DWORKIN'S CONSTRUCTIVE OPTIMISM V. DECONSTRUCTIVE LEGAL NIHILISM

In *Law's Empire* Ronald Dworkin has proposed more than a theory of how interpretation works *in the law*. He offers an account of the nature of interpretation in general, and the specific theory of legal interpretation derives from the broader account. He thus enters the arena of "hermeneutics", the branch of philosophy that investigates the claim that all understanding is interpretive by debating questions about the possibilities and limits of interpretation. Whereas some recent reviewers of *Law's Empire* have either avoided or dismissed the more general claims about interpretation, I shall take Dworkin's arguments seriously and situate them within the current debates in hermeneutical philosophy between such theorists as Hans-Georg Gadamer, Jacques Derrida, and Jürgen Habermas.¹

To focus the debates on the specific issues in legal hermeneutics, I delineate for the sake of argument two conflicting theories of interpretation of the law. One is Dworkin’s theory of *constructive* interpretation. The other may be a view that nobody holds, but by way of contrast to Dworkin’s constructive legal optimism, I call it "deconstructive legal nihilism". This paper is divided into five sections. In the first I sketch Dworkin's theory of interpretation. In the second, after comparing *Law's Empire* with Gadamer’s hermeneutical theory of interpretation, I contrast hermeneutics with deconstruction through the example of Derrida’s deconstruction of the Declaration of Independence. In the third section on "Interpretive Fit" I discuss some counterexamples to Dworkin’s general theory, and in a fourth on "Law’s Optimism" I offer counterarguments against Dworkin’s

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¹ I discuss Dworkin in relation to these European philosophers in an earlier article written before the publication of *Law's Empire*: 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives', 58 Southern California Law Review 135 (1985).

critique of critical legal studies. In the final section I ask how best to understand the claim that there are right answers to questions of legal discourse, and suggest a hermeneutical reading of Dworkin that emphasizes his pluralism and depolemicizes the contrast between his constructivism and the nihilism he fears. Along the way the other hermeneutical issues to be discussed include whether legal texts allow only one or multiple interpretations; whether only the original authors' interpretations can be correct; whether legal interpretation should be constructive or deconstructive; whether it should rely on an optimistic view about present society or a critical and even subversive one; and whether interpretation always need aim at an ideal consensus, or whether it can accept the inevitability of dissensus.

I. DWORKIN'S THEORY OF CONSTRUCTIVE INTERPRETATION

In *Law's Empire* Ronald Dworkin spells out a general theory of interpretation that he then applies to the special case of legal interpretation. His conclusion is that "Law is an interpretive concept". The interpretive character of the law should not lead to skepticism about the possibility of reaching right answers on questions of interpretation. Skepticism leads in turn to nihilism, the view that "theoretical disagreement is only disguised politics" (p. 10). Nihilism is, however, a hasty inference from the failure of philosophers to prove that lawyers all use "the same factual criteria for deciding when propositions of law are true and false" (p. 43). With the movements of both legal realism and critical legal studies in mind, Dworkin says, "Some academic lawyers ... say that past institutional decisions are not just occasionally but almost always vague or ambiguous or incomplete, and that they are often inconsistent or even incoherent as well. They conclude that there is never really law on any topic or issue, but only rhetoric.

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