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# CRITICAL HERMENEUTICS: THE INTERTWINING OF EXPLANATION AND UNDERSTANDING AS EXEMPLIFIED IN LEGAL ANALYSIS

GEORGE H. TAYLOR\*

## INTRODUCTION

One of the most vexing questions in hermeneutics is whether it can be critical—whether it can engage in critique. The nature and importance of the question are better revealed by situating the issue within the larger context of recent hermeneutic analysis. One of the many advances of hermeneutics, it is said, is its contribution to the “interpretive turn” in the humanities and social sciences.<sup>1</sup> In the well-known words of anthropologist Clifford Geertz, analysis of culture is now taken to require “not an experimental science in search of law but an interpretive one in search of meaning.”<sup>2</sup> While the interpretive turn is more commonplace in the humanities, it has gained many adherents in the social sciences as well<sup>3</sup> and has led, for example, to the rise of narrative approaches in both law<sup>4</sup> and sociology.<sup>5</sup>

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1. See, e.g., *THE INTERPRETIVE TURN: PHILOSOPHY, SCIENCE, CULTURE* (David R. Hiley et al. eds., 1991). Another symposium participant, John Valauri, has an essay in this volume. See John T. Valauri, *Constitutional Hermeneutics*, in *THE INTERPRETIVE TURN: PHILOSOPHY, SCIENCE, CULTURE*, *supra*, at 245.

2. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973).

3. See generally *INTERPRETIVE SOCIAL SCIENCE: A READER* (Paul Rabinow & William M. Sullivan eds., 1979).

4. The debate on the role of narrative in law has been rich. See, e.g., *LAW'S STORIES: NARRATIVE AND RHETORIC IN LAW* (Peter Brooks & Paul Gewirtz eds., 1996); ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). Although much of this scholarship retains a critical element, other scholarship has been sharply oppositional to narrative. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997). Jay Mootz has responded eloquently to the Farber and Sherry critique. See Francis J. Mootz III, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605 (1998) (reviewing FARBER & SHERRY, *supra*).

5. See, e.g., PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

Traditionally, the divide between those in search of meaning and those in search of law is understood to be one between “understanding” and “explanation.” Hermeneutics, in this conception, falls on the side of understanding, while the natural sciences—and social sciences attempting to emulate them—fall on the side of explanation. A rich literature has explored the differentiation.<sup>6</sup> Gadamer’s *Truth and Method*,<sup>7</sup> first published in 1960, can be seen as an argument encapsulated in its title: truth *versus* method, an argument in favor of openness to truth and understanding through hermeneutic inquiry and an objection to the arms-length, interrogatory method of explanation found in the social and natural sciences. In the Gadamer-Habermas debate,<sup>8</sup> Gadamer’s affinity is with understanding while Habermas’s is ultimately with explanation.

In my view, one of the signal contributions of Paul Ricoeur’s work is his attempt to mediate, from *within* hermeneutics, the debate between understanding and explanation. Ricoeur applauds, for example, Habermas’s efforts to develop a critical social science, but in turn criticizes Habermas for his failure to appreciate that these critical sciences must finally be resituated within hermeneutics. “The critical social sciences,” writes Ricoeur, “allow us to make the detour required to *explain* the principle of distortion, a detour necessary so that we may recapture for *understanding* and self-understanding what in fact has been distorted.”<sup>9</sup> In other writings, Ricoeur explores the interrelation between understanding and explanation in broader strokes,<sup>10</sup> and more generally it seems to me that the tension between

6. See, e.g., KARL-OTTO APEL, UNDERSTANDING AND EXPLANATION: A TRANSCENDENTAL-PRAGMATIC PERSPECTIVE (Georgia Warnke trans., MIT Press 1984) (1979); GEORG HENRIK VON WRIGHT, EXPLANATION AND UNDERSTANDING (1971); UNDERSTANDING AND SOCIAL INQUIRY (Fred R. Dallmayr & Thomas A. McCarthy eds., 1977).

7. See generally HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., Crossroad 2d rev. ed. 1989) (1960).

8. See, e.g., Hans-Georg Gadamer, *Rhetoric, Hermeneutics, and the Critique of Ideology: Metacritical Comments on Truth and Method*, in THE HERMENEUTICS READER 274 (Kurt Mueller-Vollmer ed., 1985); Jürgen Habermas, *On Hermeneutics’ Claim to Universality*, in THE HERMENEUTICS READER, *supra*, at 294.

9. PAUL RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA 236 (George H. Taylor ed., 1986) (emphasis added) [hereinafter RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA]. This book contains two lectures on Habermas. See *id.* at 216, 232. Ricoeur evaluates the Gadamer-Habermas debate in two other essays. See PAUL RICOEUR, *Hermeneutics and the Critique of Ideology*, in HERMENEUTICS AND THE HUMAN SCIENCES: ESSAYS ON LANGUAGE, ACTION AND INTERPRETATION 63 (John B. Thompson ed., trans., 1981) [hereinafter HERMENEUTICS AND THE HUMAN SCIENCES]; Paul Ricoeur, *Ethics and Culture: Habermas and Gadamer in Dialogue*, in POLITICAL AND SOCIAL ESSAYS 243 (David Stewart & Joseph Bien eds., 1974).

10. See PAUL RICOEUR, *What Is a Text? Explanation and Understanding*, in HERMENEUTICS AND THE HUMAN SCIENCES, *supra* note 9, at 145; PAUL RICOEUR, *The Model of the Text: Meaningful Action Considered As a Text*, in HERMENEUTICS AND THE HUMAN SCIENCES,

understanding and explanation lies at the heart of Ricoeur's theory of interpretation. Interpretation, he claims, "functions at the intersection of two domains . . . . On one side, interpretation seeks the clarity of the concept [i.e., explanation]; on the other, it hopes to preserve the dynamism of meaning [i.e., understanding] that the concept holds and pins down."<sup>11</sup> A few pages later, Ricoeur writes of "the *dialectic* that reigns between the experience of belonging as a whole and the power of distancing that opens up the space of speculative thought."<sup>12</sup>

What is especially intriguing to me in these statements is to see Ricoeur's emphasis that *internal* to interpretation is work seeking "the clarity of the concept," work acknowledging the inexorability *within* interpretation of "distancing that opens up the space of speculative thought." The dialectic is not one that proceeds from naive understanding through a separate stage of explanation and then back to more critical understanding; the element of distance, analysis, critique is persistent throughout.<sup>13</sup> Indeed, in more recent work Ricoeur types the vocabulary of understanding and explanation outmoded, preferring instead the terms "nomological explanation"—explanation by laws—and "explanation by emplotment"<sup>14</sup>—explanation by narrative. To narrate, he writes, "is already to explain."<sup>15</sup> To tell a story is more than to recite a chronology; a narrative is a

*supra* note 9, at 197, 209-21 [hereinafter RICOEUR, *The Model of the Text*]; PAUL RICOEUR, *Explanation and Understanding: On Some Remarkable Connections Among the Theory of the Text, Theory of Action, and Theory of History*, in THE PHILOSOPHY OF PAUL RICOEUR: AN ANTHOLOGY OF HIS WORK 149 (Charles E. Reagan & David Stewart eds., 1978) [hereinafter RICOEUR, *Explanation and Understanding*].

11. PAUL RICOEUR, THE RULE OF METAPHOR: MULTI-DISCIPLINARY STUDIES OF THE CREATION OF MEANING IN LANGUAGE 303 (Robert Czerny et al. trans., Univ. Toronto Press 1977) (1975) [hereinafter RICOEUR, THE RULE OF METAPHOR]. This definition of interpretation is a more nuanced conception of a theme with origins much earlier in Ricoeur's corpus. In *The Symbolism of Evil*, Ricoeur's phrase is: "The symbol gives rise to thought." PAUL RICOEUR, THE SYMBOLISM OF EVIL 348 (Emerson Buchanan trans., 1967).

12. RICOEUR, THE RULE OF METAPHOR, *supra* note 11, at 313 (emphasis added). Distancing allows the possibility of critique "not without, but within hermeneutics." Paul Ricoeur, *Can There Be a Scientific Concept of Ideology?*, in PHENOMENOLOGY AND THE SOCIAL SCIENCES: A DIALOGUE 44, 59 (Joseph Bien ed., 1978). Elsewhere I explore at somewhat greater length these larger dimensions of Ricoeur's interpretive theory. See George H. Taylor, *Editor's Introduction to RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA*, *supra* note 9, at ix, xxiii-xxxv.

13. Sometimes in Ricoeur's work it appears that the stages are more separable, see, e.g., RICOEUR, *The Model of the Text*, *supra* note 10, but that apprehension must be modified by statements in the same works that "[u]nderstanding is entirely mediated by the whole of explanatory procedures which precede it and accompany it." *Id.* at 220.

14. 1 PAUL RICOEUR, TIME AND NARRATIVE 181 (Kathleen McLaughlin & David Pellauer trans., Univ. Chicago Press 1984) (1983).

15. *Id.* at 178.

*construct*, an effort to interrelate heterogeneous circumstances.<sup>16</sup>

I will not pursue Ricoeur's analysis further here, but his insights inspire the remainder of my remarks, where I will largely turn to legal inquiry. For convenience I will retain the vocabulary of understanding and explanation and will proceed in the following manner. In Part I of this Article, I will show how within legal hermeneutics the element of critique is present even within those forms of legal interpretation most adherent to stances of "understanding." Here I will concentrate on the work of Robert Bork and Justice Antonin Scalia and demonstrate how distance, separation, critique is present within their theories. In Part II, I will reverse emphases and show how elements of "understanding" persist within legal theories most avowedly reliant on forms of "explanation." My exemplar here is recent work of Judge Richard Posner.<sup>17</sup> In Part III, I will explore Judge Posner's larger critique of much contemporary legal theory, in particular his criticisms of what he calls "top down" theory and "bottom up" theory. My claim here is that the dialectic between understanding and explanation that forms the character of hermeneutics (explored in Parts I and II) responds to Posner's critique. Finally, in Part IV, I will assess the import for law of its being a product of both understanding and explanation. If Geertz differentiates between "an experimental science in search of *law*" and "an interpretive one in search of meaning," how is it possible to recover a sense of "law" within the legal domain that encompasses both? To address this issue, I will briefly advert to some work in evolutionary theory by biologist Ernst Mayr. Mayr claims that evolutionary biology itself does not proceed on the basis of deterministic "laws." Mayr's example from within the natural sciences reinforces the point that there are other forms of "expla-

16. *See id.* Some postmodernist criticism condemns hermeneutics for imposing order—a narrative—on the heterogeneous and challenges the very possibility of meta-narrative. *See, e.g.,* JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE*, at xxiii-xxiv (Geoff Bennington & Brian Massumi trans., Univ. Minn. Press 1984) (1979) (criticizing appeals "to some grand narrative, such as . . . the hermeneutics of meaning" and arguing instead for an "incredulity toward metanarratives"). In other work I have examined the Derridean objections to Ricoeur's hermeneutics and argued that Derrida's portrayal inappropriately reduces the complexity of Ricoeur's project. *See* George H. Taylor, *Justice As Postmodern?* (2000) (unpublished manuscript, on file with author). For Ricoeur, narrative does not subsume discordance, but rather presents a "dialectic between discordance and concordance." RICOEUR, *supra* note 14, at 161. I return to this point later in this Article. *See infra* note 97 and accompanying text.

17. I reserve to Part III a brief evaluation of Judge Posner's claim that his pragmatic approach is anti-interpretive in its valuation of attention to the potential *consequences* of judicial decision making in a particular case. *See infra* Part III.

nation” than nomological explanation, explanation by “law.” Mayr’s work also provides a useful counterpoint to Posner, who invokes evolutionary biology as a more nomological form of explanation. My thesis, then, is that there is a fundamental dialectic between understanding and explanation: each lies at the heart of the other.<sup>18</sup>

## I

My first object is to examine the work of legal thinkers most closely identified with an interpretive stance that could stereotypically be described as one of “understanding.” Authors such as Robert Bork and Justice Scalia define their interpretive approaches as ones that emphasize fidelity to the authors of the Constitution or statutory texts. They reject that readers of these texts—*e.g.*, judges—should have a role in contributing to these texts’ meaning; deference must be paid to the authors. Bork indeed calls his approach one of “original understanding.”<sup>19</sup> Originalism might seem to represent some of the virtues commonly associated with hermeneutic understanding: it emphasizes the importance of hearing the other,<sup>20</sup> rather than imposing one’s own views on the other. Yet consider Bork’s analysis of the Supreme Court’s decision in *Brown v. Board of Education*.<sup>21</sup> Bork famously rejects the Court’s reasoning yet agrees with the Court’s result.<sup>22</sup> Bork maintains that the Court’s conclusion that segregated education is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment can be defended—and must only be defended—on the basis of an originalist methodology.<sup>23</sup> How,

18. To be more precise, I argue that the dialectic exists within the disciplinary areas analyzed. I do not enter into the debate over the “objectivity” of the “hard” natural sciences such as physics. *See, e.g.*, ALAN SOKAL & JEAN BRICMONT, *FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS’ ABUSE OF SCIENCE* (1998). The impetus for the book was a Sokal article that seemed to argue that the natural sciences are a social construction; however, later Sokal showed the article be a parody of that position. *See* Alan Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, 46/47 *SOCIAL TEXT* 217 (1996), *reprinted in* SOKAL & BRICMONT, *supra*, at 212. The book develops the critique of the social constructivist position. For our purposes, it is perhaps revealing of the current distortions of the term hermeneutics that Sokal included it so readily in his parody title.

19. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990) (“[O]nly the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the design of the American Republic.”).

20. *See, e.g.*, GADAMER, *supra* note 7, at 462 (“[T]he primacy of hearing is the basis of the hermeneutical phenomenon . . .”).

21. 347 U.S. 483 (1954).

22. *See* BORK, *supra* note 19, at 75.

23. *See id.* at 82-83.

as a matter of the original “understanding,” can the Court’s conclusion be correct, though, when Bork also acknowledges that it is an “inescapable fact . . . that those who ratified the [fourteenth] amendment did *not* think it outlawed segregated education or segregation in any aspect of life”?<sup>24</sup> How can an originalist square this “inescapable fact” with the result in *Brown*? For Bork, the original understanding requires a focus not on original *intent*—what the framers subjectively thought—but on original *meaning*—what did they put into the constitutional text. “The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.”<sup>25</sup> Because the framers put equality into the text, and the concept of equality requires desegregation, it does not matter that the framers may have subjectively understood something different by the term. What was enacted was the text, not the framers’ intent.

This differentiation between meaning and text is echoed in the work of Justice Scalia.<sup>26</sup> In his recent book, *A Matter of Interpretation*,<sup>27</sup> Scalia writes that “despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law . . . .”<sup>28</sup> Later in the

24. *Id.* at 75-76 (emphasis added). Acceptance of this proposition is not universal. In part to counter the difficulties raised by Bork’s position, Michael McConnell strenuously argues that the framers of the Fourteenth Amendment did think it prohibited segregated education. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). McConnell’s argument is itself the subject of vigorous response. See, e.g., Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223 (1996). McConnell responds to Klarman in Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995). For my purposes it does not matter whether McConnell is “correct” (which I do not think he is). More important is that his interpretive stance is not endorsed by such important originalist methodological thinkers as Bork and Justice Scalia.

25. BORK, *supra* note 19, at 82.

26. In emphasizing the commonality here of Bork and Scalia, I am aware of but simply set aside as secondary their differences. For exploration of their differences, compare *Ollman v. Evans*, 750 F.2d 970, 993, 994 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (permitting the evolution in application of a constitutional principle), with *id.* at 1036, 1038 n.2 (Scalia, J., dissenting in part) (criticizing sharply any “alteration of preexisting principles”). In *The Tempting of America*, Bork defends and quotes at length his *Ollman* concurring opinion. See BORK, *supra* note 19, at 167-70.

27. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

28. *Id.* at 17. The specific context of Scalia’s remark is statutory interpretation. He later comments similarly about constitutional interpretation: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.” *Id.* at 38.

book, Scalia indicates that his approach holds in common with Ronald Dworkin's that both follow the "semantic intention" of a text rather than "the concrete expectations of lawgivers."<sup>29</sup> Scalia (and Bork) differ with Dworkin in adhering to an "originalist" understanding of textual meaning while Dworkin permits meaning to evolve, but it is extraordinary to see even this level of interpretive commonality between such otherwise diverse figures.

Elsewhere I consider at greater length the implications for legal interpretation of this commonality across diverse approaches.<sup>30</sup> What is remarkable for present purposes is the separation, internal to a conservative legal methodology, between different kinds of meaning. Even within conservative approaches, "understanding" is not simply passive recognition of and adherence to an unambiguous datum—authorial meaning—because authorial meaning can be interpreted in diverse ways. Further, once loosened from the notion of specific authorial intent—that is, from particular results or entailments that an author allegedly had in mind—the boundaries and delimitations of meaning are not self-evident. Scalia, Bork, and Dworkin all concentrate on textual meaning, but they can derive quite different meanings from the same text.<sup>31</sup> "Understanding" does not derive from some allegedly unambiguous "fact"—subjective authorial intentions. Understanding is rather *separable* from subjective authorial intention; it is a *construct* that requires an argument and a theory. It includes an element of *explanation*, of methodology (whether nomological or not) imposed upon the text. Explanation lies at the core of understanding

The separation in such figures as Bork and Scalia between subjective authorial intention and textual meaning provides some confirmation of the fundamental interrelation between understanding and explanation. My larger claim is that this interrelation is fundamental throughout hermeneutics, not just legal hermeneutics. It is instructive for this larger claim that the separation in legal analysis between subjective authorial intention and textual meaning echoes a similar separation found in the hermeneutics of Ricoeur and

29. *Id.* at 144.

30. See GEORGE H. TAYLOR, *THE DYNAMISM IN LEGAL INTERPRETATION* (forthcoming).

31. As I analyze in my book, *see id.*, once meaning is cut from a supposed anchor in subjective intent, interpretation opens itself to the problem of generality. On what textual grounds, for example, do we delimit whether the concept of equality in the Fourteenth Amendment entails protection for black people, for other racial minorities, for women, or for gays and lesbians? See, e.g., Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (developing the problem).



Gadamer.<sup>32</sup> Gadamer, for example, criticizes Friederich Schleiermacher's hermeneutics, which saw interpretation as a "divinatory process" by which the gap between author and interpreter is overcome.<sup>33</sup> Gadamer argues instead: "To understand what a person says is . . . to come to an understanding about the subject matter, not to get inside another person and relive his experiences . . ."<sup>34</sup> Ricoeur concurs, maintaining that understanding is "never a direct intuition but always a reconstruction."<sup>35</sup> Expanding on some of my earlier comments about Ricoeur, it seems to me that among his central contributions to hermeneutic analysis is his attention to the fact that interpretation is a reconstruction. This emphasis is highlighted in Ricoeur's preoccupation with hermeneutics as the interpretation of *texts*. The better exemplar for hermeneutics is not face-to-face dialogue but interpretation of a text. "[T]he text . . . is the paradigm of distanciation in communication. . . . [I]t is communication in and through distance."<sup>36</sup> Interpretation is not the unmediated meeting of subject and subject; it is inevitably mediated by signs and texts. Elsewhere, Ricoeur makes it plain that he understands his theory to apply not only to linguistic texts but to the textuality of action and history as well.<sup>37</sup>

Exploration of the role of explanation—of distance, of reconstruction—at the core of understanding requires one final point. Once we loosen interpretation from the supposed datum of subjective authorial intention, once interpretation becomes interpretation of texts, then hermeneutics loses priority as *the* proper method of text interpretation. There may now be different ways to analyze what is at work in the text, and hermeneutics is only one of them. This has at least two consequences. Hermeneutics itself can attempt to interpret a work (or body of work) to make it say what it does not want to, something other than its "intentions." Hermeneutics does not

32. In another work I explore in more detail the affinity here between hermeneutics and legal interpretation and contrast this affinity to the more subjectively oriented hermeneutics of Friederich Schleiermacher. See George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 327-29 (1995).

33. See GADAMER, *supra* note 7, at 193 (characterizing Schleiermacher's hermeneutics).

34. *Id.* at 383; see also *id.* at 311, 333.

35. RICOEUR, *supra* note 14, at 97.

36. PAUL RICOEUR, *The Hermeneutical Function of Distanciation*, in HERMENEUTICS AND THE HUMAN SCIENCES, *supra* note 9, at 131. Interestingly, on the page from which this excerpt is taken, Ricoeur objects to Gadamer's division between truth and method; Ricoeur wants to maintain their relation. Again, it seems Ricoeur is more attentive than Gadamer to the interconnection between understanding and explanation.

37. See, e.g., RICOEUR, *Explanation and Understanding*, *supra* note 10.

passively accept any perspective a text purports to put forth; it has its own interpretive agenda, its own goals for what it looks for in a text. In his analysis of Freud, for example, Ricoeur tries to show that internal to Freud's hermeneutic of "suspicion"<sup>38</sup>—its uncovering of the unconscious—is another hermeneutics that permits a restoration of meaning.<sup>39</sup> This interpretation of Freud may be just as little or just as much an imposition on Freud's texts as the hermeneutics of suspicion are imposed on the texts they analyze.<sup>40</sup> Hermeneutics has its own model of interpretive explanation/understanding. Second and correlatively, other interpretive approaches have their own model of explanation/understanding and when done well—which, as with hermeneutics, is a matter of judgment, argument, and persuasion—have their own viability. In this sense, deconstruction, to take another example, also tries to establish what is at work in the text. Hermeneutics does contain elements of explanation within its larger model of "understanding";<sup>41</sup> it does not rest on understanding alone, and in its interrelation of explanation with "understanding" shares this interrelation—this effort to analyze what is at work in the text—with other interpretive approaches.

## II

In this Part, I reverse emphases and attempt to show how elements of "understanding" pervade "explanation." My example is work of Judge Richard Posner. In his recent book, *The Problematics*

38. See PAUL RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* 32-36 (Denis Savage trans., 1970).

39. See, e.g., *id.* at 551. Ricoeur takes a similar interpretive tack when he analyzes Marx, another master of suspicion, *id.* at 32, and his theory of ideology. See RICOEUR, *LECTURES ON IDEOLOGY AND UTOPIA*, *supra* note 9, at 21-102.

40. Ricoeur is certainly aware of this tension in his approach. At the end of his second lecture on Weber—whose details I set aside—Ricoeur comments:

Some may claim that my reading of Weber, just as my reading of Marx, does violence to his text. By doing apparent violence to Marx, though, I think that I actually succeeded in reading *The German Ideology* better. . . . [M]y own stance is that this reading recognizes a dimension of the text. In fact, I would claim to have done more violence to Weber than to Marx. I forced Weber, I compelled him to say what he did not want to say: that it is through some ideological process that we take hold of our own motivation in relation to power.

*Id.* at 214-15.

41. In fact, Ricoeur's model attempts to incorporate not only its own "explanatory" model but as well other models of "explanation," such as the hermeneutics of suspicion. As I have argued elsewhere, if Ricoeur's hermeneutics has any advantage here over these other interpretive models, it is that it can incorporate their insights, while it is open to question whether they can incorporate Ricoeur, or at least a sophisticated account of Ricoeur. See TAYLOR, *supra* note 16 (discussing the example of deconstruction).

of *Moral and Legal Theory*,<sup>42</sup> Posner has a two-fold objective. He wants to dismiss the relevance of academic moral theory to particularized decisionmaking, including legal decision making<sup>43</sup>—a subject I return to in Part III—and he wants to proffer the relevance of the social sciences<sup>44</sup> in the alternative. The *pragmatic* approach that Posner endorses believes

that intuition and opinion and the rest can sometimes be educated by immersion in “the facts.” I have put this term between quotation marks to signal that it is to bear a wider meaning than in the law of evidence. It is a sense that takes in the analytic methods, empirical techniques, and findings of the social sciences (including history). In broadest terms, then, and with some exaggeration as we shall see, this book asks whether, when the methods of legal positivism fail to yield a satisfactory resolution of a legal issue, the law should take its bearings from philosophy or from science. And it answers, “from science.”<sup>45</sup>

The nature of Judge Posner’s reliance on social science is somewhat ambiguous. At times it seems that the social sciences can provide the “right answer” to a legal question. In Posner’s view, for example, antitrust law “has become a branch of applied economics, has achieved a high degree of rationality and predictability, and is a success story of which all branches of the law and allied disciplines can be proud.”<sup>46</sup> Elsewhere are statements that “the only sound basis for a legal rule is its social advantage, which requires an economic judgment, balancing benefits against costs.”<sup>47</sup> At other junctures, though, Judge Posner’s claims about the social sciences are more modulated. Economists, he writes, can estimate the private benefits and social costs of a policy, but it is left to others to determine “how much weight to give costs and benefits as a matter of social justice.”<sup>48</sup>

My concern, using Judge Posner’s work as a vehicle, is to explore whether the social sciences allow legal issues to be decided simply on

42. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

43. Posner writes:

[M]oral theorizing does not provide a usable basis for moral judgments (such as “abortion is bad” or “redistributing wealth from rich to poor is good”) . . . . [E]ven if moral theorizing can provide a usable basis for some moral judgments, it should not be used for making *legal* judgments. . . . [I]t does not mesh with the issues in legal cases.

*Id.* at 3.

44. As noted earlier, *supra* note 18, I basically restrict my attention to the social sciences also, although in Part IV, I make reference to evolutionary biology.

45. POSNER, *supra* note 42, at viii.

46. *Id.* at 229. It would be interesting to know whether Judge Posner’s immersion in the Microsoft antitrust case has modified his views.

47. *Id.* at 208.

48. *Id.* at 47.

the basis of social scientific *explanation*, or whether these explanations are themselves contestable both internally and on application and so permeated at both levels by issues of interpretive *understanding*. Let me take the following two statements by Judge Posner as a guide. In *Overcoming Law*, Posner writes that the scientist acts

not as the discoverer of the ultimate truths about the universe—truths that once discovered by the experts should be forced on the rest of us—but as the exposé of falsehoods, who seeks to narrow the area of human uncertainty by generating falsifiable hypotheses and confronting them with data.<sup>49</sup>

In his more recent book, Judge Posner expresses disdain for the expression of legal claims by moral and constitutional theory, whose vocabulary is “opaque and spongy,” and advocates instead legal claims’ conception in scientific terms, “for legal claims might then actually be falsifiable.”<sup>50</sup> The tasks of the social sciences here are more modest: not ultimate truth but falsifiability. Nevertheless, the issue is whether legal issues are resolvable on social scientific grounds alone or whether social scientific inquiry itself requires interpretive resolution and application, which are matters of argument and persuasion. My thesis here is that social scientific explanation does not have the status of fact, which can stand alone, but must be integrated within larger interpretive stories. My thesis contests not the value but the sufficiency of attention to social scientific insight.<sup>51</sup>

I take as suggestive of Judge Posner’s stance his response to the Supreme Court’s decision in *United States v. Virginia*.<sup>52</sup> There, the Court, in an opinion by Justice Ginsburg, held that it was

49. RICHARD A. POSNER, *OVERCOMING LAW* 6 (1995).

50. POSNER, *supra* note 42, at 204.

51. I therefore levy on hermeneutic grounds a critique of Judge Posner that resonates with criticisms others have advanced as well. See, e.g., Ronald Dworkin, *Philosophy and Monica Lewinsky*, N.Y. REV. BOOKS, March 9, 2000, at 48, 51 (reviewing POSNER, *supra* note 42) (arguing that when Judge Posner’s pragmatic judge tries to determine whether one set of projected consequences is better than another, this determination must rest on moral or political principles); Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 U. CHI. L. REV. 1447, 1461 (1990) (noting that law and economics principles such as wealth maximization are themselves dependent on “controversial visions of the way the world is or should be”). I set aside the differences between Fish and Dworkin. As I shall describe *infra* notes 91-100, 115 and accompanying text, Posner is aware of these criticisms and has attempted—though neither fully nor quite successfully—to integrate them in revisions of his own position.

52. 518 U.S. 515 (1996). For a separate discussion of Posner’s assessment of this decision, see Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287 (1999) (endorsing the role of empiricism in constitutional law but criticizing Posner for trying to replace constitutional theory with empiricism). Professor Merritt is replying to one of Judge Posner’s articles later incorporated into his *Problematics* book. See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).

unconstitutional under the Fourteenth Amendment for the Virginia Military Institute (“VMI”) to refuse to admit women.<sup>53</sup> VMI had claimed that the admission of women would eliminate its ability to maintain an “adversative” program of education, a program physically and psychologically stressful, intense, and invasive.<sup>54</sup> For Judge Posner, the VMI decision is a most apt representative of the kind of constitutional thinking he is arguing against. The issue is not the result but that the decision is “so barren of any engagement with reality that the issue of [its] correctness scarcely arises. The Achilles’ heel of constitutional law is the lack of an empirical footing, not the lack of a good constitutional theory.”<sup>55</sup>

What are the specific problems with the majority decision? Posner reads the opinion as supposing that the only major differences between men and women are physical and that these distinctions make no education-related differences. This is most inadequate, he claims.

Once the advance of science is conceded, it becomes appropriate to observe that, like many articles of faith, the “no difference” claim is contradicted by modern science. Modern science teaches that along with the obvious physical differences there are inherent *psychological* differences between the average man and the average woman, differences with respect to aggressiveness, competitiveness, the propensity to take risks, and the propensity to resort to violence. These are differences that, along with the acknowledged differences in physical strength, bear on military fitness and performance, especially in combat.<sup>56</sup>

So the Court is not being scientific in its refusal to face these facts. But compare the Court’s presentation. The issue for the Court is not whether women *in general* would choose to attend VMI but whether the school can lawfully deny admission to those women “who have the will and capacity.”<sup>57</sup> In contrast to the generalizations about women on which VMI rests, the Court notes the following findings of fact made by the lower courts: “some women, at least, would want to attend [VMI] if they had the opportunity” and “some women are capable of all of the individual activities required of VMI cadets.”<sup>58</sup>

53. For Judge Posner’s major discussion of the case, see POSNER, *supra* note 42, at 165-73.

54. See, e.g., *United States v. Virginia*, 518 U.S. at 549 (describing the adversative approach).

55. POSNER, *supra* note 42, at 182.

56. *Id.* at 167 (footnote omitted).

57. *United States v. Virginia*, 518 U.S. at 542.

58. *Id.* at 550 (citations omitted).

For the Court the relevant social scientific issue is not the capacity of all women or the average woman but of *some* women.

Judge Posner acknowledges that some women may be able to perform well at VMI<sup>59</sup> but then switches critical bases and argues that this fact is unrelated to whether the adversative program can be maintained when women are mixed with men.<sup>60</sup> The ultimate issue for Posner, then, is whether the exclusion of women from VMI does more harm to women than their entrance would do the school's adversative educational program. The harm to women, he argues, is slight,<sup>61</sup> and "the Court had no basis either theoretical or empirical for thinking that the admission of women would not impair VMI's educational program disproportionately to the slight harm to women of being excluded from the school."<sup>62</sup>

Judge Posner thinks throughout at the level of generalities, while the Court wants to protect the rights of individuals. Contrary to Judge Posner's statements, the Court does assess the empirical realities of women's capabilities and finds that some women can satisfy VMI's requirements. The Court holds that there is harm done to women by exclusion and that VMI has not shown that admission of women will adversely affect the school's ability to maintain an adversative education.<sup>63</sup> Admittedly, the Court does treat briefly the claim that the admission of women would require some alteration of VMI's program.<sup>64</sup> Its finding that these adjustments are "manageable"<sup>65</sup> does not directly respond to the claim that the adjustments diminish adversative education. The Court seems to rest on the fact that similar claims were made and subsequently laid to rest in other forms of education, including the admission of women to law school, medical school, and the federal military academies.<sup>66</sup> My sense is that the Court is taking the "experimental" stance that Judge Posner otherwise advocates<sup>67</sup> and saying to VMI: "You haven't proven a

59. See POSNER, *supra* note 42, at 167.

60. See *id.*

61. The harm, he says, is the difference between a VMI education and an alternative created by the state elsewhere, multiplied by the small percentage of women who would want to attend VMI. See *id.* at 171. Earlier, Posner recognizes exclusion may have some symbolic value but finds it a "laughable suggestion" that women's equal status depends in any degree on their admission to VMI. See *id.* at 169.

62. *Id.* at 171.

63. See *United States v. Virginia*, 518 U.S. at 542.

64. See *id.* at 540, 550 n.19.

65. *Id.* at 550 n.19.

66. See *id.* at 542-45.

67. See POSNER, *supra* note 42, at 254-55. Judge Posner elsewhere states:

harmful effect, so you are required to admit women. Evidence from the past suggests your fears about the effects of their admission on adversative education will be unfounded, but if necessary we can revisit the issue again when you have experience with actual evidence.”<sup>68</sup> In the absence of sufficient proof of harm to the school, the proper default position is that admission of women should go forward.<sup>69</sup>

The majority opinion’s treatment of social scientific evidence is intriguing on at least two grounds. First, the Court is skeptical about what the social sciences claim to show. On many occasions in the past, the social sciences have asserted—wrongly—that various forms of education would have adverse effects on women.<sup>70</sup> The social sciences proceed not on the basis of explanation alone—here, empirical “evidence”—but must integrate that evidence into interpretive theories of understanding that may well be incorrect or contested. Second, even if the present social scientific evidence—about average physiological and psychological differences between men and women—is accepted, it can be integrated into and applied by diverse forms of interpretive understanding. At this level, the debate is not between Judge Posner as defender of science and the

A pragmatic judge . . . need not have faith in any particular bodies of data as guides to making the decision that will best serve the future. . . . The less one thinks one knows the answers to difficult questions of policy, the more inclined one will be to encourage learning about them through experimentation and other methods of inquiry.

*Id.* at 248.

68. The difference, then, would be between a facial challenge to the constitutionality of VMI as a single-sex institution and a challenge as applied, once the real impact of women on VMI’s adversative educational process becomes more apparent. This incrementalist agenda seems consistent with larger themes in Justice Ginsburg’s jurisprudence. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

The evidence since women’s admission to VMI suggests that some women are indeed succeeding at the school. *See, e.g.*, Mary Anne Case, *Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership*, 1999 U. CHI. LEGAL F. 347 (documenting the successes of women both at VMI and in the alternative program set up at Mary Baldwin College, the Virginia Women in Leadership program of Case’s title). More recent newspaper accounts indicate a woman in the first co-ed VMI class has just been named one of the two student “battalion commanders” for her senior year and in that position will lead half the student body. According to the school, she was “the best-qualified candidate in terms of grades, leadership ability and physical fitness.” John Bacon, *Military School Gets 1st Female Leader*, USA TODAY, March 24, 2000, at 3A.

It remains a separate issue whether VMI’s admission of women has led to any diminution in its adversative educational program. Case provides evidence that women are being treated equally harshly as men, *see Case, supra*, at 374-75, and that individual program changes were not an accommodation to women, *see id.* at 373. Additional evidence would be necessary, though, to document the effect on VMI’s adversative approach more generally.

69. It is, of course, also an entirely separate issue whether VMI’s education is normatively desirable. For Case’s comparison of VMI and Virginia Women in Leadership, *see id.* at 378-79.

70. *See, e.g.*, United States v. Virginia, 518 U.S. at 536 n.9 (citing evidence).

Court but between different interpretations of science. As Judge Posner elsewhere acknowledges, it is inadequate to claim to rest simply on the “facts”—on empirical explanation—for the facts must be fit into an “analytic framework”<sup>71</sup>—into interpretive understanding. Judge Posner’s emphasis on empirical generalities is not required as a matter of science.<sup>72</sup> As he also acknowledges at points, his predisposition toward generalities fits the facts within his preferred analytic framework of utilitarianism, which he accepts is itself a contestable form of understanding.<sup>73</sup> Explanation must be contextualized within interpretive understanding.

### III

If Parts I and II have argued that understanding and explanation each pervade the other, this Part argues how this interrelationship may be recast. I again want to use Judge Posner’s work as a point of entry.

In his more subtle moments, Judge Posner has launched criticism of both “top down” and “bottom up” legal reasoning.<sup>74</sup> Top down approaches—Judge Posner uses Ronald Dworkin’s as exemplar—begin in general theory and argue it is possible to generate outcomes in specific legal cases on the basis of the theory.<sup>75</sup> Bottom up approaches begin with the particular, such as individual cases, and argue that outcomes in subsequent cases can be generated by induction—through processes such as analogy.<sup>76</sup> Over the course of his work, Posner has criticized bottom up reasoning at several junctures,<sup>77</sup> and his recent book, *The Problematics of Moral and Legal Theory*,<sup>78</sup> is an extended critique principally of top down approaches but also of bottom up theories. Posner finds neither approach persuasive. We never start simply from cases as the bottom up approach would suggest; we can read and interpret them only on the

71. POSNER, *supra* note 42, at 145-46.

72. As with VMI, then, it is not necessarily the case that “we are naturally more interested in typical than in exceptional situations.” *Id.* at 180. In Part IV, I return to this point and show that it is a mistake to believe that science itself necessarily concentrates on generalities.

73. See POSNER, *supra* note 42, at xii-xiii.

74. See, e.g., POSNER, *supra* note 49, at 171-97.

75. See *id.* at 172-73.

76. See *id.* at 173-75.

77. In addition to his Legal Reasoning chapter, *supra* note 74, see, for example, RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 86-98 (1990); POSNER, *supra* note 49, at 518-24.

78. POSNER, *supra* note 42.



basis of a larger “linguistic, cultural, and conceptual apparatus,” and we can argue for the propriety of an analogy from one case to another also only on the basis of a larger theory.<sup>79</sup> Top down approaches in turn provide a general theory, but the ineluctability of choosing one theory over another is questionable, as is the claim that particular results follow deductively from the larger theory.<sup>80</sup> Further, and a principal argument in Judge Posner’s new book, neither approach convinces anyone not already predisposed to the view advocated.<sup>81</sup> As we have already anticipated, Posner’s approach is pragmatic: “a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”<sup>82</sup>

In Part II, I noted that I certainly do not object to the value of empirical inquiry but argued there that empirical inquiry is insufficient on its own. The explanatory mode of analysis must be reincorporated within a larger mode of interpretive understanding. In this Part, I want to explain how that can occur, while integrating Judge Posner’s criticisms of top down and bottom up interpretive approaches. My thesis here is that *hermeneutic* analysis both agrees with and provides accommodation for the kinds of criticisms Judge Posner levies. Since I expect my presentation of hermeneutics on this point is rather familiar, I will be brief.

As is well-known, hermeneutics does not provide a “manual for guiding understanding” or “a system of rules to describe, let alone direct, the methodical procedure of the human sciences.”<sup>83</sup> Hermeneutics operates at a more fundamental level; it seeks to ascertain and clarify the very “conditions in which understanding takes place.”<sup>84</sup> These conditions are most fruitfully revealed in considering the inextricability of application to understanding.<sup>85</sup> What, then, does application mean? Application may be usefully

79. POSNER, *supra* note 49, at 174-75.

80. *See, e.g., id.* at 187-88 (criticizing Dworkin).

81. Judge Posner states:

[A]fter more than two centuries no signs of closure [in constitutional theory] are visible, or even, as it seems to me, of progress. The reason is that constitutional theory has no power to command agreement from people not already predisposed to accept the theorist’s policy prescriptions. This is because it is normative in the same way that moral theory is, being abstract, unempirical, and often at war with strongly held moral intuitions or political commitments . . . .

POSNER, *supra* note 42, at 145.

82. *Id.* at 227.

83. GADAMER, *supra* note 7, at xxviii.

84. *Id.* at 295.

85. *See id.* at 324 (“[A]pplication is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning.”).

contextualized by contemplating it as an aspect of the hermeneutic circle: “that we must understand the whole in terms of the detail and the detail in terms of the whole. . . . The anticipation of meaning in which the whole is envisaged becomes actual understanding when the parts that are determined by the whole themselves also determine this whole.”<sup>86</sup> Hermeneutics rejects a notion of application whereby meaning is first known in its universal form and then rendered concrete in—applied to—a particular case.<sup>87</sup> Hermeneutics argues that application does not follow behind understanding but rather provides understanding. Application involves “co-determining, supplementing, and correcting [a] principle.”<sup>88</sup> As Joel Weinsheimer explains:

In order to explain how application alters and expands understanding, we need a dialectical conception of the relation between the particular and the general. Neither induction nor deduction explains how concepts are formed and understanding is furthered, because both are hierarchical and unidirectional: they proceed either from the “lower” particular to the “higher” general or vice versa, but not both. Understanding is furthered in application, however, only if neither the rule nor the instance to which it is applied is antecedent to the other. The act of conjunction that advances understanding can still be called application so long as we conceive of application as reciprocal rather than unilateral. Each term modifies and acts on the other so that they interact.<sup>89</sup>

In its interconnection of whole and part, hermeneutics operates as both a top down approach going from whole to part and a bottom up approach going from part to whole but goes beyond each in recognizing their reciprocity and mutual import.

In my view, we can recast the interrelation of understanding and explanation as the basis for the act of application. The relationship between understanding and explanation itself forms a hermeneutic circle: understanding is mediated by explanatory procedures, and explanation needs contextualization within interpretive understanding.<sup>90</sup> This interrelation, as with the interrelation of whole and part, is not automatic or pre-cast.

86. *Id.* at 291.

87. *See id.* at 341.

88. *Id.* at 39.

89. JOEL WEINSHEIMER, *PHILOSOPHICAL HERMENEUTICS AND LITERARY THEORY* 80 (1991); *see also* JOEL C. WEINSHEIMER, *GADAMER'S HERMENEUTICS: A READING OF TRUTH AND METHOD* 192 (1985) (“[T]he general is not a pre-given universal that could be pre-known, because it is continually determined by the particular, even as it determines the particular. Application is not reductive but productive . . .”).

90. *See* RICOEUR, *The Model of the Text*, *supra* note 10, at 220-21.

Is this presentation of hermeneutics responsive to Judge Posner's critique of top down and bottom up approaches? Yes. Neither the movement from theory to case nor case to theory is sufficient. At the moment of application each implicates and informs the other. The act of application requires judgment. "[N]o learned and mastered technique," neither top down nor bottom up, "can spare us the task of deliberation and decision."<sup>91</sup> Both Judge Posner and hermeneutics have emphasized the role of practical reason;<sup>92</sup> both reject foundational interpretive methods. The approach of neither is algorithmic. Judge Posner notes of his advocacy of pragmatism, for instance, that "[p]ragmatism is a method, approach, or attitude, not a moral, legal, or political algorithm, so it will not resolve any moral or legal disagreement."<sup>93</sup> Judge Posner's pragmatism rests more in the social sciences, while hermeneutics rests more in philosophy, but there can be degrees of accommodation at this level too. Judge Posner's emphasis on social science insight is salutary; in the vocabulary I have used, it requires encompassing "explanatory" modalities within the world of understanding. Similarly, as discussed in Part II, when Posner overemphasizes reliance on the social sciences, hermeneutics argues that social scientific insight rests on and must be reintegrated within a larger interpretive understanding, as Posner at his best acknowledges.<sup>94</sup> Differences do remain. Judge Posner's pragmatism is more instrumental in orientation and less concerned about ties to the past,<sup>95</sup> while hermeneutics emphasizes the effect of tradition on an interpreter.<sup>96</sup> But even this disparity, which I can touch upon only briefly, can be overdrawn. Just as Ricoeur conceives of narrative as a "dialectic between discordance and concordance,"<sup>97</sup> so he also

91. HANS-GEORG GADAMER, *Hermeneutics As Practical Philosophy*, in REASON IN THE AGE OF SCIENCE 88, 92 (Frederick G. Lawrence trans., MIT Press 1981) (1979).

92. See, e.g., *id.*; POSNER, *supra* note 77, at 71-100.

93. POSNER, *supra* note 42, at xii.

94. See, e.g., *id.* at 145-46 ("Of course, just getting the facts right can't decide a case; there has to be an analytic framework to fit the facts into.").

95. See, e.g., *id.* at 241 (claiming that the pragmatist judge "is concerned with securing consistency with the past only to the extent that deciding in accordance with precedent may be the best method for producing the best results for the future").

96. See, e.g., GADAMER, *supra* note 7, at 300 ("[H]istorical consciousness is itself situated in the web of historical effects."). This emphasis on tradition was one source of the debate between Gadamer and Habermas. See, e.g., RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA, *supra* note 9, at 236 (noting this point). As the text goes on to point out and as earlier discussion of the interrelation of explanation and understanding emphasized, Ricoeur attempts to integrate and transcend this debate.

97. RICOEUR, *supra* note 14, at 161.

conceives of tradition as “the interplay of innovation and sedimentation.”<sup>98</sup>

Let me close this Part by comparing Judge Posner’s assessment of hermeneutics with his evaluation of pragmatism. First, Judge Posner criticizes hermeneutics:

The problem of interpretation, after all, is not that people don’t know how to read carefully and with due allowance for cultural distance; the problem is that there are no techniques for generating objective interpretations of difficult texts. Hermeneutics poses the problem; it does not offer a solution. It is neither the salvation of legal interpretation nor the annunciator of its doom. Hermeneutics will not teach you how to interpret the Eighth Amendment or the Sherman Act. It will not even tell you whether to construe legal texts broadly or to hew close to the surface meaning. That is a political judgment.<sup>99</sup>

Next, Judge Posner defines pragmatism:

All that a pragmatist jurisprudence really connotes . . . is a rejection of the idea that law is something grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends. If it plants no trees, this pragmatic jurisprudence that I have been defending, at least it clears away a lot of underbrush. It signals an attitude, an orientation, at times a change in direction. That is something, and maybe a lot.<sup>100</sup>

It is true that adoption of a hermeneutic approach does not mandate or endorse any particular interpretive strategy. It is also true that it requires a political—or political, normative, or legal—judgment to decide both what interpretive approach to apply and how it should apply in a particular case. But these are not hermeneutic failures; these are hermeneutic *insights*. Hermeneutics itself “clears away a lot of underbrush.”

Hermeneutics rejects the claimed availability of simple top down or bottom up approaches: their alleged ability to begin in some facticity—an overarching principle or individual cases—and maneuver by “logical manipulations” to some defined end. Instead, hermeneutics argues, interpretation does not begin in facticity, and its process of application is a matter of judgment at each stage, all the way down. Similarly, hermeneutics rejects the Judge Posner who advocates that if the law is to choose to take bearings from science or

98. *Id.* at 68.

99. POSNER, *supra* note 77, at 298.

100. POSNER, *supra* note 49, at 405.

philosophy, it should choose science<sup>101</sup>—a claim for the availability of a different form of facticity. Science, or explanation, exists only within larger forms of understanding, of interpretation. Thus, if hermeneutics agrees with Judge Posner’s challenge to (much) academic moral theorizing,<sup>102</sup> it does not do so to diminish but to exalt moral and political questions and to exalt, examine, and reflect upon the role of judgment throughout.<sup>103</sup> Like Posner’s claim for pragmatism, hermeneutics itself “signals an attitude, an orientation, at times a change in direction. That is something, and maybe a lot.”<sup>104</sup> I would say quite a lot.

#### IV

In this concluding Part, I want to entertain one last turn in our evaluation of the interrelation between understanding and explanation. In the prior Parts, I have argued that explanation cannot rest in isolation from but must be integrated within interpretive understanding. The limitation of this stance is that it may seem to indicate that explanation remains pure—purely empirical and purely scientific—on its own terms. It may also intimate that finally a chasm remains between understanding (interpretation) and explanation (science): the processes are fundamentally different. In this Part, I contend instead that evidence from the sciences—to be more precise, evidence from an evolutionary biologist’s assessment of the methodology in his own science—suggests that interpretation lies at the heart of this scientific methodology as well.

This inquiry is framed by the quotation from Clifford Geertz with which this Article began. For Geertz, recall, the interpretive turn in the social sciences led away from “an experimental science in

101. See POSNER, *supra* note 42, at viii.

102. See *id.* at 3.

103. I therefore agree with Robin West when she argues that in law we should take moral argument seriously. See Robin West, *Taking Moral Argument Seriously*, 74 CHI.-KENT L. REV. 499 (1999). My objection would be to West’s following claim:

[T]he demonstrable indeterminacy of legal texts obviously does not imply that legal conclusions are also indeterminate; it implies only that if those conclusions are determined, then something other than the legal texts themselves are doing the determining. . . . [O]ne possible determinant of outcomes . . . is that legal conclusions . . . are determined . . . as interpreted through the lens of some specified conception of political or legal justice.

*Id.* at 506. This seems to grant that a conception of justice leads, by its own terms, to determinate conclusions rather than that application remains a matter of judgment. In my view, human choice enters not only at the point of origin—the choice of which conception of justice—but at the points of application. I explore this point at greater length in TAYLOR, *supra* note 30.

104. POSNER, *supra* note 49, at 405.

search of law” to “an interpretive one in search of meaning.”<sup>105</sup> As throughout, my question is whether the two sides are as far apart as it might seem. More particularly, in this Part, I ask whether evolutionary biology provides us the example of an “experimental science” that is not in search of “law”—of uniform, determinative explanation—but includes interpretation within its own terms. The horizon of this inquiry, again as throughout, is whether in the legal domain the loss of “law”—the uniform, determinative form of top down or bottom up explanation criticized in Part III—nevertheless permits a revitalized notion of law that can incorporate, as does biology, both interpretive and explanatory elements. I will exemplify this point by one last reference to Judge Posner’s work.

The prominent evolutionary biologist, Ernst Mayr,<sup>106</sup> maintains that biology is quite different from the physical sciences. While the physical sciences are guided by ideas of “essentialism, determinism, universalism, and reductionism,” biology is informed by “population thinking, probability, chance, pluralism, emergence, and historical narratives.”<sup>107</sup>

What is the basis for the difference? Precisely that evolutionary biology is predicated upon “population thinking”: “[T]he variation from individual to individual within the population is the reality of nature, whereas the mean value (the ‘type’) is only a statistical abstraction.”<sup>108</sup> Nature presents no types or essences.<sup>109</sup> Population thinking stresses uniqueness.

All organisms and organic phenomena are composed of unique features and can be described collectively only in statistical terms. Individuals, or any kind of organic entities, form populations of which we can determine only the arithmetic mean and the statistics of variation. Averages are merely statistical abstractions; only the individuals of which the populations are composed have reality. The ultimate conclusions of the population thinker and of the typologist are precisely the opposite. For the typologist, the type (*eidos*) is real and the variation an illusion, while for the populationist the type (average) is an abstraction and only the variation is real. No two ways of looking at nature could be more different.<sup>110</sup>

105. GEERTZ, *supra* note 2, at 5.

106. Stephen Jay Gould calls Mayr “our greatest living evolutionist.” STEPHEN JAY GOULD, *FULL HOUSE: THE SPREAD OF EXCELLENCE FROM PLATO TO DARWIN* 41 (1996).

107. ERNST MAYR, *THIS IS BIOLOGY*, at xiii (1997).

108. ERNST MAYR, *TOWARD A NEW PHILOSOPHY OF BIOLOGY: OBSERVATIONS OF AN EVOLUTIONIST* 15 (1988).

109. See MAYR, *supra* note 107, at 128.

110. ERNST MAYR, *EVOLUTION AND THE DIVERSITY OF LIFE: SELECTED ESSAYS* 28

What are the methodological consequences of Mayr's conception of biology? While the physical sciences are governed by laws, biology is not. Generalizations in biology are probabilistic: most biological generalizations "have so limited an application that the use of the word *law*, in the sense of the laws of physics, is questionable."<sup>111</sup> For a science concerned with the explanation of processes occurring in time, the concept of law is much less helpful than the concept of historical narratives.<sup>112</sup> Mayr rejects the appeal to "causal-law explanations" and finds that "the historical-narrative approach . . . is perhaps the only scientifically and philosophically valid approach in the explanation of unique occurrences."<sup>113</sup> On its own terms, then, there are different accounts of what it means to engage in science, here biological science. Biological science is itself suffused with interpretation: the challenge of integrating diverse facts into larger narratives. The narrative approach in biology has more affinities with interpretive methodologies in the social sciences than it might first appear; the divide is not so great as formerly considered.

Let me close with the possible insights of this methodology for law. First, even within a science such as biology, the divide is not between interpretation and fact; the facts need integration within larger narratives. Second, the contexts of biology and legal analysis are similar in this regard: both locate themselves within the changing face of history in specific contexts that are distinct and individual.

(1976). This theme is basic as well to Gould's book, *Full House*, *supra* note 106. Gould writes: "I will argue that we are still suffering from a legacy as old as Plato, a tendency to abstract a single ideal or average as the 'essence' of a system, and to devalue or ignore variation among the individuals that constitute the full population." *Id.* at 40. Gould's thesis—and Mayr's—are controversial. Elsewhere I locate Gould within a larger debate in evolutionary theory. See TAYLOR, *supra* note 16. It is immaterial to my own thesis that Gould's and Mayr's theses have drawn controversy. All I am suggesting is that their approaches form one sophisticated account of current evolutionary theory and methodology.

111. MAYR, *supra* note 108, at 19 ("[T]he word *law* is used sparingly, if at all, in most writings about evolution. . . . The so-called laws of biology are not the universal laws of classical physics but are simply high-level generalizations."); see also *id.* at 189 (describing "the absence or at least irrelevance of laws (as defined by the physicists) in evolutionary biology."); ERNST MAYR, *THE GROWTH OF BIOLOGICAL THOUGHT: DIVERSITY, EVOLUTION, AND INHERITANCE* 37 (1982) [hereinafter MAYR, *THE GROWTH OF BIOLOGICAL THOUGHT*] (claiming that to the extent there are regularities in biology, most "have occasional or frequent exceptions and are only 'rules,' not universal laws. They are explanatory as far as past events are concerned, but not predictive, except in a statistical (probabilistic) sense.").

112. See MAYR, *THE GROWTH OF BIOLOGICAL THOUGHT*, *supra* note 111, at 130.

113. MAYR, *supra* note 107, at 64. Mayr explains:

The biologist has to study all the known facts relating to the particular problem, infer all sorts of consequences from the reconstructed constellation of factors, and then attempt to construct a scenario that would explain the observed facts of this particular case. In other words, he constructs a historical narrative.

*Id.*

The model for law need not necessarily derive from the deterministic, nomological form of explanation commonly identified in the physical sciences but may find more appropriate analogue in the interrelation of regularity and exception found in biology. A sophisticated narrative approach—informed by both interpretive understanding and explanation—can be an appropriate, indeed arguably is the most appropriate, methodology in law. Finally, where the law seeks to be informed by biological science as a form of explanation, the terms of biological science themselves do not require attention only to generality or average type; they permit recognition of variation.<sup>114</sup> If both in his specific analysis of the Court's decision in VMI and often in his general analysis elsewhere, Judge Posner appears more a legal typologist than a population thinker, that is a product of his interpretive framework.<sup>115</sup> It is not a requirement of biological science. The evidence of biology or of the social sciences permits different legal stories to be told. The interrelation between understanding and explanation is basic to each: each lies at the heart of the other.

114. It is important to maintain that biology *permits* recognition in law of biological variation; it does not compel this recognition. Whatever the "facts" of biology may be, they do not stand alone in law as forces of explanation; they must be incorporated within a larger interpretive framework. It is a *judgment* of distinctively *legal* considerations that determines whether biological variation shall be acknowledged or protected as a matter of law.

115. Judge Posner is often but not always an advocate of typological analysis. His judicial pragmatism can be quite attentive to specific factual and legal contexts. For example, he writes:

Pragmatism in the sense that I find congenial means looking at problems concretely, experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the "localness" of human knowledge, the difficulty of translations between cultures, the unattainability of "truth," the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves.

POSNER, *supra* note 77, at 465. Martha Nussbaum, for example, finds in Judge Posner's opinions examples of a form of "poetic judging" that she endorses. See MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 104-11 (1995) (analyzing in detail Judge Posner's opinion in *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007 (7th Cir. 1994)). It would take a separate essay to evaluate adequately the degree of cohesiveness between Judge Posner's more typological views and his views that remain more attentive to the variability of specific contexts.



