

# Reply to Greenawalt

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Professor Greenawalt's perceptive Essay raises at least four issues: the issue of what he calls modernization, the issue of standards of interpretation, the distinction between discourse within the law and public debate over social values, and the question of the compatibility of hermeneutics and natural law. I would like to look briefly at each of these issues in turn.

## I.

Professor Greenawalt is suspicious of the idea that literary critics and lawyers should always try to interpret texts or laws in ways that show their relevance or application to a modern audience or citizenry. Moreover, he denies that it is always inappropriate to attempt simply to reconstruct an author's original intentions or the original intent of a law. I do not disagree. Rather, I want to emphasize that both conscious efforts at modernization and conscious efforts at reconstruction are subject to hermeneutic conditions insofar as both are historically situated. The point, in other words, is not that we should always try to show the modern relevance of a text or law or that we should always reconstruct original intentions. Rather, to the extent that we try to understand a text or a law at all, we are interested in what it says or means. But texts and text-analogues do not say or mean in a vacuum. They say something to someone or fail to do so. Hence, to the extent that we try to understand, we try to understand what a text or law means to us, given our situation and the concerns and questions that orient our appropriation of the text or law in question. As Gadamer puts the point, understanding is always already application.<sup>1</sup>

The hermeneutic approach I am proposing does not deny the difference between interpreting existing law and making new law. Still, that distinction is often confused with the distinction between

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1. HANS-GEORG GADAMER, *TRUTH AND METHOD* 308 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989) (1960).

interpretive judgments with which one agrees and interpretive judgments from which one dissents. Interpretation, as Professor Greenawalt argues, involves judgment and, I would add, application in which one has to understand what the law says with regard to the issue or circumstance that motivates looking to the law in the first place. Passing a new welfare law is distinct from trying to understand what the old one means. But we also have to understand what the new one means and in trying to do so we cannot avoid interpreting it from the point of view of specific questions, interests, and concerns.

## II.

Professor Greenawalt raises two questions with regard to the standards I ascribe to interpretation. First, he points out that the hermeneutic notion of the unity of part and whole may not make sense when applied to the law. Second, he questions whether the second standard I proposed, that of illumination, makes sense at all. I think I can best try to clarify my claim by returning to the issue of affirmative action. The interpretive claim I want to make points to the one-sidedness of a critique of affirmative action that understands the meaning of equal opportunity only in terms that require strict racial and gender neutrality in hiring and admissions decisions. Such an understanding assumes that civil rights struggles were limited to ending discrimination and thereby overlooks Supreme Court decisions from the case of *Sweatt v. Painter*<sup>2</sup> through the school busing cases, decisions which spoke not only to the end of legal segregation but also to full integration and participation for groups previously denied an equal part in American institutions and practices. To the extent that the critique of affirmative action fails to incorporate this part of the record into its understanding, its interpretation of equal opportunity is less adequate than one that does since it fails to unify all the parts of the text of our civil rights struggles with the whole. To be sure, a defense of affirmative action that overlooks the connection between equal opportunity and racial and gender neutrality is equally one-sided and inadequate. Indeed, the current concern with the extent to which women and minorities are stigmatized within the institutions and practices into which they have been admitted indicates the strength of the connection between equal opportunity and neutrality. An interpretation of equal opportunity that encompasses both neutrality and participation might succeed in unifying all parts of the civil rights record, struggles, and decisions. Such an interpretation, moreover, might indicate that the solution to unequal racial and

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2. 339 U.S. 629 (1950).

gender participation is not an end to affirmative action but its supplementation with all the remedial, educational, and sensitivity programs necessary to erase the presumption that women and minorities are not as qualified as the white men who occupy the same positions.

The second criterion of interpretation I examined, that of illumination, is harder to defend. The attempt here is to discover if the understanding of meaning can ever see through its own dogmatism where it is dogmatic and the problem with dogmatism is that it may be opaque to itself, unifying part and whole only by employing a kind of Procrustean bed that mangles the meaning of the parts to fit with an unchanging and adamant conception of the whole. The idea is that an interpretive understanding can overcome dogmatism only to the extent that it recognizes its interpretive elements and is open to the possibility that the text or text-analogue is other than what its assumptions first supposed. I have tried to cash out this idea in terms of a condition that genuine understanding involves, namely that one allows, in advance, for the possibility that the text or text-analogue might undermine one's prejudices and require one to rethink that which one thought one already knew. In the case of the man who interprets a woman's attempt to reject a sexual advance as an attempt to welcome it, the second criterion of adequate interpretation would ask him to be open to the possibility that he does not know what he thinks he knows or as Gadamer puts the point, "a person trying to understand a text is prepared for it to tell him something."<sup>3</sup>

Professor Greenawalt points out that this second criterion of legitimate interpretation would seem to lead to a peculiar relativism. One interpreter possesses an understanding of a text or text analogue which allows him or her to rethink some of his or her assumptions about it or the issues it addresses. However, a second interpreter with the same interpretation already knows what the first interpreter has to learn and hence, from this second interpreter's point of view, the interpretation remains inadequate. But the second criterion of understanding is not meant to deny that an understanding of meaning that confirms one's prejudices is illegitimate. It is meant to allow one to discriminate the cases in which one has simply imposed one's prejudices on a text or text-analogue and the cases in which one has rethought through them in the light of the text or text-analogue.

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3. GADAMER, *supra* note 1, at 269.

## III.

The third issue that Professor Greenawalt raises involves the difference between legal discussion and the larger public debate, a similar difference to the one that Habermas describes as the difference between institutionalized discourse and a weak public sphere. My concern here has to do with the sluiceways between the two. Clearly the Supreme Court decision in *Roe v. Wade* did not resolve the public debate over abortion. Instead, the larger public debate has required that the Supreme Court revisit and continue to revisit its decision. Our discourse about already guaranteed legal rights is not always or necessarily separate from a public debate about what those rights mean in which the legal and public debate mutually inform one another. The current cases before the Supreme Court concerning physician-assisted suicide seems to be a case in point insofar as at least one legal opinion holds that the Court ought not decide the issue until the public has more thoroughly discussed it and public sentiment is more settled than it now appears to be.

## IV.

The last issue Professor Greenawalt raises directly concerns the relation between hermeneutics and natural law. Here he seems to me to have articulated the relation well in moving from thick conceptions of law and morality that are particular to different cultures to what Michael Walzer calls thinner conceptions that every culture or at least almost every culture shares, such as the prohibition of the intentional killing of innocent citizens.<sup>4</sup> "We are capable of perceiving some transcultural truths," Professor Greenawalt writes, "and our explanations of these will be comprehensible to members of other cultures, albeit their understanding will never be precisely the same as ours."<sup>5</sup> What interests me is just this possibility of legitimate differences in our understanding. We can admit that allegiance to universal aspects of morality does not rule out some legitimate differences between cultures as to how those aspects are best understood and articulated in their laws and cultural norms. We might also admit that our common allegiance to our own laws and norms does not rule out some legitimate differences between ourselves as to how those laws and norms are best understood and articulated in our practices. To say that some of our differences reflect legitimate differences in

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4. See MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (1994).

5. Kent Greenawalt, *Interpretation and Judgment*, 9 *YALE J.L. & HUMAN.* 415, 432 (1997).

understanding does not presume that all our differences are legitimate or that we cannot rationally discriminate between culturally based understandings. Rather, there is an alternative to both the relativistic idea that any understanding of law or principle is legitimate and the dogmatic idea that only one is. Some different legitimate understandings of moral and legal principles remain possible and we might try to accommodate this pluralism both in our debates and, as far as possible, in our policies.

