Ralf Poscher

The Hermeneutics of Law

An Analytical Model for a Complex General Account

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Hans-Georg Gadamer thought that hermeneutics in general had something to learn from legal hermeneutics.[1] This claim is highly plausible because today at any rate there is hardly another field of hermeneutics of comparable social importance, with a similar institutionalized practice or a similar number of people professionally involved. It is no surprise that something can be learned from the most professionalized hermeneutic practice that impacts and shapes almost every aspect of our social lives. I disagree with Gadamer not that something can be learned, but what can be learned.

In a nutshell, Gadamer thought that what can be learned from the law is that an application element must be integrated into the concept of interpretation.[2] For Gadamer, hermeneutics is a monistic practice consisting of interpretation, which has some application element incorporated into it. Contrary to this monistic account, what can be learned from law is that hermeneutics is a set of distinct practices that are of variable relevance for different hermeneutical situations. All of these distinct hermeneutical practices involve distinct theoretical issues, most of which can be linked to particular debates in analytic philosophy. This also holds true for Gadamer's application element. On the one hand, Gadamer's achievement is to have highlighted this as an important element, not just of legal hermeneutics. On the other hand – as Emilio Betty has already rightly noted –[3], his account of application is highly equivocal. If my count is correct, it confounds at least four theoretically distinct aspects.

In the following, I wish to show that legal hermeneutics has always been acutely aware of the complexity of hermeneutic practices and that most of the relevant

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1 Hans-Georg Gadamer, *Truth and Method* (New York: Crossroad, 1989), 324–40.

2 Ibid., 340: „all reading involves application".

3 Emilio Betti, "Hermeneutics as the General Methodology of the Geisteswissenschaften," in *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy, and Critique*, ed. Josef Bleicher (London: Routledge & Kegan Paul, 1980), 81–84.

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distinctions are deeply rooted not just in the legal methodological but also in the doctrinal and even institutional tradition. Very much in the spirit of Gadamer, the essay will proceed in accordance with the different hermeneutical activities on which a lawyer must rely when she applies the law to a given case. Thus, it will show that legal interpretation, rule-following, legal construction, association, the exercise of discretion, and judgments on the significance of a legal provision are all distinct activities that can be involved. To prove the point that this complex conception of hermeneutics is not specific to the law, but applies to hermeneutics in general, some parallels in the field of the hermeneutics of art shall be noted.

A. LEGAL INTERPRETATION AN INTENTIONALIST ACCOUNT

The most basic operation when a lawyer approaches a case is to identify the legal norm applicable. The norm is usually communicated by a text – be it the text of a precedent or a statute, an act of parliament, a constitution or an administrative directive or bylaw. So the first thing a lawyer must do is to find the text of the precedent or code relevant to her case and use it to identify the legal norm. For example, Art. 5 par. 3 of the German constitution simply reads: "Art and science … are free." How does the lawyer, dealing with a police prohibition against a staging Macbeth, on the ground that it is regarded as a critique of the president, get from the text of Art. 5 par. 3 to the legal norm that the state must refrain from infringing on the exercise of art? Semantically, the text does not even state a norm, but a fact!

The basic hermeneutical operation allowing an interpreter to glean the meaning from a set of signs can be explained by an intentional account along the lines of Grice and Davidson.[4] There seems no alternative to basing meaning in a fundamental sense on communicative intentions. No non-natural meaning can exist without at least presupposing communicative intentions. The famous lines drawn in the sand by the waves[5] that resemble letters have no meaning. We can assign meaning to them only by presupposing some kind of hypothetical speaker.[6] If the waves form the signs 'I love you', we might suppose a mundane context like a couple on a romantic walk and one of them stating her or his affection.

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4 Herbert P. Grice, "Meaning," in *Studies in the Way of Words* (Cambridge, MA: Harvard University Press, 1989); Donald Davidson, "A Nice Derangement of Epitaphs," in *Truth, Language, and History*, ed. Donald Davidson (Oxford: Clarendon Press, 2009), 89–107; on their similarities and differences: John Cook, "Is Davidson a Gricean?," *Dialogue* 48 (2009): 557.

5 Steven Knapp and Walter Benn Michaels, "Against Theory," *Critical Inquiry* 8 (1982): 727–28.

6 Larry Alexander and Saikrishna Prakash, ""Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility," *San Diego Law Review* 41 (2004): 977.

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Unlike natural signs, which acquire their "meaning" from non-intentional causal relations between an object and its environment, non-natural signs acquire their meaning through the intentions that a speaker or author connects with an utterance. Like smoke, shouting the English word 'fire' also signals fire. But it does so, not because of the causal relation between the shout and the fire, but because of the intentions of the person shouting. Thus, meaningful utterances are a special kind of intentional action. They intend to communicate propositional content via utterances – be they sounds or signs, or any other kind of communicative means.[7]

This is not to say that intentionalism leaves nothing to be explained. As a mentalist theory of meaning, intentionalism explains meaning via mental representations in the form of communicative intentions, and thus, still needs to be supplemented with a theory of mental content[8]. However, there seems to be no way around the intentionalist account of meaning.[9] However a theory of mental content might approach its subject, it must be able to give a viable account of intentions in general, and communicative intentions in particular, to fulfill its explanatory task. Communicative intentions are the kind of mental content that make utterances meaningful.

This also means that any attribution of meaning to an artefact for theoretical reasons requires the attribution of intentions, since this is the only way meaning comes into the world. These intentions do not have to be actual intentions, but we cannot make sense of an artefact having meaning, without at least implicitly presupposing an intentional agent – and be it fictive or hypothetical[10].

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7 This also holds for externalist elements of meaning, which are themselves based on externalist intentions, Michael S. Moore, "Can Objectivity be Grounded in Semantics," in *Law, Metaphysics, Meaning, and Objectivity*, ed. Enrique Villanueva (Mexico City, Mexico: Rodopi, 2007), 253–54; Michael S. Moore, "Semantics, Metaphysics and Objectivity in Law," in *Vagueness and Law: Philosophical and Legal Perspectives*, ed. Geert Keil and Ralf Poscher, First edition (Oxford, New York, NY: Oxford University Press, 2016).

8 An overview by David Pitt, "Mental Representation," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta.

9 For recent general critiques of intentionalist accounts see Jody Azzouni, *Semantic Perception: How the Illusion of a Common Language Arises and Persists* (New York: Oxford University Press, 2013), 265–320. His perceptual account relies heavily on the conscious phenomenology of semantic experiences. Intentionalist accounts should, however, be able to accommodate much of the "data" when subconscious inferences are taken into account—a possibility not finally eschewed but regarded as "empirically unlikely" by ibid., 289. See also Ernest Lepore and Matthew Stone, *Imagination and Convention: Distinguishing Grammar and Inference in Language*, First edition (Oxford: Oxford University Press, 2015), who do still accept the fundamental importance of "direct" communicative intentions but try to broaden the importance of conventional meaning. For a first adaption of this approach for law see Marcin Matczak, "Does Legal Interpretation Need Paul Grice? Reflections on Lepore and Stone's Imagination and Convention," *Polish Journal of Philosophy* 10 (2016), available at: https://ssrn.com/abstract=2716629.

10 This is the theoretical reason for approaches like "hypothetical intentionalism", Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (Chicago: The University of Chicago Press, 2015), see also already Andrei A. Marmor, *Interpretation and Legal Theory* (Oxford: Hart Publishing, 2005), 23.

The same is true of legal texts. Legal methods have always been acutely aware of the fundamental importance of intentions. *Legislative intent* figures in every classical canon of legal interpretation – even if its role is contested[11]. The text "Art and science … are free" in Art. 5 par. 3 of the German constitution only has the meaning it has, because we attribute to those who ratified it the intention to communicate a legal *norm* and not just a fact.

That the ascription of intentions to collective bodies like parliaments and constitutional assemblies raise issues of collective intentionality shows only two things: First, that we cannot let go of communicative intentions even if it is hard to make sense of collective ones. Second, that legal hermeneutics needs to combine a wide range of theoretical resources. In this case, it draws on the theory of action, where it can make use of reductive accounts of collective intentions to reconstruct our pervasive talk of legislative intent also with respect to group agents like parliaments and constitutional assemblies.[12]

Legal texts receive their meaning from the legislative communicative intentions that gave rise to them. Thence it is easy to explain the nature of interpretation in its most basic form: Interpretation is a special case of empirical explanation. Interpretation is a form of explanation that relates to intentional phenomena, i.e. to someone's beliefs, desires, intentions, hopes, wishes, actions, etc., and secondary to their products, such as tools and – most prominently in the hermeneutical tradition – texts. If we see someone picking up an umbrella, we explain his action by his belief that it is going to rain, his desire not to get wet and his intention to go outside; we, thus, interpret his action.

However, interpretation is not limited to actions; it applies to any object connected to intentions. To take Heidegger's famous example[13], we interpret a piece of wood connected to a metal bar as a hammer, because someone created it with the intention of fulfilling this purpose. Moreover, if we believe in the objective spirit steering the course of history, we can interpret the course of history, because we conceive of the objective spirit as an intentional agent.

As mental phenomena, intentional phenomena supervene on non-intentional phenomena like neurophysiological brain states and, ultimately, the interplay of sub-nuclear particles. There is a token- but no type-identity between the different phenomena.

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11 For a critical assessment with respect to so called ordinary meaning Slocum, *Ordinary Meaning*, 36–91.

12 For two different reconstructions along these lines Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012); Ralf Poscher, "The Normative Construction of Legislative Intent," *Forthcoming: Droit & Philosophie, Annuaire de l' Institut Michel Villey*, 2017, availabe at: https://ssrn.com/abstract=2861250,, with further references to the theoretical critics of legislative intent.

13 Martin Heidegger, *Being and Time*, ed. Joan Stambaugh and Dennis J. Schmidt (Albany, NY: State University of New York Press (SUNY Press), 2010), § 15, pp. 68-70.

The same higher order type can be realized by very different lower order ones. Very different types of neurophysiological brain states can instantiate the same type of mental content. Different kinds of explanation draw on different regularities for types at their respective level of description. The explanations at different levels of description are not reducible to each other due to the lack of type identity. Thus, psychological regularities do not translate into neurophysiological ones, though each psychological phenomenon is instantiated by a neurophysiological token.

An anomalous monism along Davidson's lines allows for different methods[14] for different kinds of causal explanations under different descriptions. Frank Jackson and Philip Pettit framed this in a program theory, according to which higher-order explanations reveal to which type of event some state of affairs is programmed, irrespective of the different microphysical types that might realize the supervening type.[15] However, interpretations as intentional explanations do not just differ from non-intentional ones in terms of the level of explanation – such as biological explanations from physics –, but also in terms of the standards involved.[16] Interpretation has been characterized as a normalizing type of explanation because it relies on rational standards[17] like the principle of charity, according to which we must generally interpret the beliefs of an agent charitably with respect to their truth.[18] When we interpret other intentional beings, we – except under special circumstances – rely on the rationality of the agent. Without presupposing a certain degree of rationality, it would be impossible for us to reconstruct the intentions of agents other than ourselves.

Interpretation as an intentional explanation is distinct from other causal explanations because of the standards employed, which are based on rationality.[19] Thus,

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14 Donald Davidson, "Three Varieties of Knowledge," in *Subjective, Intersubjective, Objective*, ed. Donald Davidson (Oxford University Press, 2001), 215–20.

15 Frank Jackson and Philip Pettit, "Structural Explanation in Social Theory," in *Reduction, Explanation, And Realism*, ed. David Charles and Kathleen Lennon (Oxford: Clarendon Press, 1992), 117–26. Further on program explanations Frank Jackson and Philip Pettit, "Functionalism and Broad Content," *Mind* 97 (1988): 391–97; Frank Jackson and Philip Pettit, "Program Explanation: A General Perspective," *Analysis* 50 (1990).

16 Davidson, "Three Varieties of Knowledge," 215.

17 Philip Pettit, "Towards Interpretation," *Philosophia* 23 (1994): 162–66; for a systematic analysis of these rational standards in the history of philosophy Oliver R. Scholz, *Verstehen und Rationalität: Untersuchungen zu den Grundlagen von Hermeneutik und Sprachphilosophie,* Klostermann RoteReihe (Frankfurt am Main: Klostermann Vittorio, 2016).

18 Davidson, "Three Varieties of Knowledge," 211.

19 On the content/occurrence ambiguity of rational explanations Geert Keil, "Beyond Assimilationism and Differentialism: Comment on Glock," in *Welt der Gründe: Vorträge und Kolloquien des XXII. Deutschen Kongresses für Philosophie vom 11. bis 15. September 2011 an der Ludwig-Maximilians-Universität München*, ed. Julian Nida-Rümelin and Elif Özmen (Hamburg: Felix Meiner Verlag, 2012), 920: "In Davidson's theory of action explanation, mental attitudes play a dual role. … The causal relation holds between two occurrences, that is, between the mental event [i.e. the occurrence of the attitude] and the bodily movement. The relation of rationalization holds between the propositional content of the mental attitude and the description of the action. In the slogan 'reasons are causes' … these subtleties get lost."; cp. on this point also Hans-Johann Glock,

a non-intentional causal reconstruction of intentions would not count as an interpretation. If we had a mind reading machine somehow able to reconstruct the intentional content of a speaker's mind from mere natural causes, such as her brainwaves, the results would not be an *interpretation* of the mind it monitors.

Despite the different standards employed, intentional explanations nonetheless remain empirical. It is always an empirical question whether or not someone acted with a specific intention. It is an empirical question whether she picked up the umbrella to use it as a protection against the rain or to take it to the repair shop or wrap it as a gift. What holds for intentions connected to actions also holds for communicative intentions, which are simply intentions connected to a special type of action, namely speech acts.

From an intentional perspective, the interpretation of an utterance in its basic sense is an empirical hypothesis on the communicative intentions that the utterer connected with it. Whether the utterer meant the river- or the savings-bank when she asked him to meet her at the "bank" is an empirical question.

The communicative interpretation of speech acts aims at speaker's meaning in Grice's sense. In communicative interpretation, semantic meaning – sentence meaning in Grice's terms – acts as the main clue to infer the communicative intentions of the speaker. Semantic meaning itself supervenes on the diachronic and synchronic multitude of uses of a term to convey specific meanings. It makes it possible to infer that speakers in general use terms according to their semantic meaning. However, semantic meaning alone might not give us sufficient clues, as in the "bank"-example above. Speakers might not comply with the standard use of terms – consider Davidson's malapropisms – or might employ them to communicate a different intention – consider Gricean implicatures or metaphorical use. Ever since Carl Friedrich von Savigny introduced his canons of interpretation, the semantic ("grammatical" [20]) meaning of the law is among the legal canons for deciphering the intentions of the legislator.

An intentional account of interpretation does not raise issues other than those must be answered by empirical investigations in general. "The communicative model thus causes no ripples in the smooth waters of science"[21]. Intentionalism not only provides us with a basic concept of meaning but also with a basic concept of interpretation that holds

"Reasons for Action: Wittgensteinian and Davidsonian Perspectives in Historical and Meta-Philosophical Context," *Nordic Wittgenstein Review* 3 (2014): 40 f.

20 Friedrich Carl von Savigny, *System of the Modern Roman Law*, trans. W. Holloway (J. Higginbotham, 1867), 172.

21 Michael S. Moore, "Interpreting Interpretation," in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei A. Marmor (Oxford: Clarendon Press, 1995), 5; see also Stanley Eugene Fish, "Intention is all there is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law," *Cardozo Law Review* 29 (2008): 1116.

no mystery. Intentionalism can provide a precise definition of interpretation as the basic hermeneutical operation with respect to the *genus proximum* of empirical explanation.

This also holds for the law. The first step in legal an hermeneutics is to develop – in a fundamental theoretical sense – an empirical hypothesis on the communicative intentions that the legislator connected with a legal text. In the case of the lawyer confronted with the text of Art. 5 par. 3 of the German constitution, semantics gives us the factual statement, that "Art and science … are free." The context of the utterance, however, supports the empirical hypothesis that the constitutional assembly intended to communicate the normative principle that "The state shall not infringe upon the exercise of art."

In the arts, communicative interpretation in this intentionalist sense is mirrored by corresponding approaches that stress authorial intent.[22] This approach is contested, and its limitations are the topic of such literary theories as New Criticism[23] and poststructuralists such as Roland Barthes celebrated the "Death of the Author" (1967). However, the fact that the author's intentions might be difficult to ascertain, that literary hermeneutics go beyond the author's intentions, that perhaps even the most important parts of literary hermeneutics do not rely on them, does not render them irrelevant. In art too the question of what the author intended remains a sensible one allowing for sensible answers. That Picasso wished to communicate the horrors of civil war with "Guernica" seems a legitimate hermeneutic thesis, although it does not exhaust the hermeneutical potential of the canvas. That the reconstruction of authorial intentions does not exhaust hermeneutics, however, is exactly the point of a complex conception. Hermeneutics involve a whole set of practices, but communicative interpretation is one of them – and even a foundational one in the theoretical sense, that interpretation presupposes the ascription of non-natural meaning to an utterance by an – actual or presupposed fictive – author.

B. RULE-FOLLOWING AND THE APPLICATION OF THE LAW

After a communicative interpretation of Art. 5 par. 3 of the German Constitution our lawyer knows that the text "Art is free." was written and promulgated with the intention of communicating the constitutional norm that the state shall not infringe upon the exercise of art. What is the next step? After identifying the norm communicated by the text, she must apply it to her case. This is the first kind of application that Gadamer hinted at with his equivocal notion.

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22 For literary interpretation e.g. Eric D. Hirsch, *Validity in Interpretation* (New Haven: Yale Univ. Press, 1967).

23 John Crowe Ransom, *The New Criticism* (Westport, Conn.: Greenwood Press, 1979).

The theoretical background to how to reconstruct what happens when we apply a norm to a case covered by it is the subject of the extended rule-following discussion spurred by Wittgenstein's remarks on the topic and Saul Kripke's[24] skeptical interpretation of them. Wittgenstein rightly pointed out that no kind of interpretation in the sense of substituting one rule formulation by another can ever close the gap between a rule and its application. The effort to close the "gap" between the rule and its application by paraphrasing the rule will just lead to an endless and fruitless series of interpretations. In intentionalist terms: no interpretative reformulation of the communicative intentions can close the gap between the norm communicated and its application. "What this shows, is that there is a way of grasping a rule which is *not an interpretation*, but which is exhibited in what we call 'obeying the rule' and 'going against it' in actual cases."[25] Thus, a faculty other than inferring the intentions of others is needed to apply a rule, and this seems to be the best conception of rule-following: a shared fundamental human faculty.[26]

Understanding a rule is a complex faculty that among other things consists of the ability to paraphrase expressions of the rule. However, understanding a rule above all entails the faculty to apply it in standard cases in various intertwined practices, which include judging others according to rules, as in the case of a court judging the behavior of defendants and parties according to the law. A faculty-based understanding of our rule-following practice resembles Kant's analysis of the faculty of judgment: "If the understanding in general is explained as the faculty of rules, then the power of judgement is the faculty of subsuming under rules … Now if it [logic] wanted to show generally how one ought to subsume under these rules, i.e., distinguish whether something stands under them or not, this could not happen except once again through a rule…and so it becomes clear that although the understanding is certainly capable of being instructed and equipped through rules, the power of judgement is a special talent that cannot be taught but only be practiced.[27]So, one might speak of a gap between a rule and its application, but there is no gap between *understanding* a rule and knowing how to apply it in standard cases, because being able to apply it to standard cases is precisely what understanding in Kant's and Wittgenstein's sense most importantly entails.

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24 Saul A. Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Oxford: Blackwell, 1982).

25 Ludwig Wittgenstein, *Philosophical Investigations*, ed. Gertrude E. M. Anscombe (Oxford: Blackwell, 1953), § 201.

26 Philip Pettit, *The Common Mind: An Essay on Psychology, Society, and Politics* (Oxford University Press, USA, 1996), 76–108. On the challenges for such accounts to preserve the specific normativity in distinguishing correct and incorrect applications, between following a rule and merely believing to follow a rule Hans-Johann Glock, "Meaning and Rule Following," unpublished manuscript, 2 f.

27 Immanuel Kant, *Critique of Pure Reason*, trans. Paul Guyer, Allen W. Wood (Cambridge: Cambridge Univ. Press, 1998), 268.

Applying the rule established via communicative interpretation as the content of an utterance demands the use of our faculty to follow it. By obeying the rule in a given case, the faculty to follow the rule is exercised. Just as abilities are exercised under given circumstances: as a swimmer exercises the ability to swim on various occasions – in a lake on a hot summer day, in a pool for a workout, etc. –, or as a jockey exercises the capacity to ride on different horses in different races.

In contemporary pragmatism, the relation between a rule and its application is sometimes reversed even more radically. Rules are regarded merely as the attempt to make our practice in standard cases explicit. Applications do not follow from rules, but rules supervene on applications.[28] This would also explain why we sometimes fail to come up with a rule that covers all of our practice in individual cases as the Gettier-problems seem to illustrate for the concept of knowledge. Just as Wittgenstein remarked: "A main source of our failure to understand is that we do not command a clear view of the use of our words. – Our grammar is lacking in this sort of perspicuity"[29].

However we conceptualize the relation between understanding a rule and its application–as a grammatical relation in Wittgenstein's sense or as an attempt to make our practice explicit in Brandom's sense –, the relation between a rule and its application addresses a different issue than the inference of communicative intentions from an utterance. While the meaning of an utterance is determined by inferring the communicative intentions connected with it, the applications of the rule thus communicated are not extracted from the rule via interpretation or any other inferential means. The rule that is the content of the communicative intention does not "contain" its applications just as the ability to swim does not "contain" a swim in a specific lake.

Communicative interpretation and rule-following are all that is needed in so-called easy cases. Thus the politically motivated police prohibition of the *Macbeth* performance is an easy case of a violation of Art. 5 par. 3 of the German constitution. After the lawyer reconstructed the law-maker's intentions to establish the rule that government infringements on art are prohibited, she must simply employ her rule-following capacity to apply the rule to her case. A theatrical performance is a paradigm instance of art and the prohibition of the show is a paradigm instance of a state infringement. If the lawyer "understands" the rule, she can apply it to the case. In German, there is even a term for the rule-following faculty in legal contexts. The term "Judiz" refers to the ability of an experienced lawyer to deliver a correct judgment on a case intuitively. Note, however, that

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28 Robert B. Brandom, *Making it Explicit: Reasoning, Representing and Discursive Commitment* (Cambridge, MA: Harvard University Press, 1994), Chap. 1; Robert B. Brandom, "Some Pragmatist Themes in Hegel's Idealism," in *Tales of the Mighty Dead: Historical Essays in the Metaphysics of Intentionality* (Cambridge, MA: Harvard University Press, 2002), 230–34.

29 Wittgenstein, *Philosophical Investigations*, § 122.

even in an easy case the application of the law requires two operations: the inference of communicative intentions from a text and the exercise of our rule-following ability.[30]

At least in the performing arts, there are elements of rule applications as well. "Interpreting" a piece of music involves rule following in conforming to the instructions given in the form of musical notation. If the first movement is to be played *adagio*, it must be slower than the second in *presto*.

C. LEGAL CONSTRUCTION, THE HERMENEUTIC CREATION OF LAW

If one were to look at our overall legal practice, quantitatively, easy cases make up almost the totality. Of the billions of contracts concluded any given year only an infinitesimally small number will be brought to the attention of professional lawyers and of these only a small fraction are not easy cases, in which the lawyers are only needed to enforce the payment of a price, a mortgage, or an eviction. However, despite their infinitesimally small quantitative importance, cases in which communicative interpretation and rule-following are insufficient to apply the law are central to law as a professional practice. This is especially true of for so-called hard cases in which the further methodic resources do not allow for a determinate legal answer.[31] Hard cases are those on which our higher courts decide, that are published in law reports, and that are as H.L.A. Hart rightly observed "the daily diet of the law school"[32].

Cases can be hard for several reasons. It might be impossible to decipher the communicative intentions of the legislator for epistemic reasons. This might be due to the semantic or syntactical indeterminacies caused by ambiguity, polysemy, multidimensionality, standard relativity, or vagueness; or due to the pragmatic context of the legislative process that conflicts with an otherwise determinate text. Often, though the text of each of the relevant legal provisions for a case is determinate, their relation might not be clear when they point in different directions. Even then, the application of the law may be merely more complicated but still easy since there are a number of priority rules such as the hierarchal ordering of statutes and constitutions, or the *lex-posterior*- or *lex-specialis*-rule. However, if that is not the case, there might be what could be called systematic indeterminacy of the law. The communicative meaning of a specific provision

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30 Ralf Poscher, "Interpretation and Rule Following in Law. The Complexity of Easy Cases," in *Problems of Normativity, Rules and Rule-Following*, ed. Michał Araszkiewicz et al. (Heidelberg: Springer, 2015), 285.

31 In legal theory is not disputed that hard cases exist, the debate over one-right-answer-theories only concern their merely epistemic or substantive character. For two version of the epistemic thesis Ronald M. Dworkin, "Is There Really No Right Answer in Hard Cases?," in *A Matter of Principle* (Oxford University Press, 1985); Michael S. Moore, "Law as a Functional Kind," in *Educating Oneself in Public: Critical Essays in Jurisprudence*, ed. Michael S. Moore (New York: Oxford University Press, 2000), 228; Michael S. Moore, "Legal Reality: A Naturalist Approach to Legal Ontology," *Law and Philosophy* 21 (2002): 619–705.

32 Herbert L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 615.

might have to give way to a legal meaning emerging form the resolution of the systematic conflict. In yet other cases, the application of the communicated legal rule does not conflict with other legal norms, but with further intentions of the legislator, with expediencies of rationality or justice. How these cases are to be handled – whether and under what circumstances we can make use of teleological reductions, the absurdity rule, or even Radbruch's famous formula – is highly contested and can thus render them hard. Last but not least, indeterminacy concerns cases that pertain to constellations that were unforeseen or even unforeseeable by the legislator.

Gadamer captured the latter aspect in his idea of the different horizons between the production of a text and its application.[33] In the distance between the two horizons – to continue in the metaphor – cases may arise that leave us uncertain as to whether they fall under a rule or not. Does the answer of an internet search engine to the query "best contemporary politician" fall under the protection of the First Amendment of the U.S. Constitution? When the framers were contemplating free speech, nothing like a computer let alone the internet could evenbe imagined. It is fair to assume that they would be at least as baffled as we are when confronted with the case: the resulting indeterminacy is not only epistemic. In all cases of indeterminacy, lawyers must make recourse to yet another activity to apply the law to a given case – namely legal construction.

Since the first modern reflections on legal hermeneutics, legal scholars have been aware of the distinction between legal interpretation and legal construction. Savigny distinguished between legal interpretation and "Fortbildung des Rechts" i.e. the doctrinal development of the law in his early lectures on methodology in 1809.[34] Three years before Savigny published his methodological teachings in 1840,[35] Francis Lieber published his seminal essay "On Political Hermeneutics, or on Political Interpretation and Construction"[36], in which he distinguished between legal interpretation and construction. Ever since, the distinction has remained a lively topic in the methodological debate in law.[37]

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33 Gadamer, *Truth and Method*, 301–7.

34 Friedrich Carl von Savigny, "Methodologie (Vorlesungsnotizen)," in *Vorlesungen über juristische Methodologie 1802-1842*, ed. Friedrich Carl von Savigny (Frankfurt a. M.: Vittorio Klostermann, 1993), 150.

35 Savigny, *System of the Modern Roman Law*, § 50.

36 Francis Lieber, "On Political Hermeneutics, or on Political Interpretation and Construction, and Also on Precedents," *American Jurist and Law Magazine* 18 (1837).

37 E.g. for the contemporary discussion in constitutional law: Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review* (Lawrence, KS: Univ. Press of Kansas, 1999); Lawrence B. Solum, "The Interpretation-Construction Distinction," *Constitutional Commentary* 27 (2010); Randy E. Barnett, "Interpretation and Construction," *Harvard Journal of Law & Public Policy* 34 (2011); in private law: Gregory M. Klass, "Interpretation and Construction Distinction in Contract Law," available at: https://ssrn.com/abstract=2913228.

Legal construction amends the law that is indeterminate for the case at hand by a rule that covers it such that it can be applied by mere rule-following. This distinguishes legal construction from legal interpretation. Legal construction creates new law. It is not an empirical but a normative enterprise.

What still makes it an interpretative activity is that its justification must follow the structure of communicative interpretation. The courts cannot simply amend the law by a rule of their choosing, like a legislator solely following its conviction of political rationality. Courts must justify it as an intention that a – fictive – rational legislator could have connected with the text. This places semantic restrictions on legal construction since a rational legislator would not have associated an intention with the text that could not be connected with it by an interpreter. Semantic meaning plays a guiding role in legal interpretation but a limiting role in legal construction. Beyond the requirement to establish a justification that can relate to the text, the details of the justificatory standards for legal construction are specific to a legal culture and can even vary for different areas of the law. The need to maintain an interpretative relation with a text, however, distinguishes legal construction from legislation, though both serve to create new law.[38]

Legal construction is not merely reconstructive but allows for creativity and choice. The results of a search engine can either be included in or excluded from the free speech protection of the German constitution or the First Amendment. They could be brought into connection with the text of both provisions. A rational legislator might have intended to protect the creators of algorithms that produce opinionated content and might have connected this intention with the broad formulations of the free speech protections.

Via legal construction, the law is adapted to the developing exigencies of its time. Legal construction thus relates to another aspect of Gadamer's concept of application and probably that which caught his attention when he looked at the law. Legal construction bridges the horizon of the past legislator to that of the present-day court that has to apply the law to new circumstances.

In the legal literature, this is classically framed by the expression that the text of the law can be smarter than the legislator.[39] This is bolder than Kant's original remark on his interpretation of Plato that we often "understand an author better than he has understood

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38 Ralf Poscher, "The Hermeneutic Character of Legal Construction," in *Law's Hermeneutics: Other investigations*, ed. Simone Glanert and Fabien Girard (New York, NY: Routledge, 2017), 207/220-222.

39 Karl Binding, *Handbuch des Strafrechts - Band I.,* Systematisches Handbuch der Deutschen Rechtswissenschaft (Leipzig: Duncker & Humblot, 1885), 454; Josef Kohler, "Über die Interpretation von Gesetzen," *Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart* 13 (1886); Adolf Wach, *Handbuch des deutschen Civilprozessrechts, Erster Band* (Leipzig: Duncker & Humblot, 1885).

himself"[40]since the former hides the agency of the interpreter behind the personification of the text transforming it into a rational, intentional subject.

In the interpretation of art, construction works in a similar way. Robert Stecker provides a nice example in his book on interpretation and construction in the hermeneutics of art. It is famously disputed whether Jean-Antoine Watteau's painting "The Embarkation for Cythera" shows people arriving at or leaving the island of Venus birth. Watteau purposely left the answer open. Irrespective of whether the difficulty is merely epistemic, i.e. Watteau had a communicative intention but did not disclose it, or whether he did not specify his intention on this point, someone who wants to give an interpretation of the painting that pertains to the point, cannot rely on the intentions of the artist. He must construct the scene as either depicting an arrival or a departure and, thus, implicitly presuppose an intentional subject who painted the scene with either this or that intention. Radical constructivists – as Stecker calls them – claim that every interpretation of art is a construction of the interpreter, moderate constructivists merely allow for constructions to legitimately supplement or substitute interpretations that rely on the communicative intentions of the artist.[41] Be that as it may, my point is simply to show that the distinction between communicative interpretation and construction applies equally to the hermeneutics of art.

There is, however, one striking dissimilarity between construction in the hermeneutics of law and of art. In law construction is mandatory, since every case brought before the courts has to be decided. That holds also for those for which there are no intentions of the legislator to be had. In these cases, abstaining from construction would amount to a denial of justice. In art, whether it seems worth to engage in construction is up to the beholder. Watteau's painting can be just as well enjoyed without it.

D. ASSOCIATION AND THE CONTEXTS OF DISCOVERY AND JUSTIFICATION

In its relation to the text, construction is distinct from association. In the case of an association, the object offers only an opportunity for the production of meaning on the part of the person perceiving it. There is only a causal relation between the object and the association. While the object triggers the association, it is not conceptualized as representing the association, or even as containing any meaning at all. The famous madeleine may trigger childhood associations, but these associations can be explained without ascribing these meanings to the madeleine. The madeleine causes the childhood associations, but it does not intend to do so. The same is true of a song that a mother

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40 Kant, *Critique of Pure Reason*, 396.

41 Robert Stecker, *Interpretation and Construction: Art, Speech, and the Law* (Malden, MA: Blackwell, 2003), 95–152.

frequently sang to her child. The song does not need to be about childhood to trigger childhood associations.

For an interpretational justification, a merely associative relation is not sufficient. Rather, the justification of an interpretational relation must pertain to a meaning of the text that structurally predates the act of interpretation. In contrast to association, in interpretation the text is not only the trigger but also the measure of the meaning connected with it. It is not enough for a text to cause an idea in the mind of the recipient; the meaning connected with the text must also be intended by its actual or implicit fictive author. In law, association might come into play in what is called the context of discovery[42]. All kinds of associations can come into play when confronted with the task of applying the law to a hard case. In the search engine case, the kind of query in question might remind the lawyer of a great politician in history and his way of dealing with difficult questions. This might spark an idea of how the free speech guarantee may be best adapted to the digital age. For reasons of legitimacy, however, association does not figure in the context of hermeneutic justification of legal decisions. Legal decisions rely on the legitimacy of their source. Thus, their legitimation must be traced back to the source of the law to be applied – be it an actual, fictive or in former times usually divine legislator. By contrast, the content of an association is not intentionally tied to its source, but springs from the associating subject.

In art, however, association is much more often at the center of its reception – beauty is in the eye of the beholder. More often than not, artists create their works with the specific purpose of creating objects of association, which involve the spectator much more than the intentions of the artist. It is this non-interpretative component of hermeneutics in particular that makes the reception of art a much more personal and subjective experience.

E. EXERCISE OF DISCRETION AND THE GENERALITY OF DESCRIPTIONS

Rule-following is a complex ability that comprises a whole set of activities such as paraphrasing a rule in different formulations or judging whether someone is following it. Lawyers are often engaged in the latter: judging the rule-following behavior of others – paradigmatically the behavior of a defendant by the court. However, the faculty of rule-following is foremost "exhibited in what we call 'obeying the rule' and 'going against it' in

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42 On the distinction usually attributed to Hans Reichenbach, *Experience and Prediction* (Chicago, Ill.: Univ. of Chicago Press, 1938), 6 f., but in substance with a much richer genealogy that some authors trace back to ancient Greek philosophy, Paul Hoyningen-Huene, "Context of Discovery and Context of Justification," *Stud. Hist. Phil. Sci.* 18 (1987): 502 f.; on the role of the distinction in legal methodology Bernhard Schlink, "Juristische Methodik zwischen Verfassungstheorie und Wissenschaftstheorie," *Rechtstheorie* 7 (1976): 101.

actual cases"[43]. When lawyers have to apply the law to a case, they often not only have to judge how other addressees of the law have performed, but are addressed by legal rules themselves. They must then use their rule-following faculty to perform an action that is "obeying the rule". A criminal court must not only judge whether the defendant has violated the law but, in the affirmative, also obey a legal rule that demands that a sentence be handed down. Usually an obligation obeyed with professional routine, it can make itself felt if it comes with a moral burden. For example, some judges in the USA complain that inflexible sentencing guidelines force them to hand down sentences that do not do justice to some of their cases.[44]

This kind of application of a norm in the sense of exhibiting rule following behavior involves a fourth activity that addresses a third aspect of Gadamer's equivocal concept of application. It involves yet another theoretical aspect of legal hermeneutics, relating to what has been called the descriptive inexhaustibility of concrete objects and events due to the ontological density of the world.[45] The Latin dictum "*individuum est ineffabile*" can be traced back to ancient Greek philosophy and it which came to prominence in German Romanticism, not least through Goethe's repeated references to it.[46] It can be elucidated by contrasting the world with our linguistic representations of it. None of our linguistic representations of concrete objects and events can describe all their properties with its predicates. This is especially obvious when we take relational properties into account. Each individual object and each individual event is already related in time and space to an infinite number of other individual objects and events. Given their infinity, it would be impossible to describe them in their totality for theoretical reasons. Further, our descriptions are limited by our perception, which is more or less restricted to properties at the level of medium-sized goods.[47] Most importantly, however, we limit our descriptions for pragmatic reasons with respect to our purpose. Even definite descriptions do not demand completeness. Identification is achieved by the singularity of the combination of properties described.

In the legal methodological tradition, Hans Kelsen stressed the limitations of our descriptive means to underscore the inevitability of discretion. Legal norms determine the creation of other norms or acts. "This determination can never be complete. The higher norm cannot bind in every direction the act by which it is applied. There must

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43 Wittgenstein, *Philosophical Investigations*, § 201.

44 E.g. Federal Judge J.S. Rakoff, Mass Incarceration. The Silence of the Judges, New York Review of Books, May 21, 2015: "it is we judges who are forced to impose sentences that many of us feel are unjust and counterproductive."

45 Geert Keil, "Über die deskriptive Unerschöpflichkeit der Einzeldinge," in *Phänomenologie und Sprachanalyse*, ed. Geert Keil and Udo Tietz (Paderborn: Mentis, 2006).

46 Ibid., 84–87.

47 John L. Austin, *Sense and Sensibilia* (Oxford: Oxford University Press, 1962), 8: "moderate-sized specimens of dry goods".

always be more or less room for discretion … Even the most detailed command must leave to the individual executing the command some discretion. If the organ A orders organ B to arrest subject C, the organ B must, according to his own discretion, decide when and where and how to carry out the order of arrest."[48] In law, the purpose is to steer the behavior of its addressees in aspects that are relevant to the interest and rights of others. It thus suffices to describe the main properties of the behavior that affects these interests and rights. Thus, no legal rule ever describes the behavior it demands in full ontological detail. It only describes certain aspects of the action and leaves the rest open. It commands the purchaser of a good to pay the agreed price. However, it does not describe the specific banknotes or coins to be used, the time of day they are to be handed over, or what kind of clothes the purchaser must wear on the day of payment.

In all the non-prescribed aspects of the legally required behavior, the addressee of the law has discretion. This also holds insofar as the required action is only described in very general terms. The German police codes empower the police to take "measures" to avert danger without specifying the measures in any way except that they must serve the purpose of averting danger. The police thus has wide-ranging discretion as to the kind of measure to be taken. In the case of an environmental hazard, it can compel the landowner to investigate the source; it can order this to be done by a third party or do it on its own. Sometimes the law explicitly sets boundaries for the discretion with respect to certain actions. Usually, penal norms do not specify fixed sentences, but a certain sentence range such as "one to five years of prison", leaving it to the discretion of the judge to decide on a sentence within the range, as she deems appropriate for the concrete circumstances of the case and the perpetrator. Sometimes the law even goes so far as to grant discretion as to whether to administer the legally conditioned action at all. Under German law, prosecutors and courts in principle have no discretion whether to prosecute a crime that was brought to their attention; they are under what in German doctrine is called the legality principle – they have to prosecute every crime. By contrast, when confronted with a danger to public safety the German police in principle has discretion whether to intervene or instead to hope for the best and sit it out. In German doctrine this is called the opportunity principle. The police are allowed to intervene in a demonstration when participants pose a danger to public safety, but they might also consider it wiser to take the risk since a police intervention could turn a menacing, but still peaceful demonstration into an uncontrollable riot.

Whether discretion pertains to an aspect of an application that the law did not address or the generality of the description of the aspects it did address or to an explicit granting of discretion, its exercise is categorically distinct from legal interpretation or

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48 Hans Kelsen, *Pure Theory of Law* (Union NJ: Lawbook Exchange, 2002), 349.

construction. Insofar as the law provides discretion, its addressees are not bound by interpretive standards. They are not required to justify their choices with respect to the text, as they must in the case of legal construction. They do not have to argue that the actual or a fictive rational legislator intended to communicate that they had to pay the debt with this and not that 50-Euro-note, that the legislator intended to communicate 2 years when it ordered the sentence to be 1 to 5 years, etc. Broadly speaking, one could say that legal construction pertains to the indeterminacy of the law, discretion to its generality. We need legal construction to precisify the law when its description is indeterminate with respect to its applicability to a given case. We exercise discretion in so far as it is determinate that it applies but general in its scope, and we have to choose one of the alternative forms of application that fall under its general description.

Discretion is on the one hand limited by the general description of the rule that is to be applied. This excludes actions that lie beyond the scope to the general description. If the law provides for a sentence between 1 to 5 years, the court cannot hand down 6 years. On the other hand discretion is usually reined in by some secondary legal standards such as the principle of proportionality. Given a sentence range from 1 to 5 years a 5-year sentence for a first offender in a case that caused only minimal harm would be disproportioned. However, insofar as the discretion is not reined in by secondary standards, its addressee is not bound by the law and her decision bears no interpretative relation to it.

The exercise of discretion cannot be justified according to an interpretative standard, but it might well require justification according to other standards, such as its general rationality, efficiency, or political appropriateness. Exactly along these lines, German administrative law distinguishes sharply between justification of an administrative interpretation of the law controlled by the courts according to standards of legal interpretation and construction on the one hand, and the justification of the exercise of discretion controlled solely within the political hierarchy of the administration itself according to standards of political rationality on the other. The distinction between legal construction and the exercise of discretion is thus even written into our legal institutions.

In literary aesthetics scholars such as Roman Ingarden have highlighted the "spots of indeterminacy of represented objectivities" in literary works, some of which are filled in by the imagination of the reader. In the performing arts discretion shares the same source.[49] Even if she wanted to, a playwright could not determine every aspect of its

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[49] Roman Ingarden, *The Literary Work of Art: An Investigation on the Borderlines of Ontology, Logic, and Theory of Literature; With an Appendix on the Functions of Language in the Theater*, trans. George G. Grabowicz, with the assistance of George G. Grabowicz (Evanston Ill.: Northwestern Univ. Press, 1986), § 38, pp. 246-254; cp. also David Lewis, "Truth in Fiction," *American Philosophical Quarterly* 15 (1978): 42 f.; Keil, "deskriptive Unerschöpflichkeit," 105.

staging. She has to leave room for discretion and usually will do so abundantly to allow for interesting variations and adaptions of her play to divergent local and temporal contexts. In the performing arts, discretion also serves to bridge the horizons Gadamer was so concerned with and provides room for the adaption or – as Gadamer would say – application of a play to a different time and place in history. In 2003 John Dew could stage Wagner's Rheingold in Wiesbaden with a Nuclear Power Plant as Walhalla because Wagner's text does not say what Walhalla should look like on stage, leaving it to the discretion and imagination of directors.

However, though discretion shares some of the functionality with construction, they could not be more different in nature – the latter is interpretational, the former is not.[50] As in the case of association, the hermeneutical subject does not have to justify the exercise of discretion with respect to communicative intentions already connected with the text. In contrast to association, however, the exercise of discretion must stay within the boundaries of the text, whereas association can go far beyond it. Further, the exercise of discretion usually has to be justified by some other rational standard,[51] whereas associations need not to follow rational patterns at all.

F. „BUT, AT SOME POINT, THE COLOURING CHANGES"[52]: THE SIGNIFICANCE OF SIGNIFICANCE

The last point can be kept short because it has already been extensively discussed by Betti.[53] It pertains to Gadamer's equivocation of meaning and significance. The equivocation is facilitated by the ambiguity of the German term "Bedeutung", used in both senses. Gadamer insisted that even a legal historian would never be interested in the pure reconstruction of historical facts for their own sake and that any sensible form of historiography would try to understand the meaning of historical facts with regard to

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50 Contrary to H. L. A. Hart, "Discretion," *Harvard Law Review* 127 (2013) who discusses both phenomena under the topic of discretion. He, however, shows at least some sensibility for their differences, when he distinguishes them gradually, ibid., 665. "It seems to me clear, for example, that where discretion is used in the course of judicial determinations in the attempt to apply rules, the weight of factors such as consistency with other parts of the legal system will be prominent, whereas they may be at their minimum in cases of Avowed Discretion exercised by, say, a rate-fixing body."

51 Cp. ibid., 657, distinguishing the exercise of discretion from personal whim.

52 Max Weber, "The 'objectivity' of knowledge in social science and social policy," in *Collected methodological writings*, ed. Hans. H. Bruun and Sam Whimster (London: Routledge, 2012), p. 138: „But, at some point, the colouring changes: the significance of those points of view that have been applied unreflectingly grows uncertain, the way forward fades away in the twilight. The light shed by the great cultural problems has moved on. Then science, too, prepares to find a new standpoint and a new conceptual apparatus, and to contemplate the stream of events from the summits of thought. It follows those stars that alone can give meaning and direction to its work".

53 On his controversy with Gadamer see David C. Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," *Southern California Law Review* 58 (1985): 140–47.

their relevance from a contemporary perspective. For Gadamer this shows that the contemporary interests in a text are part of every interpretation of a text.

This argument, however, confuses meaning with significance.[54] The significance of a legal regulation might only be assessed from the ever-changing present perspective. However, this does not automatically affect its meaning. A speed limit on certain roads does not change its meaning by the fact that it has become insignificant due to permanent heavy congestion. As Betti rightly insisted, meaning and significance must be distinguished. Legal interpretation and construction are about the meaning of laws, not about the significance of this meaning.

Nevertheless, in law as well, there are some discussions in which meaning is confounded with significance. In German constitutional law, there is a more than a more-than-a-century-old discussion on constitutional change (Verfassungswandel), i.e. on if and how constitutional provisions can change their "meaning" due to changing political circumstances. It fascinated constitutional scholars in the late 19th century that the constitution of the newly founded German Empire played out quite differently from what the text of the constitution seemed to suggest.[55]

One striking example was the development of a federal bureaucracy out of the chancellery. The Chancellor represented presiding – hegemonic – Prussia in the Federal Council, the representation of the federation's monarchies. The Chancellor was responsible for countersigning federal laws and the exercise of their oversight by the council. Nowhere did the constitution provide for federal ministries. Bismarck, however, built an extensive federal oversight administration around his chancellorship with different departments that became de facto federal ministries. The provisions on the chancellery thus took on an unenvisioned significance discussed under the topic of constitutional change as a hermeneutic phenomenon.[56]

In art, the changing significance of works of art is one of the most commonplace experiences in its reception. For decades, no theater in Germany bothered to stage "The Suppliants" of Aischylos. However, after the height of the so-called refugee crisis in the summer of 2015, even our provincial theater in Freiburg staged it. Even after more than 2.500 years, the significance of a play can change dramatically in just one summer.

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54 Emilio Betti, "Hermeneutics as the General Methodology of the Geisteswissenschaften," in *The Hermeneutic Tradition: From Ast to Ricoeur, Hermeneutics as the General Methodology of the Geisteswissenschaften*, ed. Gayle . Ormiston and Alan. D. Schrift (Albany, NY: State University of New York Press (SUNY Press), 1990), 173.

55 Paul Laband, *Die Wandlungen der deutschen Reichsverfassung* (Dresden: Jahn & Jaensch, 1895); Georg Jellinek, *Verfassungsänderung und Verfassungswandlung: eine staatsrechtlich-politische Abhandlung*, ed. Walter Pauly (Goldbach: Keip, 1996).

56 Example taken form Laband, *Wandlungen*, 8–21; cp. also Jellinek, *Verfassungsänderung und Verfassungswandlung*, 26 f.

G. SUMMARY

Legal hermeneutics is an internally complex phenomenon sometimes encompassing difficult to distinguish, related, and intertwined activities. An analytical perspective that distinguishes the different elements can clarify the complex nature of hermeneutics. It can relate the different elements to different theoretical issues that are not specific to hermeneutics in the philosophy of language, action, rationality and ontology. The law shows in many of its doctrinal and methodical aspects an intuitive awareness for these distinctions. The law distinguishes between interpretation and construction, between interpretation and judicial faculty of judgment ("Judiz"), between construction and association for contexts of justification and discovery; between interpretation and the exercise of discretion, and also between meaning and historical significance. In theoretically following up on the distinctions inherent in legal doctrine and methods, hermeneutics in general can live up to Gadamer's observation that there is something to be learned from looking at the law.

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