


2000

# Foreward, Symposium: Philosophical Hermeneutics and Critical Legal Theory

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## Recommended Citation

Mootz, Francis J. III, "Foreward, Symposium: Philosophical Hermeneutics and Critical Legal Theory" (2000). *Scholarly Works*. Paper 99.

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## FOREWORD

FRANCIS J. MOOTZ III\*

This Symposium brings the considerable talents of a diverse group of scholars to bear on a pressing problem in legal theory: Whether critical theory is possible after the hermeneutical turn. All too often, this problem is framed to invite an “either-or” response. *Either* we reject the hermeneutical turn and hew to a traditional account of critique anchored by an unimpeachable standard (whether economic, historical, conceptual, cognitive, or otherwise), *or* we take the hermeneutical turn by embracing radical historical contingency and fluidity, thereby forsaking the possibility of critique and surrendering to conservative conventionalism or inviting postmodern chaos. This Symposium challenges this either-or formulation more than it proposes a definitive answer to the problem.

In this Foreword, I describe in very general terms the historical and political contexts for raising the question of critique in light of the hermeneutical turn, and then I briefly describe how each article contributes to our understanding of this question. It is commonplace at this juncture of a foreword to disavow the pretense of being able to capture the depth and nuance of the contributions that follow, and I must emphatically follow this convention. Each article discusses a shared topic from a different perspective and with a different focus. It is fair to say that the articles comprise a wide-ranging conversation more than an organized elaboration of a set of theses. My purpose is to provide a (contested) point of entry to this conversation about the potential for critical theory after the hermeneutical turn, rather than to foretell an answer to the question.

\* I would like to thank the Chicago-Kent Law Review for agreeing to publish this Symposium; Paul J. Ferak, Eric R. Moran, and the editorial staff for their organization and professionalism; and Professor Steven J. Heyman for his encouragement and support. I would also like to thank Caren Senter and George Taylor for carefully reading and commenting on earlier drafts of this Foreword.

## GADAMER AND PHILOSOPHICAL HERMENEUTICS

The term “philosophical hermeneutics” is most often associated with the work of Hans-Georg Gadamer. Gadamer is widely acknowledged to be one of the contemporary architects of the hermeneutical turn in philosophy, a movement that has had a lasting impact in a variety of fields including law, literature, linguistics, and sociology. Gadamer is one of the most important philosophers of this century because those who follow after him, whether expressly or not, must wrestle with the questions that he struggled to articulate. To take one particularly vivid example of Gadamer’s influence, Jürgen Habermas’s renowned efforts to reconstruct philosophy, sociology, and political theory have been shaped in substantial ways by his reaction to Gadamer’s philosophical insights. Gadamer is also a touchstone for contemporary theorists because he works from a strong grounding in, and re-reading of, the philosophical tradition. The contributors to this Symposium not only take up Gadamer’s philosophical legacy as it is manifest in a number of different currents in contemporary efforts to develop critical legal theory, they also reach back to the classical roots of Gadamer’s philosophy.

The topic of this Symposium is particularly timely since February 2000 marked the centenary of Gadamer’s birth. However, with a body of work that spans from classical translations and explications of Plato’s philosophy to an analysis of the transformations ushered in by the computer age, Gadamer’s philosophical hermeneutics will continue to be a substantial point of reference in philosophical discourse for many years beyond the centenary celebration. Despite their differences, the contributors are in agreement that the issues raised by philosophical hermeneutics require and deserve additional thinking in the coming years.

Gadamer’s principal philosophical claim is that the experience of truth is not exhausted by the methodological approach of modern technical-empirical science. In *Truth and Method* he criticizes the belief that insulated and self-determining subjects cast interpretations (whether scientific, aesthetic, or political) over the determinate objects comprising the world. He argues that interpretation is not just a method for bringing objects into a sharper focus, but rather that human experience is fundamentally interpretive. Gadamer’s most vivid model of the hermeneutical nature of understanding is the give-and-take experience of everyday conversation. A genuine conversation does not involve the production of knowledge by following a

methodological strategy. Instead, a conversation happens only within a historical context and between two individuals who are motivated by preunderstandings, or “prejudices.”

To be a discussant without prejudices would be to exist outside of history and time. Prejudices are the marks of human finitude. On one hand, without historically conditioned prejudices, there would be no shared basis (a developing tradition) from which to engage another person. On the other hand, without any prejudices there would be no difference between two discussants, and without difference there simply would be nothing to talk about. Gadamer insists that prejudices are not rigid limitations, but rather constitute a horizon that continually is in flux as the person accumulates experience. We experience conversation as an event that happens to us, inasmuch as it takes its own path when we converse with another person because neither is directing the conversation with complete control. So too, all human understanding involves a fusion of horizons in which a common subject is taken up by two participants in a manner that allows the subject matter to unfold through their dialogue in a way that feels “natural” rather than as a product of methodological rules designed to produce knowledge. Difference always remains when the conversation concludes, sometimes painfully so, but conversation effects a kind of shared experience that can serve as the basis for future dialogue.

Gadamer argues that legal interpretation provides a particularly vivid demonstration of his hermeneutical philosophy. Because judges are faced with specific cases that require a binding judgment, there is much less of a threat that practitioners will become overly enamored with methodologies that purport to extract the “true” meaning of authoritative legal texts. Most practicing lawyers quickly discover that it is difficult enough to find a fitting and persuasive interpretation that supports their client’s position, leading them to regard the quest for a univocal, true interpretation as an academic pursuit of no real moment. Gadamer stresses that understanding is always a historical project of rearticulating the tradition in response to the practical demands of the present. This means that within legal practice we can understand a binding norm only within a practical context: understanding and application are a unified act. At a crucial juncture of *Truth and Method*, Gadamer offers legal practice as an exemplary instance of his thesis that rule-knowledge cannot be separated from rule-application. Because Gadamer acknowledges that legal practice provides indispensable guidance for hermeneutical philosophy, it is

not necessary to import his philosophy to legal practice as if it is a strange and novel provocation from a “foreign discipline.”

PROBLEM: IS CRITICAL LEGAL THEORY POSSIBLE AFTER THE  
HERMENEUTICAL TURN?

If Gadamer is correct, then it would appear that the aspirations of critical legal theorists to deconstruct legal practice with a strong theoretical construct is highly suspect. Critics regularly charge that Gadamer invites conservatism and quietism by insisting on the “prejudiced” and contextual nature of understanding as part of his vigorous challenge to the most ambitious claims of the Enlightenment. Gadamer is adamant that the “risk” to subjectivity that is entailed by a “fusion of horizons” always opens our prejudices to revision, but most critics argue that Gadamer invites only individual critical engagements with others as educative and enlightening, and that he rejects the possibility of developing a more systemic critical theory. In the 1960s, Gadamer engaged in an extended debate with Jürgen Habermas about the possibility of critical theory. Habermas resolutely defended the epistemological legitimacy of critically assessing social structures and beliefs according to Freud’s model of overcoming “systematically distorted communication.” In response, Gadamer rejected Habermas’s attempt to “psychoanalyze” society from a privileged perch as just another fruitless quest inspired by the Enlightenment desire to eliminate prejudice with the power of reason. Several thinkers, most notably Paul Ricoeur, attempted to chart a middle course. Ricoeur suggested that the dialectic between the hermeneutics of belonging (advanced by Gadamer) and the hermeneutics of suspicion (advanced by Habermas) cannot be dissolved, and he championed the cause of a critical hermeneutics that is animated by this dialectic.

Thirty years later, the Gadamer-Habermas debate continues to reverberate in the clash between postmodern legal scholars and the ever-expanding array of critical legal scholars, including feminists, critical race theorists, and gaylegal theorists. With the recent publication of *Between Facts and Norms*, Habermas has joined in this contemporary dispute with a complex argument in defense of critical legal theory. However, Habermas claims that theory justifies only a thin, or procedural, account of law, implicitly recognizing the force of Gadamer’s earlier arguments. The contributors to this Symposium enter this contested debate by addressing whether critical legal theory

can survive the hermeneutic turn initiated by Gadamer. From different disciplines and perspectives, each contributor in effect poses the question: Do Gadamer's ontological and epistemological arguments about the interpretive character of human existence inevitably lead to conservative quiescence or postmodern paralysis, or is critical legal theory still possible (albeit without the self-assurance guiding early proponents of critical legal studies) if we accept (in whole or in part) Gadamer's philosophical arguments?

## I. HISTORICAL PERSPECTIVES ON CONTEMPORARY HERMENEUTICS

The first three articles provide important historical perspectives that situate the problematic of contemporary hermeneutics. P. Christopher Smith contends that Gadamer's recourse to Aristotle's philosophy provides an antidote to Plato's theory of argumentation as a clash in which a person attempts to compel the adherence of another by demonstrating the inescapable truth that he or she already possesses. Aristotle's attention to deliberation and taking counsel with another revives the Homeric tradition of reason as participation in a preexisting social realm, rather than reducing dialogue to the announcement of an individually discerned truth. Smith endorses Gadamer's description of legal practice as a model of social reason, and he argues that we should overcome the adversarial and demonstrative model by recapturing a communal understanding that rests on social bonds. This normative claim evidences Smith's belief that the risk of taking counsel with another, rather than subjecting another to one's proofs and demonstrations, works as a critical check on individual hubris in a manner that can reinvigorate legal practice.

Peter Goodrich provides a different historical account of hermeneutics. Rather than tracing and recuperating the roots of Gadamer's philosophy, Goodrich finds historical traces within legal practice that evidence its diversity and contingency. Goodrich reconstructs an "amatory jurisprudence" based on the fifteenth-century "courts of love" that challenges our notions of law and judgment that have been shaped by the aggrandizing force of unitary and centralized state jurisdictions. Amatory jurisprudence reveals an effort to adjudicate the private realm of love, thereby challenging the sober and dramatically restricted scope of legal rule in modern time. In an interesting connection with Smith's article, Goodrich suggests that amatory jurisprudence was a dialogic expression of care and

community that often was favored over the legalistic rituals of the day, providing for more nuanced judgments that did not brand one party a winner and the other a loser.

Finally, Charles W. Collier provides a historical account of a variety of “professional narratives,” or hermeneutical paradigms, in order to better understand the socially constructed professional narratives of law and legal practice. Collier surveys the common law narrative, the constitutional narrative, and the community-society narrative as constitutive narratives in legal practice. He begins with an important insight: Socially constructed narratives are no less real to participants in a practice than would be the mythical timeless narratives of justice and law that animate traditional accounts. Collier exposes the hermeneutic constitution of legal practice in reviewing these narratives, in a move similar to Goodrich uncovering forgotten aspects of our jurisprudential tradition. Collier’s purpose is to draw our attention to the need for a hermeneutic professional narrative and the shifting dimensions of these plural narratives, thus challenging the idea that there is or can be a unitary “correct” professional narrative that generates specific answers to legal disputes.

## II. HERMENEUTICS AND CRITIQUE: DIALOGUE OR DISJUNCTION?

The second group of articles explicitly addresses the apparent conflict between hermeneutics and critique by assessing Gadamer’s position in comparison to a number of contemporary theorists. Fred Dallmayr revisits the Gadamer-Habermas debate in an innovative way, utilizing the metaphor of a “border” to critically assess each philosopher’s continuing response to their famous exchanges. Whereas Habermas has continued to demarcate realms of reason and to propose metatheoretical approaches that draw sharp boundaries, Gadamer has continued to view borders as permeable horizons that can be “crossed” in hermeneutical exchanges. Dallmayr argues that these divergent approaches to “borders” have significantly different effects on our effort to deal with the ongoing process of globalization, with Gadamer offering a plausible pathway to a genuine “dialogue of civilizations” that is not beholden to Eurocentric traditions.

Ingrid Scheibler continues this line of thinking by arguing that an emerging “left-Gadamerian” approach opens the possibility for critique. Gadamer endorses Heidegger’s emphasis on language, but he does not abandon the social use of language in everyday discourse

as part of Heidegger's radical effort to overcome tradition through *destruktion*. Gadamer similarly endorses Habermas's concern with reinvigorating a public sphere that is not warped by unproductive prejudices, but he does not embrace Habermas's rationalist tendencies. In effect, Scheibler contends, Gadamer's model of conversational understanding situates him between Heidegger and Habermas. Hermeneutics has a critical component because it involves an active acknowledgment of the tradition within the context of a practical demand to act morally and appropriately.

Stephen M. Feldman also positions Gadamer, but he places him prior to Derrida's deconstruction and Habermas's critical theory. Feldman accepts the ontological force of Gadamer's philosophical critique of methodologism, but he insists that this does not preclude all manner of methodology. Just as Gadamer accepts the role and value of scientific methodology, notwithstanding its hermeneutical basis, Feldman suggests that we can employ the philosophies of Habermas and Derrida as alternative critical methodologies that partially foreground some of the prejudices that define our hermeneutical situation. Feldman disavows the project of building a guiding meta-theory, but his mediation embraces the use of plural methodologies to foster ongoing critical activity.

Gary Wickham explores the potential connections between Foucault's "governmentality" approach, which has contributed to the burgeoning field of sociolegal studies, and Gadamer's hermeneutics. Despite some points of connection, Wickham concludes that Gadamer's project does not easily mesh with the Foucaultian critique that he has done much to articulate and advance. Wickham argues that Foucault's reading of Heidegger diverges significantly from Gadamer's, and that an attempt to link the philosophers through their common heritage is unavailing. Whereas Gadamer places central importance on dialogue as an activity, Foucaultian critics regard conversational dialogue as an object to be investigated. In short, Wickham suggests that the divide between hermeneutics and critical theory (in a Foucaultian sense) cannot be bridged easily, although there are a few vague family resemblances evident in the literature.

In the final article of this section, I review Jack Balkin's theory of ideology and critique from a Gadamerian perspective. Balkin generally follows Gadamerian premises, but he finds it necessary to deviate from philosophical hermeneutics in order to provide an account of ideology critique. I argue that Balkin errs to the extent that he distinguishes his approach from Gadamer, and I contend that



Gadamer's philosophy, as interpreted and extended in the work of P. Christopher Smith and Calvin Schrag, provides sufficient resources for explaining the force of ideology and also the potential for critique. I rely on two models of critique that I have developed in prior articles: rhetorical exchange and psychotherapeutic practice.

### III. HERMENEUTICS AND CRITIQUE IN LEGAL PRACTICE

The final section of the Symposium brings these theoretical concerns to bear on particular areas of legal practice. R. George Wright addresses the theoretical stalemate surrounding the constitutionality of legal penalties for hate speech by drawing on the complementary accounts of social conversation offered by Gadamer and Habermas. Despite their important differences, Gadamer and Habermas share a sophisticated approach to discourse that points the way toward distinguishing speech that promotes the values underlying First Amendment protection from speech that does not. Wright is careful, however, to use the Gadamer-Habermas model only for inspiration. He avoids glossing over their differences, and he refrains from pretending that their philosophies can be applied to law as a decisional template that provides answers in specific cases.

Allan C. Hutchinson, a long-standing advocate of critical legal studies, promotes a reading of Gadamer's hermeneutics that coheres with his critical project. Hutchinson characterizes the common law as a "work-in-progress" that is deeply contingent and inevitably political. Although he regards Gadamer's emphasis on tradition as misplaced, Hutchinson finds a radical side to Gadamer that can be used against his more conservative tendencies. Hutchinson provides a concrete point of reference for his discussion with an analysis of Justice Souter's opinion in the "right to die" cases before the Supreme Court. Hutchinson criticizes my earlier Gadamerian reading of this same opinion for failing to follow the radical implications of Gadamer's insights in an uncompromising manner, and he argues that Gadamer can be rescued from what he believes is an overly conservative reading only by holding firm to the insight that "law is politics."

John T. Valauri set out to map the debates in hermeneutical philosophy and social theory onto the contemporary debates in constitutional theory, but he reluctantly concludes that there is no easy and direct correspondence. Valauri believes that this undercuts Gadamer's claim of hermeneutic universality to the extent that the

legal context presents specific normative issues that the ontological bent of philosophical hermeneutics does not address. Valauri favorably compares Gadamer's approach to that of Betti and Habermas, but in the end he suggests that Gadamer's ontological account must be supplemented with an ethical dimension if it is to hold more direct relevance for ongoing disputes in constitutional theory.

George H. Taylor moves in the opposite direction, arguing that the apparent conflict between understanding (hermeneutics) and explanation (critical theory) is misplaced, inasmuch as they comprise a symbiotic dynamic that is manifest in legal theory and practice. Reviewing the work of prominent theorists and judges, Taylor demonstrates that each of their attempts to privilege either understanding or explanation in fact reflects both motivations. Although specific disciplines may be circumscribed enough to permit rigorous explanation in the model of the logical-empirical sciences, Taylor underscores the scope of his claim by comparing legal theory to evolutionary biology, arguing that both disciplines involve an intertwining of explanation and understanding.

#### COMMENTARY: RETHINKING THE HERMENEUTIC TURNS IN LEGAL THEORY

Robin West concludes the Symposium with a probing and provocative commentary in which she poses a fundamental challenge for hermeneutically minded critics. West begins by suggesting that philosophical hermeneutics is not a curiosity that has been developed by a few offbeat legal academics, but rather that it has become, directly or indirectly, one of the guiding perspectives in legal theory. Although West acknowledges the dilemma expressed by the topic of this Symposium, she finds some comfort from the fact that it is critical legal scholars who are turning to hermeneutical philosophy. She raises a more radical concern, though: What do we lose when the critical project is first filtered through hermeneutical presuppositions?

I wish to close this Foreword by previewing some of West's interesting points and offering my own thoughts about this broader question. West correctly notes that contemporary legal theory is marked by a multiplicity of "hermeneutical turns," and she argues that each turn demonstrates that when we turn toward something we necessarily turn away from something else. I take her principal point to be that the fascination with interpreting texts often obscures our

pre-cognitive existence, which is defined by our mind-bodily inherence in physical space and affective relationships. Have the hermeneutic turns in legal theory turned us *away* from our mammalian selves and pointed us too rigidly *toward* our linguistic selves? Do we forget the fundamental reality of empathy and human connectedness as a result of our fixation on the experience of interpreting texts? I think that West is quite right to pose these questions to legal theorists, but I would insist that the hermeneutical turn (my use of the singular here is intended) best accommodates West's incisive criticisms. It may well be that some of the hermeneutical turns in legal theory have been too narrow and therefore unsatisfactory, but the corrective may come from developing a better appreciation of the hermeneutical turn, in effect freeing it from overly parochialized expressions in various hermeneutical turns in legal theory.

Gadamer's assertion of the "universality of the hermeneutic situation" is not a claim that life is nothing but interpreting texts, but rather that reflective life and social projects are grounded on understandings that are hermeneutically secured. Even accepting West's critique of particular hermeneutical turns in legal theory, is it not the case that we ultimately must ask how we can translate our affective lives into social practices and political institutions? It would appear that dialogue, some form of rhetorical engagement with others, is inevitable when we undertake this project. Even if we reflect on such issues silently, we engage in a "dialogue with ourselves" that is always parasitical on a lifetime of conversations with others. Philosophical hermeneutics may very well be insufficiently attentive to our nonlinguistic lived reality. Nevertheless, it provides the best account of how we are able to join together with others and act on the basis of our lived reality. I agree that we must read Merleau-Ponty's phenomenological account of our existence along with Gadamer's hermeneutics, but I see no need to choose between them. More strongly, I believe that there is a continuity in their thinking and approaches that yields synergistic benefits.

An example given by West may clarify my point. West persuasively argues that one of the hermeneutical turns in legal theory has been to eliminate the nontextual, fundamental rights approach of so-called "noninterpretivists," principally by regarding legal texts as more malleable and capacious and therefore amenable to "interpretation." But her argument that we should refer to nontextual values does not undermine the hermeneutical insight,

because it remains a *hermeneutical task* to articulate such values and to persuade others to endorse them and to act on them. The problem that West identifies follows from a rather narrow application of philosophical hermeneutics by some legal theorists who are fixated on developing new techniques for textual interpretation. In other words, the problem lies with one of the hermeneutical turns in legal theory, rather than with the philosophical orientation designated as the hermeneutical turn.<sup>1</sup>

I can only applaud West's careful and detailed demonstration of the inadequacies of the hermeneutical turns of legal theory, but I would reserve the possibility that these inadequacies have resulted from an overly superficial application of the hermeneutical turn. This is not to say that the "hermeneutical turn" is a fixed position requiring no further elaboration. If this Symposium demonstrates nothing else, it demonstrates the folly of adopting such a view. West issues a much needed challenge to all hermeneutical thinkers to relate their studies back to the lived reality in which they work, thereby constantly rethinking the hermeneutical turn. This is an important reminder in two respects: we must pursue the ethical and social implications of philosophical hermeneutics, but we must also recall that the activity of philosophizing takes place within a certain social and political context.<sup>2</sup> And so, in closing, I unreservedly endorse

1. It is helpful to recall that Gadamer refers to the practice of judging as an example that reinforces one of his three central topics: the historicity of understanding. Gadamer's first topic, the experience of truth in art, addresses the kinds of issues that West properly raises against those who would cabin Gadamer's philosophy as relating only to textual interpretation. Gadamer does not regard the truth of art as a message that is interpreted, but instead as an experience that follows from, and reveals, our interpretive nature. The shock of recognition that often constitutes the truth of art is hermeneutic, but it is not (in the first instance) exegetical.

2. Gadamer makes these same points about his philosophy:

[Philosophical hermeneutics] limits the position of the philosopher in the modern world. However much he may be called to draw radical inferences from everything, the role of prophet, of Cassandra, of preacher, or of know-it-all does not suit him.

What man needs is not just the persistent posing of ultimate questions, but the sense of what is feasible, what is possible, what is correct, here and now. The philosopher, of all people, must, I think, be aware of the tension between what he claims to achieve and the reality in which he finds himself.

HANS-GEORG GADAMER, *TRUTH AND METHOD*, at xxxviii (Joel Weinsheimer & Donald G. Marshall trans., Crossroad 2d rev. ed. 1989) (1960). Some might read this passage as foreclosing radical critique, but I believe that it is equally plausible to read this passage as communicating Gadamer's belief that *radical* criticism—criticism that gets to the root of the issue—is more likely to follow from an acknowledgment by the critic that she is situated in a finite historical reality rather than from the critic's pretense to deliver a critique from outside the situation that she criticizes.

Gadamer's social commentary is not in the vein of critical theory, but nonetheless represents sensitive and nuanced interpretations of the challenges of modern life. See, e.g.,

West's prescription: "As we follow the path laid out by the interpretive turns, we should from time to time glance over our shoulder and appreciate those horizons we have left behind. We might want to go back and reclaim them."<sup>3</sup> This, it seems to me, is precisely the lesson of the hermeneutical turn, and it describes the constant challenge confronting the hermeneutical turns in contemporary legal theory.

HANS-GEORG GADAMER, *THE ENIGMA OF HEALTH: THE ART OF HEALING IN A SCIENTIFIC AGE* (Jason Gaiger & Nicholas Walker trans., Stanford Univ. Press 1996) (1993); HANS-GEORG GADAMER, *PRAISE OF THEORY: SPEECHES AND ESSAYS* (Chris Dawson trans., Yale Univ. Press 1998) (1983). This approach is made plain in one of Gadamer's speeches, when he observes:

Whatever philosophy is, it must be seen as a natural propensity within us all rather than as some sort of professional skill or ability. I ask of you, then, that my contribution today be understood not as that of a specialist who has answers to all the questions, but rather as that of one who is simply putting forward his own reflections alongside everyone else's.

GADAMER, *THE ENIGMA OF HEALTH*, *supra*, at 93. The question is whether we can appreciate that the project of critical theory (perhaps paradoxically) resides in this openness to dialogic engagement.

3. Robin L. West, *Are There Nothing but Texts in This Class? Interpreting the Interpretive Turns in Legal Thought* 76 CHI.-KENT L. REV. 1125, 1130 (2000).