kent Greenawalt's *Law and Objectivity* (New York and Oxford : Oxford University Press, 1992), pp. 83 - 85; and, in general, Harold J. Berman, *Law and Revolution* (Cambridge, Mass. : Harvard University Press, 1983), especially chap. 4 ("Theological Sources of the Western Legal Tradition"), pp. 165 ff. An interesting older reference is Per Olof Ekelöf, "Teleological Construction of Statutes," *2 Scandinavian Studies in Law* (1958), 88-89.
3. Elizabeth A. Martin (ed.), *A Concise Dictionary of Law* (Oxford : Oxford University Press, 1987), p. 189. For a fuller discussion of these canons, see, inter alia : Herbert Broom, *Legal Maxims*, ed. W. J. Byrne (9th ed.; London : Sweet & Maxwell, 1924), chap. 8 ("The Interpretation of Deeds and Written Instruments"), pp. 342-444; P. B. Maxwell, *The Interpretation of Statutes*, ed. G. Granville Sharp and Brian Galpin (10th ed.; London : Sweet & Maxwell, 1953); Rupert Cross, *Statutory Interpretation*, ed. John Bell and George Engle (2d ed.; London : Butterworths, 1987).
4. Cf. Uniform Commercial Code, sec. 2-202.
5. Charles E. Odgers, *The Construction of Deeds and Statutes* (4th ed.; London : Sweet & Maxwell, 1956), p. 21. The cited statement offers a direct challenge to and refutation of the so-called "intentional fallacy" as commonly practiced in contemporary biblical interpretation; see John Warwick Montgomery (ed.), *God's Inerrant Word* (Minneapolis : Bethany, 1974), pp. 30-31, 41.

6. Gibbons v. Ogden, 9 Wheaton 187-89 (1824).
7. Francis Bacon, *The Advancement of Learning*, II. 20. viii.
8. Roland Burrows, *Interpretation of Documents* (2d ed.; London : Butterworth, 1946), p. 13.
9. Roberto Unger, *The Critical Legal Studies Movement* (Cambridge, Mass. : Harvard University Press, 1986); Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass. : Harvard University Press, 1987); Peter Fitzpatrick and Alan Hunt (eds.), *Critical Legal Studies* (Oxford : Basil Blackwell, 1987); and cf. Costas Douzinas, Ronnie Warrington, and Shaun McVeigh, *Postmodern Jurisprudence* (London : Routledge, 1993), especially chap. 3 ("Hermes versus Hercules : Hermeneutics and Aesthetics As Legal Imperialism"), pp. 55 - 73, 274.
10. See especially J. W. Harris, "Legal Doctrine and Interests in Land," in *Oxford Essays in Jurisprudence*, Third Series, ed. John Eckelaar and John Bell (Oxford : Clarendon Press, 1987), pp. 167-97.
11. Ronald Dworkin, *Law's Empire* (Cambridge, Mass. : Harvard University Press, 1986), p. 52.
12. *Ibid.*
13. Ronald Dworkin, in *Law, Morality and Society : Essays in Honour of H. L. A. Hart*, ed. Hacker and Raz (Oxford : Oxford University Press, 1977), pp. 58-83.
14. Robert Bork, interview in "Bork v. Tribe on Natural Law, the Ninth Amendment, the Role of the Court," *Life*, Fall Special, 1991, pp. 96-99. For his position in detail, see Bork, "Neutral Principles and Some First Amendment Problems," 47/1 *Indiana Law Journal* (Fall, 1971); Bork, *The Tempting of America* (New York : The Free Press, 1990); and cf. Ethan Bronner, *Battle for Justice : How the Bork Nomination Shook America* (New York : W. W. Norton, 1989).
15. For examples of the contribution of Wittgensteinian analysis to legal hermeneutics, though centering more on the *Philosophical Investigations* than on the *Tractatus Logico - Philosophicus*, see Jim Evans, *Statutory Interpretation : Problems of Communication* (corrected ed.; Auckland, New Zealand : Oxford University Press, 1989), pp. 16-19, 25-26, 29-30, 188.
16. See John Warwick Montgomery, "The Theologian's Craft," in his *The Suicide of Christian Theology* (Minneapolis : Bethany, 1970), pp. 267-313.
17. The corresponding principle of classical biblical hermeneutics in that extra-biblical materials may be used ministerially, but never magisterially, in the interpretation of the sacred text. On the English legal scene, the opinion prevails in some quarters that the recent House of Lords decision in *Pepper (Inspector of Taxes) v. Hart and Others* (*Times Law Report*, 30 November 1992) erodes the fundamental hermeneutic principle that statutes must interpret themselves, since it allows the record of Parliamentary debate ("Hansard") to assist in interpreting them. However, *Pepper* emphatically does not displace the classic rule, for the decision expressly makes "a limited modification to the existing rule, subject to strict safeguards." These are : (1) use of Hansard is allowed only "as an aid to construing legislation which [is] ambiguous or obscure or the literal meaning of which led to absurdity" and only "where such material clearly discloses the mischief aimed at" by the legislation; and (2) even in such instances, it is highly unlikely that any use can legitimately be made of a Parliamentary statement "other than that of the minister or other promoter of a Bill." Thus *Pepper* is little more than a gloss on the golden rule and the mischief rule of the classic canons of legal hermeneutics (see rules 3. and 4. in the list corresponding to note 3, *supra*).
18. The medieval "fourfold" interpretive scheme built upon a historical-grammatical foundation : the figurative, moral and anagogical levels of exegesis always had their starting-point in the literal meaning of the text. Thus the genuine differences between "Catholic" and "Protestant" hermeneutics must not be allowed to obscure their common foundation.
19. Eugene F. A. Klug, "'Sensus Literalis' -- das Wort in den Wörtern, eine hermeneutische Meditation vom Verstehen der Bibel," 12/5 *Evangelium* (December, 1985), 165-75.
20. Cf. Bultmann's seminal essay, "Is Exegesis Without Presuppositions Possible?," conveniently available in English translation in Kurt Mueller-Vollmer (ed.), *The Hermeneutics Reader : Texts of the German Tradition from the Enlightenment to the Present* (Oxford : Basil Blackwell, 1986), pp. 241-48.
21. Roy J. Howard, *Three Faces of Hermeneutics : An Introduction to Current Theories of Understanding* (Berkeley : University of California Press, 1982), pp. 165-66. On the varieties of contemporary higher criticism, see Steven L. McKenzie and Stephen R. Haynes (eds.), *To Each Its Own Meaning : An Introduction to Biblical Criticisms and Their Application* (London : Geoffrey Chapman, 1993).

- 22.** A.N. Sherwin-White, *Roman Society and Roman Law in the New Testament* ("Sarum Lectures, 1960 - 1961"; Oxford : Clarendon Press, 1963), p. 187. On the scholarly problems with form - and redaction-criticism, see the references in John Warwick Montgomery, Letter to the Editor, 3/12 *Ecclesiastical Law Journal* 45-46 (January, 1993); and John Warwick Montgomery, "Why Has God Incarnate Suddenly Become Mythical?," in *Perspectives on Evangelical Theology : Papers from the 30th Annual Meeting of the Evangelical Theological Society*, ed. K. S. Kantzer and S. N. Gundry (Grand Rapids, Mich. : Baker Book House, 1979), pp. 57-65.
- 23.** See, for example, Gerhard Maier, *Biblical Hermeneutics*, trans. Robert W. Yarbrough (Wheaton, Ill. : Crossway Books, 1994), and Anthony C. Thiselton, *New Horizons in Hermeneutics* (Grand Rapids, Mich. : Zondervan, 1992).
- 24.** Cf. Montgomery, *Suicide of Christian Theology*, loc. cit.
- 25.** J.A. Bengel, Preface to his manual edition of the Greek New Testament (1734). Translation : "Apply thyself entirely to the text : [then] apply the entire subject matter to thyself."