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Book Review: Legal Hermeneutics: History, Theory, and Practice. Edited by Gregory Leyh.

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I would hope that veteran Court-watchers will focus on this problem and propose creative solutions. Critiques like Professor Goldstein's will help to draw attention to the problems with the June opinions. The Justices seem to have solved past problems with screening cases, as evidenced by the notable fall-off in the number of cases granted review in the last few Terms.³⁷ We can hope that Professor Goldstein's audience next will address the problems caused by the June Crunch:

There are ways for the Court to maintain a current docket without the cost associated with the end-of-term onslaught of opinions. If, and as, the Court fashions an alternative, it will again demonstrate leadership in accommodating the demands of the judicial process to the public's interest in keeping abreast of the work of its government.³⁸

This kind of leadership would result in real progress towards the goal of making the Constitution intelligible to We the People.³⁹

LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE. Edited by Gregory Leyh.¹ Berkeley: University of California Press. 1992. Pp. xix, 325. \$45.00.

*Paul Campos*²

I

Seven hundred years ago, amid the orange groves of Catalonia, there lived a man named Abraham ben Samuel Abulafia. He was a Spanish Jew whose only passion was the study of God's words, and on a languid Mediterranean afternoon his sleep was troubled by a voice in a dream:

The words of the Holy One, blessed be He, are not like our words. Men speak and write with whatever signs chance might

37. Linda Greenhouse, *Washington Talk; Mystery for Court: Case of the Dwindling Docket*, N.Y. Times, July 9, 1990, at 10, col. 4; Tony Mauro, *Light Schedule Leads to Tight Deadlines*, Legal Times, Feb. 17, 1992, at 8. See generally Samuel Estreicher and John Sexton, *Redefining the Supreme Court's Role* (Yale U. Press, 1986); Thomas E. Baker, *Siskel and Ebert At The Supreme Court*, 87 Mich. L. Rev. 1472 (1989) (book review).

38. Editorial, 76 *Judicature* at 42 (cited in note 35). Not everyone is sanguine. See Tony Mauro, *Relieving the Pain of the "June Crunch"*, Legal Times, July 20, 1992, at 12 (concluding "nothing can be done").

39. See also *Report of the Federal Courts Study Committee* 164-65 (Apr. 2, 1990) (discussing the importance of effective judicial communications with the press and public).

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lend them for giving form to their fragmentary thought. Yet the thoughts of the Divine Mind are whole and complete. Chance can play no role in His speech: His words are not like our words.

When he awoke from this dream he could not remember it, but he knew he had heard and then forgotten something of infinite value. With a head still heavy from sleep and the burden of his loss, he turned to the beginning of the sacred books. He read a single word: *Bereshith*. In the beginning. What, he asked himself, is the beginning of this beginning? It is a single letter: *beth*. Why would the Holy One, blessed be He, choose to begin all beginning with this letter? How (he pondered) are we instructed to begin—meals, marriages, Torah study? With a *blessing* (Spanish: *bendicion*, Hebrew: *baruch*). Blessing begins with *beth*; He, too, begins the first beginning with a blessing.

II

The arcane techniques of the Cabalists, which assumed that even the very letters of the sacred texts—their order, their numerical significance, their occurrence in other words—were full of meaning, followed logically, one might even say inexorably, from their interpretive assumptions. Foremost among these was their knowledge that the text's author was an all-knowing, omnipotent Being. Such an author would necessarily produce an absolute text: that is, a perfect, noncontingent work, the product of an infinite intelligence, whose meanings would be ineluctably adequate to every conceivable interpretive situation.

The extreme nature of Cabalistic interpretation flowed from the complexity of the task they set for themselves. Having been given a text which by definition contained the answer to any significant question, the Cabalists knew that finding that answer must be a matter of discovering a sufficiently complex method for decoding the plenitude of meanings hidden among the letters of the sacred text. Hence they developed the fantastically elaborate interpretive system set forth in their most famous work, *The Book of Splendor*, also known as *The Zohar*.³

III

Seven hundred years later, a group of distinguished authors have furthered the development of a somewhat different hermeneu-

3. An excellent introduction to this literature is Gershom G. Scholem, *Major Trends in Jewish Mysticism* (Schoken Books, rev. ed. 1946).

tic discourse.⁴ *Legal Hermeneutics* joins Sanford Levinson's and Steven Mailloux's earlier collection of essays⁵ in announcing the arrival of yet another European model which threatens to cut into the market share of domestic legal theory.

Although "hermeneutics" can mean simply "interpretation," the word has become most commonly associated with the interpretive theories of the German philosopher Hans-Georg Gadamer. *Legal Hermeneutics* confirms the trend: fully half the essays in this collection advocate an essentially Gadamerian approach to interpretation.⁶ For example, consider Jerry Stone's description of the Aristotelian concept of praxis, i.e., "the reflective application of one's tradition":

But praxis cannot occur without dialogue between the two horizons [that is, between the respective epistemic fields of the reader and the text], and fortunately our present horizon is not so confining as to preclude such a dialogue, says Gadamer. Just as our physical horizon moves ahead as we approach it, so our cultural horizon expands as we reach its edges, edges where we dialogically engage our past horizon—our tradition—as it meets us in its own linguistic form.

Gerald Bruns sees Gadamer's vision of law as a potentially therapeutic force that could, if properly understood, save legal thinkers from oscillating between shallow formalism and fashionable despair:

[L]egal theory generally needs to loosen up its notion of rationality . . . Gadamer's notion of hermeneutics, which attempts

4. *Legal Hermeneutics* includes essays by: Fred Dallmayr on the hermeneutic contribution to the ongoing struggle to distinguish law from politics; Gerald L. Bruns on the limits of language, legal and otherwise; Peter Goodrich on the social history of sixteenth-century English legal apologetics; James Farr on Francis Lieber's introduction of European hermeneutics to the American legal system of the 1830s; Jerry H. Stone on the intersection of theory and practice in theological exegesis; Terence Ball on the flaws inherent in any originalist account of constitutional meaning; Drucilla Cornell on the (in her view) misuse of the philosophy of Derrida by certain critical legal scholars to support a radically skeptical concept of the ethical; David Couzens Hoy, critiquing the intentionalist account of textual meaning put forth by Steven Knapp and Walter Benn Michaels; Steven Knapp and Walter Benn Michaels, replying to Hoy's critique; Ken Kress on the relationship between arguments about legal indeterminacy and disputes concerning legal legitimacy; Lief H. Carter on his experiences during a week-long judicial retreat which he attended in order to determine whether judges were "foundationalist" or "pragmatic" in their jurisprudential practices; Michael J. Perry on why he believes constitutional theory matters to constitutional practice; Gregory Leyh on how an hermeneutic theory could improve legal education; and Stanley Fish, who comments on the other essays in the collection.

5. Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Nw. U. Press, 1988).

6. Gadamer's account of the hermeneutic inquiry is favorably received in the essays by Dallmayr, Bruns, Stone, Ball, Hoy, Perry and Leyh.

(among other things) to clarify the practical rationality of life in terms of *phronesis* [practical reason] as against procedural and instrumentalist reasoning, shows at least that one does not have to choose between uncritical, implausible accounts of legal reasoning and apocalyptic visions of crisis, irrationality, skepticism, nihilism, and despair.

And Gregory Leyh suggests that a Gadamerian account of the phenomenology of judging might be a useful addition to the law school syllabus.

[Gadamer's] account of legal judgment illuminates a mental operation the attainment of which is one objective of a humanistically oriented education in law. One thing a student might acquire from studying the phenomenology of judging is that the making of sound judgments—in law as in life—is not a matter of appealing to universals, original meanings, or inflexible rules.

William Eskridge has summed up the Gadamerian approach to interpretation:

Hermeneutics stresses the multidimensional complexity of [legal] 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.⁷

A skeptical reader might note that all these suggestions seem to fall under the heading of "exhortation"⁸ or (less politely) "moral cheerleading."⁹ Indeed, hermeneutic theory appears to be joining "pragmatism" and "contextualism" in the race to deploy the greatest number of platitudes per square inch of law review paper.

Now platitudes are not necessarily bad things. But do we really need any more books and articles imploring us to reason "dialogically," to interpret "contextually," to be suspicious of "rigid rules and inflexible categories?" The legal literature is enduring a blizzard of texts that often read like nothing so much as a series of annotated fortune cookies.

Which is a shame. For hermeneutics, or more broadly "the turn toward interpretation," does have a valuable role to play in the development of legal thought.

7. William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609, 633 (1990).

8. See Steven D. Smith, *The Pursuit of Pragmatism*, 100 Yale L.J. 409, 444 (1990).

9. See Stanley Fish, *Dennis Martinez and the Uses of Theory* 96 Yale L.J. 1773 (1987).

IV

Samuel Johnson is supposed to have remarked that, if he heard the world was about to come to an end, he would move to Holland because everything happened there thirty years later than everywhere else. Legal scholarship is only now beginning to confront certain fundamental questions of semantic meaning ("What does it mean to 'interpret' a text? What is a 'text'?")¹⁰ that have been at the center of philosophical and literary critical debates for a generation.

For instance, more than a decade has passed since the literary critics Steven Knapp and Walter Benn Michaels unleashed a comprehensive attack on linguistic formalism that has not, to my knowledge, been successfully answered.¹¹ Their critique of formal accounts of semantic meaning must be dealt with, directly or indirectly, by anyone who aspires to give a coherent account of textual interpretation. And yet, although their pieces are often cited in the fancier legal literature on interpretation, the continuing assumptions of that literature—that there is a difference between textual and contextual meaning, that "authorial intent" is an interpretive *method*, and that one can therefore choose *how* to interpret a text—provide evidence of the superficial fashion in which their work has been (mis)understood.¹²

The inadequacy of the standard legal academic responses to ideas imported from other disciplines has been lamented often enough. The current arguments about interpretation provide yet another example of this tendency. All the fundamentally interesting questions are begged at the very beginning of the enterprise: instead of inquiring into questions of how texts come to have meanings, or, more radically, *whether* they have meanings, the ontological status of "the text of the —" as an adequate mode of signification is simply *assumed*, so that we can turn at once to the unspeakably important task of informing Hercules, J., about the fas-

10. Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)* at 241 in *Legal Hermeneutics: History, Theory, and Practice*.

11. See Steven Knapp and Walter Benn Michaels, *Against Theory*, 8 *Critical Inquiry* 723 (1982); *A Reply to Our Critics*, 9 *Critical Inquiry* 790 (1983); *A Reply to Richard Rorty: What Is Pragmatism?*, 11 *Critical Inquiry* 466 (1985); *Against Theory 2: Hermeneutics and Deconstruction*, 14 *Critical Inquiry* 49 (1987). The points Knapp and Michaels make regarding constitutional interpretation in their contribution to *Legal Hermeneutics* are extensions of the arguments they put forward in these essays.

12. See Paul Campos, *Against Constitutional Theory*, 4 *Yale J.L. & Humanities* 279 (1992). For a critique of Gadamarian hermeneutics in an explicitly legal context, see Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 *Minn. L. Rev.* — (1993).

cinating new brand of interpretation that will speed us toward social justice on issues X, Y and Z.

Like some sort of secular Cabalist, the legal hermeneutician erects his stupendously elaborate interpretive structure around statutes, legislative histories, administrative orders and, of course, judicial opinions, without first pausing to reflect on whether these linguistic emanations are capable of supporting the burden of the meanings he assumes they must contain. That these bureaucratized texts *are* capable of the semantic tasks required of them is, for the hermeneutic interpreter, not a conclusion, but rather an article of faith.

V

Aspiring legal hermeneuticians would do well to heed Meir Dan-Cohen's recent comments on sincerity as an essential attribute of textual meaning. Dan-Cohen refers to the ubiquitous AT&T operator's automatic use of the phrase "Thank you for using AT&T" as an example of a purely "strategic" utterance; that is, as a statement which has primarily an institutional rather than a linguistic meaning:

If the telephone operator's recitation of thanks is not designed to express his gratitude, what is it designed to do? The answer is suggested by the bureaucratic setting in which the utterance is made. . . . Seen in this light, the point of the operator's mock politeness is rather clear: it simply serves the business purpose of trying to secure customers' continued patronage. This rather obvious interpretation of the "thank you" practice marks it as an instance of strategic communication: the utterance does not perform its usual linguistic function indicated by its [presumptive] content (i.e., the expression of the speaker's gratitude) but is rather used for a predetermined purpose that is ulterior to that function and that content.¹³

Dan-Cohen's observations might lead one to compare with each other such disparate texts as:

In the beginning, gods create the heavens and the earth,
and

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon

13. Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. Colo. L. Rev. 569, 578 (1992).

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,¹⁴

and

Thank you for using AT&T.

The first text could once be read—can perhaps still be read—as a fountain of infinite meaning; the last statement is properly understood not as a text, but as a literally mindless and therefore semantically meaningless utterance: a product of bureaucratic imperatives rather than of any signifying agent.¹⁵

And as for that atrocious middle sentence? No doubt a platoon of dauntless hermeneuticians are already at work, striving to make it the best legal utterance it can be. Nevertheless, we should consider the possibility that, at the end of the millennium, amid the soulless machines that construct our bureaucratized texts, the law's words may not be like our words after all.

DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT. By H.W. Perry, Jr.¹ Cambridge, Mass. and London, England: Harvard University Press. 1991. Pp. ix, 308 (including appendix). \$39.95.

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When Phil Frickey asked me to review *Deciding to Decide*, he predicted I would not be able to set the book down. He was right. Forged from firsthand interviews with five Supreme Court Justices and 64 former Supreme Court clerks, H.W. Perry's book provides a fascinating inside look at the Court's case-selection process. The book was of special interest to me both because I once served as a law clerk and because I did so during the very time period Perry

14. Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1075.

15. As Joseph Vining puts it, "Words themselves cannot speak." For a fascinating meditation on the implications of bureaucratic processes for the production and interpretation of legal texts, see Joseph Vining, *The Authoritative and the Authoritarian* 26 (U. of Chi. Press, 1986).

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2. Associate Professor of Law, University of Georgia. Copyright © 1993, Dan T. Coenen. The author thanks the following friends who commented on this review: Peter J. Kalis, Geoffrey P. Miller, William J. Murphy, Robert V. Percival, Paul Schectman, James C. Smith, David O. Stewart, Michael J. Wahoske and Rebecca H. White.