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The Quest to Reprogram Cultural Software: A Hermeneutical Response to Jack Balkin's Theory of Ideology and Critique

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THE QUEST TO REPROGRAM CULTURAL SOFTWARE: A HERMENEUTICAL RESPONSE TO JACK BALKIN'S THEORY OF IDEOLOGY AND CRITIQUE

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INTRODUCTION

Critical theory has lost the self-assurance that defined the heady days of Marxist economics and Freudian psychoanalysis. In his famous debate with Hans-Georg Gadamer thirty years ago, Jürgen Habermas argued that critical theory was a necessary corrective to the quiescence and conventionalism that followed from Gadamer's hermeneutic perspective. As the 1960s unfolded, the second generation of the Frankfurt School appeared poised to bring sophisticated techniques of social criticism to bear on the emerging postindustrialist system of global capitalism. But the promise of critical theory failed to materialize. Today, Habermas plays the role of the aging lion who refuses to accept the postmodern verdict that his theoretical roar simply has no practical bite. Sophisticated philosophy is just another narrative, the postmodernists argue, and the dream of critical theory is just a fantasy. Locked in the grip of this impasse, theorists are now searching for a new approach to critical theory.

Against this backdrop, Jack Balkin has written an important book that attempts to define critical theory in our postmodern age. Balkin's previous legal scholarship invoked postmodern and deconstructive themes, but it also invoked the critical legal studies tradition in America, which has adopted (loosely) the goals and methods of the Frankfurt School in the context of legal theory.[1] In

* Professor of Law, Penn State University, Dickinson School of Law. This Article grew out of my introductory comments as chair of a panel at the Second Annual Meeting of the Working Group on Law, Culture, and the Humanities, Wake Forest University School of Law, March 12–14, 1999. I would like to thank George Taylor for presenting a very interesting and challenging critique of Balkin's book, the audience for their probing comments and questions, and Jack Balkin for his spirited participation. I benefited from comments on an earlier draft that were offered generously by Step Feldman, Jim Gardner, and George Taylor.

1. *See, e.g.*, J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) (using Derrida's deconstruction to further the goals of critical legal theory).

Cultural Software: A Theory of Ideology,[2] Balkin moves beyond the specific realm of legal philosophy and presents a comprehensive theory about the nature and genesis of ideology and the role of critical theory in responding to the effects of ideology. Balkin argues that using the metaphor of "cultural software" to describe the "tools" of understanding and evaluation opens a pathway for moving beyond entrenched positions and delivering a new and more productive account of ideology and the prospects for critical theory. In short, Balkin proposes to demonstrate that critical theory remains possible in a postmodern world.

Although Balkin displays an impressive grasp of numerous currents in contemporary thought, I will argue that the guiding metaphor of "cultural software" proves unhelpful in gathering these currents into a better conception of critical theory. Balkin uses Gadamer's philosophical hermeneutics as his foil at critical junctures of his account, but his impoverished reading of Gadamer's philosophy leads him to underestimate the force of Gadamer's hermeneutical challenge to critical theory. My thesis is that the productive aspects of Balkin's theory in fact are central to Gadamer's philosophical hermeneutics, and that the unproductive elements in Balkin's theory are best explained by his deviation from Gadamer's hermeneutical approach. Balkin's theory of ideology and critique delivers some important insights, but it must be recast in terms of the hermeneutical tradition that he unsuccessfully attempts to surpass.

It would be ironic if I claimed to judge Balkin from a fixed and insular conception of philosophical hermeneutics, given the centrality of dialogue to Gadamer's philosophy of human understanding. I concede at the outset that the role of critical theory has too often been suppressed in philosophical hermeneutics, leading to the kinds of misunderstandings that appear in Balkin's book. In the foreword to the second edition of *Truth and Method*, Gadamer acknowledged that his focus on hermeneutic universalism displayed a certain "one-sidedness" that had tended to obscure that "it is still part of the nature of man to be able to break with tradition, to criticize and dissolve it," but Gadamer insisted that his one-sidedness embodied the "truth of a corrective" in response to the intellectual hubris of the modern age of instrumental reason.[3] The intellectual tide has clearly

2. J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY (1998).

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

reversed in the intervening years, however. Postmodernism reflects the most radical elements of a more broad-based rejection of the naive scientific consciousness that was Gadamer's original target. As a result, now it is necessary to draw from Gadamer's hermeneutical philosophy a different "corrective" that can overcome the neglect of man's critical "nature" that currently reigns. In the course of identifying the inadequacies of Balkin's account, then, philosophical hermeneutics will emerge with new accents and themes. Balkin's provocation helps to reveal that the positive contribution that philosophical hermeneutics makes to the critique of ideology is lodged precisely within its longstanding arguments against overreaching by critical theorists such as Habermas.

In Part I, I unpack Balkin's metaphor of "cultural software" and argue that he shares substantial common ground with Gadamer's philosophical hermeneutics, notwithstanding his insistence on drawing a sharp distinction. However, I contend that Gadamer employs more fruitful metaphors in expressing their common approach to human understanding. In Part II, I describe Balkin's theory of ideology and his corresponding account of critical theory. Balkin correctly moves beyond "pejorative" accounts of ideology that first presume unproblematic grounds for determining the contours of justice and rationality and then equate ideology with defective modes of knowledge that yield irrational and unjust social practices. However, Balkin's use of a transcendental argument to secure critical theory betrays his model of human understanding. In Part III, I defend the critique of ideology while avoiding the problems that Balkin encounters by returning to Gadamer's hermeneutical philosophy through the work of Calvin Schrag and P. Christopher Smith. Critical theory survives "postmodernity" and the "interpretive turn" without transcendental arguments, I argue, and reconceived in this new light, philosophical hermeneutics effectively points the way to developing a postmodern account of critical legal theory.

I. CULTURAL SOFTWARE AND HUMAN UNDERSTANDING

A. Balkin's Metaphor of Cultural Software: Evolution through Interaction

Balkin uses the term cultural software as a "master metaphor"[4] for describing our capacity to understand and evaluate our world. His

4. BALKIN, *supra* note 2, at 286.

metaphor is rather complex and requires careful delineation. First, Balkin emphasizes that cultural software is not like a program that we might choose to "run" in order to accomplish a specific task. Instead, cultural software is an operating system of cognitive tools and skills that permit us to apprehend, understand, and evaluate the world. We don't *use* cultural software; rather, in a very important sense we *are* cultural software. From this it follows that cultural software is not a limited information-processing capacity; it consists (at a minimum) of "the abilities, associations, heuristics, metaphors, narratives, and capacities that we employ in understanding and evaluating the social world."[5] Despite the breadth of this definition, cultural software is bounded. Balkin stresses that because we are finite, historical beings we embody a set of cognitive tools that "simultaneously enable and limit our understanding, empower us and have power over us."[6] Because we literally cannot apprehend the world by putting aside our cultural software, this opening to the world proves to be a restrictive filter as well. By using a metaphor to understand the world we necessarily eschew different metaphors that would yield different understandings.

The second important feature of cultural software is that it is "written and rewritten through social interaction and communication."[7] Our cultural software continually undergoes revision as a result of our interaction with other people, each of whom bears slightly different copies of cultural software.[8] Balkin insists that cultural software is "in" each individual and is not a "supraindividual" entity, but he maintains that cultural software is constantly affected by an "economy of exchange" among interacting individuals.[9] Cultural software is not the possession of an insulated self because, as a product of exchange and interaction, it is constantly and unavoidably altered in ways that are beyond the individual's conscious control or direction.[10]

Third, Balkin defines cultural software by reference to its constituent elements. Balkin borrows the concept of a "meme" from the evolutionary biologist Richard Dawkins to characterize linguistic and bodily skills—including "skills, norms, ideas, beliefs, attitudes,

5. *Id.* at 6.
6. *Id.* at 3.
7. *Id.* at 14.
8. *Id.* at 14-16.
9. *Id.* at 95; *see id.* at 92-96.
10. *Id.* at 23-41 (chapter 2, entitled "Bricolage and the Construction of Cultural Software").

values, and other forms of information"[11]—that comprise the building blocks of cultural software. Balkin defines memes as "the smallest units of cultural skills or information 'that can [sic] replicate themselves with reliability and fecundity.'"[12] Cultural software evolves because it is exposed to an economy of exchange in which memes are appropriated, modified, and propagated. Balkin's analysis is best illustrated by considering the well-known legal norm of "equality under the law." Balkin would contend that this norm is a particularly durable meme because it is constantly invoked in a variety of settings, with the result that it has an ever-changing valence. This meme is an important part of an American lawyer's cultural software because it acts as an ordering principle and filter for diffuse experience; in effect, it is a means of limiting the perception of reality. This meme is also expansive and dynamic, though, because it is invoked in new situations and it continually evolves as a result of an economy of exchange between individuals who will have (usually only slightly) different practices for employing this meme. Moreover, the use of this meme is propagated through the group affiliations and disciplinary practices of lawyers, and so it is socially defined and maintained beyond immediate exchanges between two people. Finally, the meme is employed in ordinary discourse in a variety of nonlegal settings, expanding beyond a restricted scope of operation in a manner that Balkin explains by borrowing the concept of *bricolage* from Claude Levi-Strauss.[13]

Fourth, Balkin argues that memes compete for survival and are not simply inert bits of information that people choose to employ. Memes have varying degrees of hardiness, which can be assessed by the ability of the meme to survive in the economy of exchange while retaining a similar structure over time.[14] In every culture, "at any point in time there is a 'meme pool' of memes competing for survival in the environment of human minds, just as there is a gene pool that competes in its environment."[15] Memes are symbionts in this environment: "they survive, reproduce, and propagate because it

11. *Id.* at 43.

12. *Id.* at 47 (quoting DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED 201 (1991)).

13. *See id.* at 23-41. *Bricolage* refers to the use of tools at hand in a new context or in response to new problems. Just as we might use a screwdriver to pound a nail in a pinch, we often use memes in a new context beyond their original use, thereby expanding the scope of the meme. Balkin argues that, "Cultural bricolage (1) is cumulative, (2) involves unintended uses, (3) is economical or recursive, and (4) has unintended consequences." *Id.* at 32.

14. *See id.* at 57.

15. *Id.* at 48-49.

advantages them,"[16] and they can spread in a manner very similar to a computer virus that infects the software programs with which it comes into contact if the memes are sufficiently "catching."[17] Memes are more or less successful in surviving and spreading throughout culture for a variety of substantive and psychological factors that enhance their utility.[18] In this respect, Balkin adopts a structuralist approach to explain the ability of some memes to cohere with the dominant shared features of cultural software and to remain accessible for continued use, subject to the cognitive capacities and social needs of their human hosts.[19]

Finally, cultural software is defined as the mechanisms (or "tools") by which memes are transmitted and utilized by social actors. Balkin provides an extensive and illuminating discussion of a variety of mechanisms—cultural heuristics, narrative expectations, homologies and associations, and metaphors and other cognitive models—but his primary aim is to demonstrate the ambivalent character of all tools of human understanding. Balkin ambitiously attempts to merge the interpretive turn with the cognitive revolution[20] for the purpose of demonstrating that the mechanisms by which we have a world necessarily limit the scope of our understanding of the world. Understanding is purchased at the cost of filtering the diffuse experience of reality through cognitive mechanisms such as metaphor and metonymy. Although all mechanisms of understanding can yield both good effects and bad effects, the mechanisms themselves are neither "good" nor "bad." For example, metaphoric understanding produces good results in some settings by enabling us to order our world, but metaphoric understanding also produces bad effects in other settings by limiting or foreclosing certain ways of ordering our world.[21] Our mechanisms of understanding, as tools, are ambivalent.

16. *Id.* at 61; *see also id.* at 61-68.

17. *Id.* at 60-61.

18. *See id.* at 75-88.

19. Balkin explains that the substantive factors that determine the success of a meme extend beyond the "truth or falsity" of the informational content and include the effects generated by the meme such as strong emotions, entertainment, or support for ongoing activities. *Id.* at 75-76. Psychological factors include the ease of comprehension, retention, retrieval, and communication. *Id.* at 76-82. Once again, these factors extend beyond the question of the truth or falsity of the meme, and Balkin emphasizes that some memes are durable precisely because they provide paradigms of wrong or unsuccessful norms or behaviors. *Id.* at 82.

20. *Id.* at 186-87.

21. Balkin writes: "Metaphorical models are classic examples of the ambivalent nature of cultural software. They assist understanding in some respects even as they hinder it in others.

Just as a hammer may be used to build shelter from the environment or to attack another person, the metaphors we live by can foster just social conditions or unjust social conditions.

Balkin argues for the superiority of his metaphor of cultural software by contrasting his views with Gadamer's hermeneutical approach to human understanding. Balkin acknowledges that his approach has hermeneutical features, but he insists that the metaphor of cultural software overcomes serious inadequacies in Gadamer's philosophy. In particular, he argues that Gadamer's concept of the "tradition" that shapes human understanding is misguided because it posits tradition as "supraindividual entity"[22] that guides understanding, leaving Gadamer unable "to explain how shared cultural understandings can be shared while still accounting for the considerable differentiation and disagreement in belief among members of the same culture or interpretive community."[23] In other words, Balkin asks of Gadamer: If tradition secures shared beliefs, how does disagreement arise? And if tradition does not perfectly secure shared beliefs, then how does it come to be instantiated in each individual in varying degrees? Balkin contends that he avoids this conundrum by focusing on the cultural software that is "in" each individual, while also acknowledging that cultural software is continually modified through an economy of exchange drawing upon a (generally) common meme pool.

B. Gadamer's Metaphor of Conversation and the Significance of Tradition

Contrary to Balkin's claim, Gadamer's philosophical hermeneutics describes human understanding in a manner that is very similar to Balkin's account. It is important to reveal this common starting point, because Gadamer's approach to the critique of ideology overcomes the deficiencies in Balkin's account of critical theory by remaining faithful to the general model of human understanding that he shares with Balkin. Balkin errs by concluding that in order "[t]o describe the phenomenon of ideology, we need something like Gadamer's concept of tradition, but we must alter it considerably to avoid the puzzles that this and similar concepts

Their power stems precisely from their ability to empower understanding by shaping and hence limiting it." *Id.* at 248.

22. *Id.* at 10.

23. *Id.* at 7.

produce."[24] The concept of tradition plays an important role in Gadamer's hermeneutical philosophy, but Gadamer never regards tradition as a "supraindividual entity" that imparts understanding to individuals. In fact, Gadamer's concept of tradition is only one part of a sophisticated and subtle account of human understanding that is quite similar to Balkin's account, but which opens greater possibilities for describing the contours of a postmodern critical theory.

Balkin interprets Gadamer's reference to tradition out of context, disregarding Gadamer's use of a number of interrelated concepts to describe human understanding. Gadamer's central claim is that human understanding is interpretive. He is not concerned with developing pragmatic strategies for interpreting specific texts or social acts; rather, Gadamer makes an ontological claim that the hermeneutical situation of interpreting is universal and unavoidable. Reflecting on the theme of *Truth and Method*, he writes: "My real concern was and is philosophic: not what we do or what we ought to do, but what happens to us over and above our wanting and doing."[25] Gadamer expresses his thesis by joining several key concepts in a nuanced phenomenological account. He begins by stating that individuals embody a "forestructure of meaning" (read: cultural software; mechanisms of understanding) that is expressed in the form of "prejudices" or "precommitments" (read: memes), and then argues that understanding results from a decentering "fusion of horizons" (read: evolution of memes in a new context) in which two individuals have a "genuine experience" (read: economy of exchange) that disrupts the pretense that either individual is an insulated self.[26]

Gadamer emphasizes the mutuality that defines exchanges leading to understanding by proposing his own metaphor in the form of a synecdoche: he suggests that the experience of understanding is revealed by reflecting on the experience of coming to an agreement in conversation. Beginning with the insight that "the more genuine a

24. *Id.* at 13.

25. GADAMER, *supra* note 3, at xxviii.

26. I have discussed these features of Gadamer's philosophy in some detail in previous articles. *See* Francis J. Mootz III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition*, 11 YALE J.L. & HUMAN. 311 (1999) [hereinafter Mootz, *Law in Flux*]; Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDISC. L.J. 491 (1998) [hereinafter Mootz, *Rhetorical Knowledge*]; Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration That the Obvious Is Plausible*, 61 TENN. L. REV. 69 (1993) [hereinafter Mootz, *Rule of Law*]; Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U. L. REV. 523 (1988) [hereinafter Mootz, *Ontological Basis*].

conversation is, the less its conduct lies within the will of either partner," Gadamer characterizes the understanding that occurs in conversation as "an event that happens to us."[27] The metaphor of conversation underscores the ego-decentering thrust of Gadamer's philosophy, not just by recalling the experience of recognizing the superior insight of one's conversational partner, but also by recalling the conversational play that occurs beyond the conscious direction of either person.[28]

> The dialogical character of language . . . leaves behind it any starting point in the subjectivity of the subject, and especially in the meaning-directed intentions of the speaker. What we find happening in speaking is not a mere reification of intended meaning, but an endeavor that continually modifies itself, or better: a continually recurring temptation to engage oneself in something or to become involved with someone. But that means to expose oneself and to risk oneself.[29]

Gadamer persuasively reinforces Balkin's description of an economy of exchange that affects each individual's cultural software by pointing to the common experience of a conversation, in which something is expressed that moves beyond the two individuals and represents a shared creation beyond either's instrumental control.

Gadamer's references to "tradition" can be understood only in light of the conceptual backdrop that Gadamer summarizes with the metaphor of conversation. Gadamer emphasizes the power of tradition only to emphasize that an individual interpreter can never rise above her historical and finite "hermeneutical situation." In this sense, tradition is nothing more than an ongoing conversation in which we always already find ourselves, a conversation that bears historical weight because, as it spirals forward through time, it establishes the meme pool through which an individual gains an understanding of the world. Tradition is "outside" individual selves only to the extent that memes are continually regenerated in playful, conversational exchanges that take place over time and throughout the culture, and so it constitutes the horizon within which an individual can understand at all. It is clear, though, that tradition

27. GADAMER, *supra* note 3, at 383.

28. Gadamer's phenomenological description of the experience of "play" forms the core of *Truth and Method*, and he uses the metaphor of conversation to emphasize the linguisticality of human understanding. For a review of Gadamer's concept of "play," see Mootz, *Ontological Basis*, *supra* note 26, at 531-33.

29. Hans-Georg Gadamer, *Text and Interpretation* (Dennis J. Schmidt & Richard E. Palmer trans.), *in* DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER 21, 26 (Diane P. Michelfelder & Richard E. Palmer eds., 1989).

exists only "in" dynamic exchanges between individuals. As Gadamer relates, Heidegger's ontological treatment of the hermeneutical circle emphasizes this dynamic character of tradition: "Tradition is not simply a permanent precondition [that is later used by a subject in interpretation]; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves."[30] Tradition is cognitively empowering, rather than a reservoir of information from which a subject can freely choose.

Although Gadamer emphasizes that tradition serves as a challenge to, and provocation of, individual interpretive strategies, he is quite clear that tradition does not confront individuals as a force from outside their existence. Gadamer writes that

> Our usual relationship to the past is not characterized by distancing and freeing ourselves from tradition [as if it were an external entity]. Rather, we are always situated within traditions, and this is no objectifying process—i.e., we do not conceive of what tradition says as something other, something alien. It is always part of us, a model or exemplar, a kind of cognizance that our later historical judgment would hardly regard as a kind of knowledge but as the most ingenuous affinity with tradition.[31]

Gadamer's tradition is much like Balkin's cultural software: it is our continually modified opening to the world—a historical, social, and finite set of cognitive mechanisms and memes—that precludes "pure" knowledge.[32] Tradition is ambivalent: it is neither the "shackles of the past," nor a utopian "golden age," but instead it is the dynamic situation in which we find ourselves as historical, finite beings who cannot look at the world with entirely "fresh" eyes.[33] "*Understanding*

30. GADAMER, *supra* note 3, at 293.

31. *Id.* at 282.

32. Gadamer starkly distinguishes tradition from a natural law conception of "the eternal orders of nature," and he emphasizes that "the way we experience one another, the way we experience historical traditions, the way we experience the natural givenness of our existence and of our world, constitute a truly hermeneutic universe, in which we are not imprisoned, as if behind insurmountable barriers, but to which we are opened." *Id.* at xxiv.

33. Gadamer's translators make this point in their preface to *Truth and Method* in the course of explaining the difficulty they faced in rendering Gadamer's use of "tradition" in English:

> This ongoing conversation is *Überlieferung*, "tradition." English has no corresponding verb, nor any adjective that maintains the active verbal implication, nor any noun for what is carried down in "tradition." We have therefore admitted the neologism "traditionary text," and have sometimes used the phrase "what comes down to us from the past" or "handed down from the past" to convey the active sense of the German. We are likely to think of "tradition" as what lies merely behind us or as what we take over more or less automatically. On the contrary, for Gadamer "tradition" or "what is handed down from the past" confronts us as a *task*, as an effort of understanding we feel ourselves required to make because we recognize our limitations, even though no

is to be thought of less as a subjective act than as participating in an event of tradition, a process of transmission in which past and present are constantly mediated."[34]

Gadamer's concept of tradition not only is consistent with the model of human understanding that he shares with Balkin, it serves as a better vehicle for expressing this model. Balkin draws heavily on contemporary debates in evolutionary biology to argue that memes compete for survival in the cultural software of human hosts, and that this competition can be viewed productively through the lens of contemporary cognitive science. Although cultural software is "in" individuals, he contends that memes can be isolated for study just as scientists can isolate human genes for study apart from individual persons. George Taylor persuasively demonstrates that Balkin retreats from his model of human understanding by taking this tack, moving away from *bricolage* that occurs in a historically contingent economy of exchange and embracing a more functionalist account of the survival of memes.[35]

David Charny criticizes Balkin on similar grounds, pointing out that Balkin's use of the concept of a meme is particularly curious in light of the original purpose of the concept. Charny notes that the

> meme was developed by biologists, cognitive psychologists, and philosophers who sought to describe the processes of thought with conceptions that were entirely physiological and material—or, at least, observable by the procedures of empirical science—and so would not depend on supposedly occult metaphysical conceptions such as an individual "consciousness."[36]

one compels us to do so. It precludes complacency, passivity, and self-satisfaction with what we securely possess; instead it requires active questioning and self-questioning.

Joel Weinshiemer & Donald G. Marshall, *Translators' Preface* to GADAMER, *supra* note 3, at xi, xvi.

34. GADAMER, *supra* note 3, at 290. Gadamer makes the point that it is the historicity of understanding that paradoxically enables understanding to rise above solipsism and subjectivism.

> This means, above all, that it is not correct to assert that the study of a text or a tradition is completely dependent upon our own decision making. Such a freedom, such a standing at a distance from the examined object simply does not exist. We all stand in the life-stream of tradition and do not have the sovereign distance that the natural sciences [methodologically] maintain in order to conduct experiments and to construct theories.
>
> . . . We are not observers who look at history from a distance; rather, insofar as we are historical creatures, we are always on the inside of the history that we are striving to comprehend.

HANS-GEORG GADAMER, THE BEGINNING OF PHILOSOPHY 28 (Rod Coltman trans., Continuum Publ'g 1998) (1996).

35. *See* George Taylor, Justice As Postmodern? 12-13, 26 (unpublished paper, on file with the Chicago-Kent Law Review) (reviewing BALKIN, *supra* note 2).

36. David Charny, *Farewell to an Idea? Ideology in Legal Theory*, 97 MICH. L. REV. 1596,

Balkin readily concedes that memes are not distinct entities that are transmitted throughout culture in the same way that a gene is transferred to offspring,[37] and so his memetic analysis inevitably generates tension within his model of human understanding. Consequently, Charny suggests that Gadamer's concept of "tradition" is more suitable than Balkin's memetic analysis for exploring the model of human understanding that Balkin outlines.

> The merely behavioral notion of transmittability is inadequate to the task [of explaining the evolution of cultural software] because it does not tell us how to decide what counts as proper transmission of a meme, as opposed to invention of a new one. Rather, what makes the fragment accessible cognitively is its embedding in a larger structure of perception or analysis—the sort of structure with which Gadamer, for example, was concerned in the theories of "tradition" that Balkin wishes to reject.[38]

Balkin's analysis of memes adds nothing to our understanding of human understanding, Charny concludes, because Balkin provides no guidance for determining how memes work in human settings. Balkin simply cannot explain how memes "function" or "survive" in the cultural realm, except to note the factors (such as their cognitive fit with human memories) that influence this process.[39] Charny concludes that Balkin must develop his references to rhetoric in greater detail, because the survival of memes within a culture is linked to their persuasive effects in ongoing rhetorical exchanges.[40]

1603 (1999) (reviewing BALKIN, *supra* note 2).

37. *See* BALKIN, *supra* note 2, at 51-54. Balkin concedes that genetic mutation is relatively rare and, at least for the moment, random, whereas memetic mutation is constant because memes are part of a dynamic symbolic structure of meaning. "Human beings are not passive receptors of memes; they are active processors and recombiners of the cultural messages and skills they receive from others." *Id.* at 52. It is precisely the innovations of human actors that a memetic analysis renders obscure, especially when Balkin writes: "Memes 'use' people for the purpose of their own propagation. . . . [T]hey survive, reproduce, and propagate because it advantages them." *Id.* at 61.

38. Charny, *supra* note 36, at 1605-06.

39. *See id.* at 1606-07.

40. Charny writes:

> The public space is not a collection of rational selves, but a swarm of viral particles of information. What rescues this from utter bleakness is the (individually limited though collectively determinative) power of each self to influence memetic propagation [through a postmodern rhetorical exchange], and the celebratory sense in which this diversity spawns ideals and aspirations that might elude a more tightly controlled communal discourse.

Id. at 1614. As I discuss below, Gadamer emphasizes this same rhetorical dimension in a manner that answers the immediately voiced fear that a rhetorical analysis leads to the conclusion that cultural software evolves out of a chaotic, "anything goes," multicultural clash of incommensurable claims.

Charny's insight is worth developing in detail: Gadamer's concept of tradition proves to be a much better vehicle for developing the model of human understanding that Balkin and Gadamer share. Because Gadamer conceives of tradition as an ongoing conversation in which individuals already find themselves, he recuperates the rhetorical tradition in order to explain (returning to Balkin's terminology) how cultural software evolves within an economy of exchange. Gadamer argues that genuine rhetoric concerns the "discovery and transmission of insight and knowledge," an experience that is exemplified in the "art of leading a conversation."[41] Genuine rhetoric is distinguished from the "idle speculations of the Sophists" because it involves more than the manipulation of linguistic indeterminacy.[42] Construed not just as an opening to the world but also as a task or question that confronts the individual, tradition is not just a static accumulation of information. Instead, tradition is a never-ceasing dynamic of rhetorical exchanges occurring within a horizon that is defined by the historical effects of previous exchanges within the culture, and in which prejudices are appropriated and developed by human actors seeking to motivate others to act.[43]

Balkin's approach tends to conjure an image of an individual with her cultural software "in place" who later comes into contact with others in a manner that leads to slight modifications in her cultural software. But this picks up the story of human understanding far too late in the book. Our cultural software is not an operating program that is loaded into us and then later slightly modified, but instead is the product of a lifetime of understandings that bear the deep imprints of the tradition that enables understanding. A person develops her cultural software before she is a conscious self by haltingly entering into an ongoing cultural conversation that Gadamer characterizes as tradition. This acculturation is linguistically mediated in increasingly complex ways as the child learns to understand language, to speak, and ultimately to read and write, but acculturation is not solely linguistic in nature. The child learns nonlinguistic interactions as well, such as smiling, averting her eyes, or hugging another person in the appropriate contexts, all of which form the social context for her linguistically mediated participation in

41. Hans-Georg Gadamer, *The Expressive Power of Language: On the Function of Rhetoric for Knowledge*, 107 PUBLICATIONS MOD. LANGUAGE ASS'N AM. 348, 350 (1992).

42. GADAMER, *supra* note 3, at 19; *see also* Gadamer, *supra* note 41, at 350.

43. *See, e.g.*, Mootz, *Rhetorical Knowledge*, *supra* note 26 (drawing out the rhetorical dimensions of Gadamer's hermeneutics).

social exchanges. The important point is that she will not experience her introduction to this ongoing conversation as encounter with an "external" tradition for the simple reason that it is this conversation that provides her with the resources for becoming conversant and participating in the activity of understanding. Tradition is the shared realm of understanding that opens a world for individuals to join in its ongoing economy of exchange. Once the individual becomes conversant she cannot escape tradition and start a new conversation, but instead can only participate as a conversation partner within a constantly evolving tradition.

It is a profound mistake, then, to regard tradition as merely a starting point of understanding that is later surpassed by the individual. Human understanding is traditionary (finite and historically conditioned) yet also inventive (the product of rhetorical exchanges oriented to persuasion). Balkin's memetic analysis could account, at most, for habit and convention, but it provides little guidance for explaining what I have elsewhere termed "rhetorical knowledge."[44] Rhetorical knowledge emerges out of the preunderstandings embedded in patterns of social discourse and interaction, but it is distinguished from mere convention by the inventive representation and reinscription of "prejudices" by the rhetorical actor. Surveying accepted topics, norms, and opinions as resources for confronting the demands of the present, individuals continually conjoin these constitutive features of themselves and their society in unique ways. Balkin is certainly correct to look to cognitive science to help explain why certain "memes" are more available for rhetorical elaboration than others. However, Taylor and Charny are equally correct in emphasizing that this inquiry provides only one part of the picture of human understanding, and that it represents a relatively insignificant part if it is not successfully wedded to a broader hermeneutical and rhetorical investigation of why and how only a fraction of the cognitively accessible memes become important within a culture.

This point can be recast by considering Balkin's use of the metaphor of evolution.[45] Balkin appears to place equal weight on a Lamarckian conception of evolution (in which the organism directly responds to the demands of the environment with *bricolage*, leading

44. For an extended discussion of "rhetorical knowledge" that informs my discussion in this paragraph, see Mootz, *Rhetorical Knowledge*, *supra* note 26.

45. I am indebted to George Taylor's lead in making this argument. *See* Taylor, *supra* note 35, at 8-13.

to unintended uses and effects that cumulate over time) and a Darwinian conception of evolution (in which random variations in memes are naturally selected over time according to their tendency to support the organism's adaptation to a changing environment).[46] Gadamer's rhetorical conception of tradition emphasizes the Lamarckian sense of evolution, and thereby provides a necessary corrective to Balkin's tendency to discount human agency. The survival of memes is not particularly interesting or significant at the level of determining the qualities that render information easily cognized. The more fundamental question is how individuals discriminate among numerous cognitively adequate memes for the purpose of addressing contemporary questions and challenges.[47] Of course, it bears emphasis that Balkin and Gadamer agree that human agency must not be characterized as the sovereign act of the cogito. However, Gadamer's characterization of tradition as an ongoing conversation that provokes and guides rhetorical exchanges provides a superior explanation of the insight that he shares with Balkin: cultural knowledge is neither the master of, nor just a tool available to, the individual.[48] Tradition stands over and above individual claims to selfhood, even as the individual rhetorically refashions traditionary prejudices in conversational exchanges that seek to motivate action in response to the practical demands presented by changing circumstances.

In short, Balkin's efforts to distinguish Gadamer's philosophical hermeneutics prove to be in vain. Gadamer's philosophy provides a better account of the model of human understanding that he (largely)

46. BALKIN, *supra* note 2, at 35-41.

47. David Charny makes this point in a similar manner. *See* Charny, *supra* note 36, at 1615. Interestingly, it appears that a Lamarckian approach may be gaining respectability even in biology with respect to specific evolutionary processes. *See* EDWARD J. STEELE ET AL., LAMARCK'S SIGNATURE: HOW RETROGENES ARE CHANGING DARWIN'S NATURAL SELECTION PARADIGM (1998) (arguing that immunities acquired during a parent's life might, in some respects, be passed on to a child).

48. In his concluding chapter, Balkin makes this point in a manner that calls to mind the point of Gadamer's emphasis on tradition and rhetoric in *Truth and Method*. Balkin writes:

> I noted earlier that we human beings exist in a great tide of informational evolution. Yet our participation in the tide of cultural evolution does not mean that we lack agency. Our cultural software surely affects our behavior; our actions always have unintended consequences. But it is a far cry from recognizing this to inferring that we are mere instruments of memetic evolution. We must reject a simplistic either/or view which insists that either we are in full control of the development of our memes or they are in full control of us.
>
> . . . We are active participants in the growth and spread of cultural software, even if we do not have full control over the terms of its evolution.

BALKIN, *supra* note 2, at 293.

shares with Balkin. At the level of describing human understanding, Balkin's differing approach generates some unnecessary tensions, albeit tensions which appear to be generally harmless to this point. However, as Balkin proceeds to develop his theory of ideology and critique, the significance of his deviation from Gadamer becomes apparent. In the next part of the Article I will describe and criticize Balkin's conceptions of ideology and critique, and then in Part III I will defend Gadamer's very different account of ideology critique. Gadamer's use of the concept of tradition within the broader metaphor of understanding as a conversation charts a productive course for postmodern critical theory that adheres to the model of human understanding that Balkin purports to defend.

II. IDEOLOGY, CRITIQUE, AND TRANSCENDENTAL ARGUMENT: BALKIN'S QUEST TO REPROGRAM CULTURAL SOFTWARE

A. Ideological Effects

Balkin contends that a new theory of ideology follows from his model of human understanding. He begins by rejecting "pejorative" approaches that characterize ideology as the product of defective modes of understanding. "Pejorative conceptions usually assume a unidirectional model of ideological analysis: the ideology-free analyst locates and criticizes ideology in the ideologically deluded analysand. Disagreements between analyst and analysand about social reality are explained as ideological delusion on the part of the analysand."[49] Pejorative accounts of ideology inevitably collapse under the weight of self-reference, though, because there can be no guarantee that it is not the critic who is employing defective tools of understanding.[50] The problem of self-reference becomes acute when competing camps accuse each other of false consciousness and ideological delusion, since there is no independent standard that can adjudicate which group is engaged in ideological thinking. As a result, the proponents of a pejorative account of ideology cannot avoid the relativist morass that postmodern thinkers have openly embraced, even if the resulting relativism is punctuated by the sloganeering and accusations of those who remain convinced of the authenticity of their own worldview.

Pejorative accounts of ideology fail because they define ideology as the product of defective tools of understanding. But, as Balkin

49. *Id.* at 126.
50. *Id.* at 125.

emphasizes, the mechanisms of understanding are themselves neither true nor false, neither just nor unjust. He insists that ideology is not "something separate from cultural understanding. The mechanisms of what we call ideological thinking are no different in kind from the ordinary forms of thought. There is not a separate set of devices that constitute 'the ideological' and another set that constitute 'the nonideological.'"[51] All mechanisms of understanding are capable of fostering both just and unjust social conditions. Ideology is one possible effect of ordinary mechanisms of understanding, an effect that occurs "when cultural software 'goes wrong' in some important way."[52] Consequently, the "study of ideology . . . might be summarized as the study of 'when good heuristics go bad,'"[53] or, more descriptively, as the study of how a heuristic with the potential for just effects within society can in certain contexts foster injustice. Balkin contends that the "tools of understanding that are entirely benign in some circumstances may become malignant if too much is demanded of them or if the context in which they are employed changes sufficiently."[54] For example, one generation might employ the metaphor of working to build a "color blind" society for the purpose of overcoming racism, but a later generation might invoke the metaphor to attack affirmative action programs, in effect eliding systemic "white privilege" and solidifying gross inequalities based on race.

If ideology is not a defective mode of understanding, but instead is equated with the detrimental effects that certain understandings have within a social context, then the identification and critique of ideology is possible only if the critical theorist has a standard against which to judge the effects of the understandings generated by cultural software. Identifying the mechanisms of understanding is a descriptive task, but Balkin stresses that ideological analysis "necessarily has a normative dimension. It cannot be value free but must presuppose a view about what is good and bad, advantageous and disadvantageous, just and unjust."[55] Balkin readily acknowledges that he has not avoided the problem of self-reference by invoking a normative criterion of justice. All human understanding is a function of ambivalent mechanisms of understanding, and so the critic can

51. *Id.* at 107.
52. *Id.* at 110.
53. *Id.* at 185.
54. *Id.* at 108.
55. *Id.* at 111.

define the standard of "justice" according to which she judges ideological effects only by employing the very same mechanisms of understanding that give rise to the potentially ideological beliefs. Put simply, the critic cannot step outside the limitations of her cultural software in order to perceive a "pure" standard of justice against which ordinary thinking can be judged.[56]

Critics will offer the obvious rejoinder that "Balkin does not suggest how he has been able to either control or transcend his own social construction."[57] However, Balkin insists that the ambivalent character of our tools of understanding reveals that the problem of self-reference is really no problem at all.

> How does an ambivalent conception of ideology deal with the problem of self-reference . . . ? It accepts the inevitability of self-reference but argues—consistent with the general conception of ambivalence—that this feature of our thought does not necessarily make ideological analysis futile or unhelpful. Quite the contrary: the ability of thought to turn upon itself is a prerequisite for an adequate analysis of ideological thinking.[58]

In other words, Balkin claims that self-reference is not an obstacle to the critique of ideology, but instead makes the critique of ideology possible.

Balkin expressly follows Gadamer's analysis to explain how the self-referential character of thought works to reveal ideological effects. An individual's cultural software is a prejudiced structure of preunderstanding that empowers understanding precisely by limiting the possibilities.[59] Because no person, even the critic of ideology, can escape entirely from her prejudiced horizon, the critic must constantly assess the possibility that it is her own thinking that is leading to ideological effects rather than the understanding that she is analyzing.[60] Again expressly adopting Gadamer's analysis, Balkin argues that the critique of ideology requires a constant check of one's own biases and prejudices by suspending the inevitable urge to brand those who have different understandings as suffering from false consciousness.[61] In addition to searching for ideological effects in

56. *See id.* at 134 (arguing that "there is no point at which we abandon the tools of understanding so that we might critically reflect upon all of them").

57. Michael J. Gerhardt, *Deconstructing Balkin*, 2 GREEN BAG 2d 219, 222 (1999) (reviewing BALKIN, *supra* note 2).

58. BALKIN, *supra* note 2, at 127.

59. *See id.* at 311 n.13 (citing Gadamer's analysis of prejudices).

60. *Id.* at 129.

61. *See id.* at 311 n.14 (citing Gadamer's analysis of the "hermeneutic circle").

patterns of understanding within a society, then, the critic must constantly assess the potential that her own understanding leads to ideological effects.

> Successful ideological analysis is possible because and to the extent that the analyst's tools of understanding enable her to understand social conditions well enough to perform the analysis. For precisely the same reason, however, it is possible that the analysand has a grasp of social conditions that conflicts with the analyst's but is nevertheless equally adequate or even more valid. The analysand may in fact see something that the analyst does not see as clearly. By considering how the analysand's thought might have elements of truth or justice in it, the analyst can attempt to analyze and modify her own views. By using the beliefs and opinions of others as a partial check on the analyst's own, ideological analysis attempts to improve social understanding not only for the analysand but for the analyst as well.
>
> I call this dialectical approach to the study of ideology or cultural software a critical approach. By *critical* I do not mean the discovery of flaws or defects in the thought of another person but rather a process of self-reflection and self-discovery that is part and parcel of the ideological analysis of the thought of other persons. A critical approach is inevitably a self-critical approach.[62]

This passage is worth quoting at length, because at first glance Balkin appears to embrace Gadamer's dialogical account of human understanding, in which a fusion of horizons occurs that moves beyond the initial understandings of both dialogue partners.

But this convergence with Gadamer's philosophy presents a problem for Balkin. If ideological analysis is nothing other than a dialogical engagement in which the critic and her conversational partner both reach new understandings, then ideological analysis cannot be differentiated from simple human understanding. This is problematic because the traditional goal of critical theory is to identify those circumstances in which an *apparent* fusion of horizons *in fact* represents ideological effects. Balkin responds to this problem by reinvesting the critic with the power to determine the scope of her engagement with the other, so as to avoid being drawn into ideological beliefs that co-opt her understanding.[63] Balkin regards this wariness of the other as a crucial difference that distinguishes his approach from Gadamer's approach.[64] In the above-quoted passage, for example, Balkin suggests that the critic chooses to *use* the beliefs

62. *Id.* at 130.
63. *Id.* at 130-32.
64. *Id.* at 313 n.15.

and opinions of others *as a partial check* on her own prejudices. The analyst cannot dominate her subject as if the other is an object of study, because the analyst's tools of understanding are no less ambivalent than her subject's tools; nevertheless, the analyst also must guard against becoming ensnared in the subject's ideological thinking. Both prospects represent unavoidable "risks" of self-referential critical thinking that the critic of ideology must carefully avoid.

It should be clear that Balkin has succeeded only in restating the problems that all theories of ideology and critique confront.[65] Balkin's argument to this point consists of a few key claims. First, the critic must guard against the ideological effects of her own cultural software while also guarding against being co-opted by the ideological effects of the social understandings that she is analyzing. Second, the critic cannot identify ideological effects as the products of certain defective tools of understanding because these tools are ambivalent; ideological effects are determined only by reference to a conception of justice as applied in a particular social context. Finally, conceptions of justice are themselves understood only by means of cultural software. Balkin thus acknowledges

> the ordinariness and even the banality of the processes by which we understand ourselves and the social world around us.... Ideological analysis is not a master discipline that can promise to regulate or direct our understanding of the social world. Rather, it is a form of knowledge acquisition just like the forms it purports to study and critique.[66]

Balkin faces an obvious challenge: What can possibly ground the critique of ideology if these three presuppositions hold true?

B. Justice As Transcendent

In order to address this challenge and overcome an apparent roadblock to defining critical theory, Balkin suddenly abandons his model of human understanding. As Step Feldman comments, it is as if Balkin experiences "postmodern vertigo" at this juncture and reacts instinctively by reaching down and grabbing "for a piece of firm,

65. Michael Gerhardt notes that Balkin "suggests that we can resolve this paradox [of self-reference] by trying to be candid with ourselves and others about the sources of our own thinking," but Balkin succeeds only in making "an aspirational declaration," which "is not the same thing as actually overcoming it or proving we have overcome it." Gerhardt, *supra* note 57, at 223.

66. BALKIN, *supra* note 2, at 135-37 (discussing Stanley Fish's critique of the quest to develop critical self-consciousness with approval).

modernist ground."[67] Balkin avoids a relativist conclusion to his argument by contending that "ideological analysis, and indeed all moral discourse, must presuppose a transcendent value of justice. Tools of understanding produced by cultures to pursue justice are articulations of this value."[68] The transcendent value of justice is an inchoate "ideal . . . demand or longing" that we attempt to understand through its "incomplete and imperfect" articulation with the tools of cultural understanding; it is not reducible to these historical articulations, but rather is the presupposition for them.[69] The transcendent ideal of justice is an abiding guarantor of the critical project.

Balkin is quite clear that the transcendent value of justice is a regulative ideal rather than a detailed set of substantive prescriptions. Justice is immanent within reality, but only as an "inexhaustible" and "indeterminate demand."[70] Balkin argues that we use the tools of understanding to implement justice within a particular context, and that we can never exhaustively implement justice within existing social institutions. "To be just we must construct examples of justice using the indeterminate urge for justice as our goad rather than as our guide."[71] Balkin credits Habermas's proceduralist account of reason for revealing that the very "rhetorical structure of dialogic encounters reveals the regulative nature of transcendent ideals in a particularly striking way,"[72] but he also argues that there is a substantive dimension to the transcendent ideal of justice.

> Even when we accuse our interlocutors of great evils, we make reference to a common value of justice that we claim they have failed to live up to. And their defense, even if unconvincing to us, will appeal to reasons that they insist should persuade us and exculpate them. When we criticize our opponent to a third party, we invoke an ideal of justice that applies not only to ourselves and the audience, but to the person we criticize.
>
> In short, transcendent ideals are presupposed by the rhetorical situation of having to persuade an audience. They seem to spring forth magically from the rhetorical encounter. Like a beautiful

67. Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 193 (1996). Feldman is discussing an earlier article in which Balkin first makes the transcendental argument that is continued, in modified form, in Balkin's book. *See* J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131 (1994).

68. BALKIN, *supra* note 2, at 143.

69. *Id.* at 144.

70. *Id.* at 161.

71. *Id.* at 162.

72. *Id.* at 148.

> mosaic whose pattern emerges from the juxtaposition of diverse stones, the framework of transcendent ideals that undergirds the rhetorical situation emerges through the confrontation between different and conflicting perspectives.[73]

Ideological analysis simply represents a special case of dialogue, in which the critic must presuppose transcendent ideals of justice in order to critically assess her understandings and the social understandings that she is studying. The transcendent ideal girds critical inquiry amidst historical flux: "The variance of history is coherent because we understand it against the background of the transcendent."[74]

The transcendental argument bears a heavy burden in Balkin's theory, and it does so uneasily. If Balkin claims that justice is a transcendent value only for the purpose of reinforcing the fact that our history and cultural practices evidence attempts to work out the requirements of a value that cannot be fully defined, then ascribing transcendent status appears to do no work; in this case, Balkin is better left with his emphasis on dialogic engagement.[75] However, with his mosaic metaphor, Balkin appears to suggest that the transcendent value of justice is more in the nature of an organizing force that has a gravitational effect on the otherwise fragmented rhetorical activities of persons who inevitably are limited by their historically and socially conditioned tools of understanding. The transcendent value exerts a mysterious force, subsiding below rhetorical exchanges as some kind of unifying principle. In this case, the transcendental argument does work for Balkin, but is unconvincing and misleading.

To his credit, Balkin has effectively undermined the lingering hopes for developing a "pejorative" theory of ideology and has squarely presented the problem of a postmodern theory of ideology and critique. Unfortunately, although there is some ambiguity in what Balkin intends to convey by claiming that justice is a transcendental organizing drive that subtends critical theory, his recourse to a transcendent value of justice appears to be either an

73. *Id.* at 149.

74. *Id.* at 170.

75. At several points Balkin emphasizes that the transcendental argument is a means of breaking down parochialism and acknowledging the absence of a determinate and unvarying conception of the "good life." *See id.* at 148. However, Balkin does not explain why he feels compelled to identify a transcendent ideal outside the dialogic confrontation with another person to accomplish this goal, since the dialogic encounter is a direct and unmediated experience of one's parochialism.

empty gesture or a betrayal of his analysis of human understanding. Under one reading, Balkin is arguing that human nature includes a drive toward justice that is presupposed by, and evident in, every human interaction. This "strong transcendental argument" completely undercuts his model of human understanding by positing a timeless and universal substrate upon which critical theory builds.[76] As several reviewers have emphasized, human history undercuts Balkin's claim: it seems all too obvious that some individuals interact with others in a manner that evidences, if anything, an inexhaustible urge toward violence and domination.[77] The "strong transcendental argument" attempts to assume away the problem that Balkin poses for himself.

Under a different reading, Balkin proposes a "weak transcendental argument" that posits the urge toward justice as a presupposition only of arguments about justice itself. Even if some people act without any reference to a concept of justice, the argument would run, those who seek to orient their behavior in accord with justice necessarily presuppose a transcendent value. But the weak transcendental argument is unpersuasive on two very different fronts. On one hand, there is no explanation why the transcendent value cannot be fully apprehended and implemented, as a religious believer might argue in the course of developing a substantive natural law theory. On the other hand, this argument does little to dispel the fears of nihilism. As Charny observes, "It is quite a leap . . . to start from the requirement of value judgment to understand human action, and to end up with the particular type of value judgment needed for ideological critique as Balkin imagines it."[78] Balkin's transcendental argument appears to be an intellectual form of whistling in the dark to convince himself that he is not walking alone.

Balkin's transcendental argument encounters these difficulties for a very simple reason. After meticulously describing human understanding as the historical cumulation of *bricolage* produced by an economy of exchange, he abandons a thoroughly temporal approach to human understanding. Although every individual effort to act justly remains temporal in his account, the purpose of his transcendental argument is to rise above the flux of existence even if only to posit a motivating gesture that remains noncontingent. The

76. *See* Taylor, *supra* note 35, at 24-26.
77. *Id.* at 25; *see* Feldman, *supra* note 67, at 200.
78. Charny, *supra* note 36, at 1609.

messy problem of making value judgments, of bringing the transcendental value of justice to bear in a particular context, is superceded by the abiding transcendental ideal of justice. But as Step Feldman recalls, "Even if we are born with some precultural drives or values—such as justice—our being-in-the-world is so *culturally saturated* that a search for a precultural pearl buried somewhere beneath the cultural waves seems at best irrelevant and at worst nonsensical."[79] There simply seems to be no point to Balkin's transcendental turn.

Anticipating strong negative reactions to his recourse to transcendentalism, in the final analysis Balkin defends his transcendental argument on pragmatic grounds by claiming that he provides the "most adequate way of describing this inadequacy [or the human predicament]" at this time.[80] Balkin concedes that his analysis, like all cultural articulations, is subject to revision if it proves to be inadequate for articulating features of human life—such as justice—which are not "wholly contingent" and do not exist "wholly internal to our discourse."[81] Balkin claims only that, at this point in history, a transcendent conception of justice best serves our purposes in moving forward. Of course, his modesty is simply another rhetorical device for reaffirming the timeless and universal qualities of the transcendent value of justice. As he observes, "Our conceptions are revisable only because there is something against which we revise them."[82]

I believe that Balkin has backed himself, admittedly with some quite impressive footwork, into a corner. The transcendental argument lodges the value of justice *beyond* the dialogue rather than *in* the dialogue. This has profound consequences. If a transcendent value of justice exists beyond immediate rhetorical exchanges, then the critic is quite capable of pursuing an application of this transcendent value in solitary thought. Balkin emphasizes the importance of challenging one's presuppositions by conversing with others, but Balkin's critic is never wholly given over to the dialogue. As he emphasizes,

> An important difference between a critical approach and Gadamer's hermeneutics is that we do not engage in this approach with the goal of reaching an agreement with the analysand. Rather,

79. Feldman, *supra* note 67, at 197-98.
80. BALKIN, *supra* note 2, at 168.
81. *Id.*
82. *Id.*

> we are interested in discovering both what we can learn from the analysand and what we ultimately cannot agree with because of the ideological effects we perceive in the analysand's thought.[83]

A dialogue partner can provide important information in the effort to develop a better articulation of the transcendent conception of justice, but ultimately in Balkin's theory it is the critic who must carefully determine to what extent the other person may serve this useful function in the critical project. The other person is a source of information and potentially a corrective challenge to the critic's shortsightedness, but the other person is not empowered to set the agenda by posing the questions that the critic addresses. The critic remains, to borrow Pierre Schlag's felicitous phrase, a "relatively autonomous self" in charge of her critical inquiry.[84]

Balkin's critic is too discerning and selective. In the end, he falls back on a traditional subject-centered approach, underwritten with a transcendental argument. Extending Balkin's central metaphor, his critic appears to be a (cultural) software programmer who works to eliminate bugs in the social system by seeking input from others, but ultimately the critic is responsible for upgrading the program with reference to an ideal that is beyond actual collaborative endeavors with other programmers. The critique of ideology is the quest to reprogram cultural software. The critic reads tools of understanding like lines of code, and assesses the merits and demerits of their deployment in various contexts against a baseline understanding of justice.

My thesis is that Gadamer's philosophical hermeneutics provides a sophisticated account of ideology and critique that remains consistent with the broad contours of postmodern sensibilities without disavowing the reality of reasonable dialogue oriented toward emancipation. Gadamer overcomes the problems that Balkin encounters by resolutely adhering to his model of human understanding in the face of powerful pressures and desires to articulate a solid, even if transcendental and rather than empirical, grounding for critical inquiry. Balkin's impressive accomplishments fall short, but Balkin does reframe the issues sufficiently to require a new reading of Gadamer's philosophy. In the concluding section, I will offer a reading of Gadamer's philosophy that responds to Balkin's challenge and renders explicit certain features of Gadamer's

83. *Id.* at 313 n.15.

84. *See* Mootz, *Rule of Law, supra* note 26, at 104-05 (discussing Schlag's criticism of Balkin for co-opting and domesticating the radically decentering activity of deconstruction).

approach that traditionally have been underemphasized but which point the way to a more fruitful approach to the problem of ideology critique in a postmodern world.

III. CRITICAL HERMENEUTICS AND THE RHETORICAL DEVELOPMENT OF TRADITION: A GADAMERIAN ACCOUNT OF IDEOLOGY AND CRITIQUE

Gadamer's philosophical hermeneutics responds to the fear that apparently genuine interpretive practices might in fact be masking power relationships that are maintained by ideology rather than consensus. This claim is not necessarily at odds with the prevailing opinion that philosophical hermeneutics precludes effective critical theory, since the proponents of critical theory generally advocate a strong conception of theory that Gadamer properly rejects. My reading of Gadamer's philosophical hermeneutics recovers the experience of critique within interpretive practices and connects this experience with a theoretical attitude that cannot be sharply distinguished from practical engagements.[85] My Gadamerian defense of critical theory begins with an account of the "postmodern self" who acts as the critic, describing the rhetorical space of critical agency in the wake of the collapse of the subject-centered philosophical tradition. I continue by describing the critical practices of this postmodern self and relate these practices to Gadamer's model of human understanding. I enlist two skilled guides to assist my effort to articulate a critical hermeneutics that is grounded in Gadamerian premises but that presses beyond Gadamer's direct concerns: Calvin Schrag and P. Christopher Smith.

A. Locating the Postmodern Self

Balkin struggles to finesse the difficult question of human agency. On one hand, he argues that cultural software is "in" every individual, constituting and enabling agency. On the other hand, he treats the evolution of memes and the operation of the tools of understanding as distinct topics of study, suggesting that cultural

85. I readily admit that my reading of Gadamer's hermeneutics is not the only plausible reading, and I make no claim that I have uniquely captured Gadamer's intentions. Such pretensions obviously would contradict the central teachings of philosophical hermeneutics. However, I defend my reading of Gadamer's philosophical hermeneutics as a charitable extension of his work that can provide an account of critical theory under postmodern conditions.

understandings are structurally defined. This ambivalence is compounded by his transcendental argument. On one hand Balkin seems to suggest that individuals transcend their situation by virtue of a power within them, but, on the other hand, the transcendent status of justice appears to be a dynamism to which individuals are subject. Consequently, it is unclear how the critic is able to identify and overcome ideology under Balkin's account. He argues that the critic must seek out interlocutors to ensure that she avoids ideological effects in her own thinking, but also that the critic must vigilantly guard against being co-opted by the other's ideological thinking. In the end, Balkin is just making the commonsense claim that individuals act *upon* their cultural software in reflective ways but that they do so only *through* their cultural software. To avoid the conundrums that Balkin encounters, it is necessary to describe this reflexive situation in greater detail and with more nuance.

Calvin Schrag's illuminating account of the postmodern self helps to situate an account of critical theory. Schrag argues that subjectivity inheres in "communicative praxis," and he locates critical agency in a "transversal rationality" that is neither pre-given, nor does it dissemble into postmodern fragmentation.[86] In a recent series of lectures, Schrag distills his work in an effort "to resituate and refigure the portrait of the human self,"[87] concluding that

> In the aftermath of the deconstruction of traditional metaphysics and epistemology, a new self emerges, like the phoenix arising from its ashes—a praxis-oriented self, defined by its communicative practices, oriented toward an understanding of itself in its discourse, its action, its being with others, and its experience of transcendence.[88]

Schrag persuasively describes how this postmetaphysical self is capable of acting reflectively and has sufficient resources for engaging

86. *See* CALVIN O. SCHRAG, COMMUNICATIVE PRAXIS AND THE SPACE OF SUBJECTIVITY (1986) (hereinafter SCHRAG, COMMUNICATIVE PRAXIS); CALVIN O. SCHRAG, THE RESOURCES OF RATIONALITY: A RESPONSE TO THE POSTMODERN CHALLENGE (1992) (hereinafter SCHRAG, RESOURCES OF RATIONALITY).

87. CALVIN O. SCHRAG, THE SELF AFTER POSTMODERNITY 8 (1997). This short book is an edited version of Schrag's 1995 Gilbert Ryle lectures at Trent University. Consequently, it is wonderfully succinct and suggestive, and it provides a good window into Schrag's philosophy.

88. *Id.* at 9. Schrag challenges the postmodern tendency to eliminate the "self" as a topic of discussion:

> Although it may be problematic to begin with the subject, either as an epistemological and self-reflecting subject or as an existentially isolated self, one still has to end with the subject, duly decentered and refigured. . . . The subject finds a new space as an emergent within the dynamics of discursive and institutional practices.

SCHRAG, RESOURCES OF RATIONALITY, *supra* note 86, at 151.

in critique, and so I turn to his account as the starting point for my project of defining a critical hermeneutics.

Schrag contends that the self emerges as an achievement of discourse, an accomplishment that is "acquired through a transversal extending over and lying across the multiple forms of speech and language games without coincidence with any one of them."[89] This dynamic achievement is falsified by the attempt to dissect discourse into its constituent units, and also by the attempt to cabin discourse with a structuralist "narratology."[90] Although such studies can yield knowledge, they inevitably obscure the living discourse in which the self emerges.[91] Balkin's analysis of the tools of understanding provides a case in point, inasmuch as his rich descriptions of the tools tend to obscure the substantial abstraction that is required to construct distinct "tools" that yield to analysis. Schrag insists that we cannot confront the fears of postmodernism successfully without attending to the fact that the postmodern self who criticizes ideology emerges as a performance within living discourse.

Schrag emphasizes that individuals avoid dissolving into postmodern fragmentation through a narrative praxis that is intimately tied to their actions within a social setting. The unity of the self is not guaranteed by an underlying logic to the forms of discourse, but rather is a performance that constantly unfolds within a web of historically conditioned discourses. "The narrating self, as at once a sediment and a project of discourse, constitutes and understands itself as emplotted within the interstices of stories already told and stories yet to be inscribed."[92] Moreover, Schrag emphasizes that discourse is intimately tied to action—the speaking self is an acting self—and that actions similarly gain their salience only because they occur within a historical context.[93] "[T]he acting self is always embedded in social practices that reclaim a tradition and invoke a remembrance of things past in anticipation of future practices yet to be performed."[94] Schrag refigures this speaking and acting self by returning to Aristotle's *Rhetoric*. "More like a social practice than a technological tool,

89. SCHRAG, *supra* note 87, at 33.

90. *Id.* at 20-22.

91. *Id.* at 22-23.

92. *Id.* at 71.

93. Schrag writes: "The placement of individual acts against the background of traditional and continuing social practices, reinserting them into the ongoing texture of communicative praxis, has the happy consequence of opening up a vision of the entwinement of discourse and action in the economy of public life." *Id.* at 73.

94. *Id.* at 71.

rhetoric for Aristotle is the art of persuasion, soliciting deliberation, choice, and action, oriented toward the projected good for the polis."[95] The postmodern self is a rhetorical being whose persuasive narratives motivate her actions within a social setting of (more or less) similarly motivated actors.

Schrag uses the term "communicative praxis" to refer to this "amalgam of discursive and nondiscursive practices, in which the meaning-engendering patterns of the spoken and the written word mix and mingle with meaning-laden actions" to coalesce into the postmodern self.[96] The crucial point is that deciding to act in a certain manner can be reasonable and ethical, as opposed to simply arbitrary, because communicative praxis involves a relinquishment of subjective control and a rhetorical participation in a shared logos. Schrag contends that there is an "incarnation of the logos within discourse and action in a hermeneutic of everyday life. Communicative praxis announces and displays reason as discourse. . . . In entering discourse the logos is decentered and situated within the play of speaker and hearer as they seek consensus on that which is talked about."[97] Judgments about the "fitting response" to a particular social situation are rational, then, to the extent that they emerge from the "responsivity of an engaged and decentered moral self as it responds to the prior thought and action already inscribed within a historicized polis"; rationality does not issue from "an interior construct of a centered and sovereign subject" because no such subject exists.[98] The rhetorical rationality of communicative praxis is inherently communal.

To this point Schrag's account closely tracks Gadamer's hermeneutical argument that truth inheres in the playful reconstitution of tradition and that it is not the product of methodological abstraction. However, Schrag argues that the communicative praxis of rhetorical actors engenders a critical distance that too often is suppressed in Gadamer's account. Schrag begins by locating the self in a "community" that "is more than customs and conventions of the tradition," and is "more like the binding textuality of our discourse and the integrating purpose of our action."[99] The speaking and acting

95. *Id.* at 75 (discussing ARISTOTLE, RHETORIC, *reprinted in* THE BASIC WORKS OF ARISTOTLE 1325 (Richard McKeon ed., 1941)).

96. SCHRAG, COMMUNICATIVE PRAXIS, *supra* note 86, at vii.

97. *Id.* at 193.

98. SCHRAG, RESOURCES OF RATIONALITY, *supra* note 86, at 175-76.

99. SCHRAG, *supra* note 87, at 87.

subject is not just situated among other speaking and acting subjects; the self is a performance that emerges only by virtue of its responses to communal practices.[100] This responsiveness includes a "moment of critical agency" that Schrag does not find in Gadamer's account of the development of a tradition, because the response to a communal logos is "not simply to accommodate oneself to that which is going on. It involves discernment, evaluation, [and] critical judgment," a pretheoretical and precognitive activity that Schrag terms "praxial critique."[101] The essence of praxial critique is that it is simultaneously an articulation and application of the criteria of judgment within a shifting historical horizon, and so rationality is seen as a performative construction rather than adherence to preexistence criteria.[102]

I contend that Schrag's approach is wholly consistent with, and anticipated by, Gadamer's philosophical hermeneutics. It is easy enough to recast Gadamer's central insight—to understand is always to understand differently—by using Schrag's terminology: all understanding involves discernment, which is an activity that always includes a degree of critical distanciation. Schrag elaborates this insight in great detail, though, demonstrating how Gadamer's ontological commitments implicate a critical agency. Schrag agrees with Gadamer that discernment emerges from prejudgments within a traditionary horizon, but he emphasizes that there can be

> no discernment apart from a placing of these prejudgments, habits of thought, and action into question. The activation of such questioning requires the performance of distanciation, a stepping-

100. Schrag's analysis closely tracks Gadamer's description of the priority of the question and the hermeneutical significance of the other.

> [T]he discourse and action that play such prominent roles in the process of self-formation are always a discourse and action responding to prior discourse and prior action. Hence the parameters for any socialization of the self have already been marked out. Within these parameters the self never begins itself; it finds itself to be always already begun. And it is always already begun by virtue of its responsivity to the speech and actions of others.

Id. at 91. This is a crucial aspect of Gadamer's genuine postmodern insights in the face of sophistic uses of postmodern themes. "Although we are sympathetic with the postmodern problematization of subject-centered philosophy, we are concerned about the failure of nerve in postmodernism to acknowledge the weight of tradition and the background of communicative practices against which the subject assumes a new posture." SCHRAG, RESOURCES OF RATIONALITY, *supra* note 86, at 151.

101. SCHRAG, *supra* note 87, at 99. For Schrag's analysis of rationality as praxial critique, see SCHRAG, RESOURCES OF RATIONALITY, *supra* note 86, at 50-67.

102. Schrag quite explicitly embraces a historical and nonfoundational description of critique. "Critique, refigured as *praxial* critique, enjoys neither modernity's zeal for foundations nor its hopes for the attainment of certainty. It rests content to discern and assess the play of forms of thought and action against the background of changing and historically conditioned patterns of signification." SCHRAG, RESOURCES OF RATIONALITY, *supra* note 86, at 57.

> back, as it were, to discern what it is that has been going on behind our backs. It is this performance of distanciation that provides the distinctively "critical" moment of rationality as praxial critique.[103]

Schrag is equally interested in challenging the excesses of postmodernism, and toward this end he insists that distanciation does not inevitably disintegrate into a bottomless and contextless negativity for the simple reason that critical distance is a product of social engagement and therefore presupposes community. The traditional picture of a solitary inquirer gaining a critical perspective on social practices by extricating herself from them is replaced by a reconceptualization of critical agency as a space that is opened only by virtue of preexisting social engagement. "The background solicitations of mutual understanding and solidarity in communal endeavors, inscribed within the participatory relationship, remain dialectically bonded with the assertion of self in the distanciating performance."[104] Aligning himself with Gadamer, Schrag agrees that critical distanciation can never be completely severed from participatory belonging. But Schrag challenges Gadamer's biases by insisting that it must also follow that participatory belonging can never be insulated from critical distanciation.

Schrag explains this inevitable commingling of critique and belonging by elaborating Gadamer's recovery of the classical rhetorical tradition that persisted until Vico's spirited last stand against the Cartesian paradigm.[105] Rhetoric has become devalued as merely a strategic tool employed by a speaker upon an audience, but the classical tradition also emphasized the rhetorical engagements that structure an active field of persuasion and action. "The engaged rhetor and audience deploy their own inscriptions of sense and reference, and maneuver their own interventions, albeit not from the vantage point of founding and originating principles but rather from the perspective of involvement and responsiveness across a landscape of we-relationships."[106] Rhetoric is the site of discernment, judgment, persuasion, and action, in which selves come to understand and act only by virtue of the provocations of their heterogeneous community. Rhetoric always involves a critical element, because these

103. *Id.* at 64 (drawing from Ricoeur's work on the dialectic of participation and distanciation in interpretive encounters).

104. *Id.* at 67.

105. *See id.* at 121-22.

106. *Id.* at 131.

provocations pose questions that push the individual beyond received wisdom and into rhetorical inventiveness.

The turn to rhetoric emphasizes the intricate coexistence of dissensus and consensus. Rationality hesitantly emerges from within conflicting discourses and patterns of actions as a transversal connection that immediately is thrown into question again. Gadamer's emphasis on the background agreements subtending disagreements is best read in this light: he does not reach for substantive points of agreement that always remain unquestioned, but rather recognizes an "agreement" in the form of a communal engagement that lies transversally across disparate discourses and practices. Schrag explains:

> Reason remains transversal to the various forms of our personal and social forms of life. It lies across them diagonally; it is neither vertically transcendent to them nor horizontally immanent within them. It operates "between" them in such a manner that it is able to critique, articulate, and disclose them without achieving a coincidence with any particular form of discourse, thought, or action. The integrity of otherness—other forms of thought and other social practices—is maintained, accomplishing at once a better understanding of that which is one's own and a recognition of the need to make accommodations and adjustments in the response to the presence of that which is other. Within such a scheme of things, the dynamics of transversal rationality falls out as a convergence without coincidence, an interplay without synthesis, an appropriation without totalization, and a unification that allows for difference. Such is the transversal dynamics that motivates rationality as a concernful struggle within communicative praxis.[107]

Rhetorical engagement is the plying of this transversal rationality in discourse and action within the historical context of a community.

My extended consideration of Schrag's defense of communicative praxis serves two purposes. First, the project of critical theory requires a critic, and so it is necessary to give an account of the situated self who will be charged with engaging in critique. Schrag connects Gadamer's ontology to a refigured "postmodern self" whose very social existence implies a critical distanciation. But this tells only half of the story. Second, there must also be a connection between this refigured postmodern self and the project of critique. Schrag concludes that the pretheoretical critical distanciation of discernment provides sufficient motivation to underwrite the later critical projects consciously undertaken by the self as critic.

107. *Id.* at 158-59.

> Both intracultural and transcultural judgments and assessments retain their efficacy. Indeed, such judgments and assessments are unavoidable given the transversal play of our beliefs and practices in responding to that which is said and done. It is precisely through this *response-dynamics* of communicative praxis, whereby we respond to the discourse and action that is thrust upon us, that the deployment of critique, articulation, and disclosure proceeds.[108]

Transversal rationality is responsive to historical context and never issues from universal presuppositions, but because it operates across different discourses, disciplines, and contexts, it is never trapped within particular contingencies. It is the constant provocation of "otherness" that situates reason outside of a closed context, even if it always is context-dependent.[109]

B. Critique As Belonging: Original Argument and the Theoretical Posture of Not-Knowing

Schrag concludes that communicative praxis includes an element of transcendence that enables the postmodern subject to gain a critical perspective.[110] Inspired by Kierkegaard,[111] Schrag's approach is far more satisfactory than Balkin's transcendental turn. Nevertheless, it is more productive to avoid the language of transcendence altogether even while attending to the "transcending" effect of being brought outside one's forestructure of prejudices in a hermeneutical encounter with another person.[112] Following the radical elements in the hermeneutical tradition of Heidegger and

108. *Id.* at 169.

109. *Id.* at 173.

110. *See* SCHRAG, *supra* note 87, at 110-48 (chapter 4, entitled "The Self in Transcendence").

111. *See id.* at 117-18.

112. Schrag argues that the social dimension of language and action results in a surplus of practices as against any temporal and contextual articulation. Schrag argues that transcendence is embedded within culturally sedimented practices by virtue of this surplus, but that our transversal rationality frees us from the confines of a particular scientific, aesthetic, or ethical-practical forms of discourse. He argues that "the integrity of the historically specific discourse and action in each of the spheres is safeguarded by a radical transcendence, a horizon of otherness, an alterity of possibilities, that provides a sheet anchor against any cultural hegemony, be it that of scientism, moralism, aestheticism, or ecclesiasticism." SCHRAG, *supra* note 87, at 133. Schrag emphasizes that transcendence doesn't secure univocity, but instead simply opens a critical distance from current practices within which we can engage in dialogue with others, "striving for convergence without coincidence, conjuncture without concordance, seeking to understand within the context of differences." *Id.* at 148; *see supra* text accompanying note 107 (emphasizing that transversal rationality is not vertically transcendent to various forms of life, but rather lies "between" them). I will avoid potential misunderstandings of his approach, and potential pitfalls, by concentrating on the experience of alterity that lies at the root of his notion of transcendence.

Gadamer, Christopher Smith outlines just such an approach by concentrating on hermeneutical *experience* rather than hermeneutical *philosophy*. Smith argues that Heidegger's early essay, *Ontology: Hermeneutics of Facticity*, recuperates Aristotle's notion of hermeneutics as talking matters through as opposed to a method of textual exegesis, and that Gadamer radicalizes this notion in a manner that overcomes Heidegger's later distrust of the "everydayness" of dialogue.[113] Smith characterizes this radical hermeneutical experience as "original argument," signaling that this fundamentally social experience is contested, or argumentative, in some manner. By recovering the experience of original argument, Smith illuminates the critical space that Schrag identifies with transversal rationality. Significantly, Smith does so without reverting to any manner of transcendental argument.

Smith seeks to uncover the original experience of argument that occurs in consultation and deliberation with another person, as opposed to the univocal and demonstrative model of argumentation that characterizes modern "reasoning." Contemporary accounts of reason present a picture of a self that formulates a position that later is converted to speech for the purpose of compelling another person's assent by demonstrating its unquestionable validity.[114] In contrast, Smith emphasizes that the original experience of hearing another person within a shared language involves both a physical and cognitive response: the child hears the parent's rebuke and *feels* it, rather than simply *processes* it.[115] Our thinking assent to a proposition that another person demonstrates to be true is always derivative of our participation in a shared language, because "*we never think in wordless ideas, but only in the words we have first heard from others and then hear again in our thinking.*"[116] Demonstrating that one has "seen" something that another should also "see" is always an

113. *See* P. CHRISTOPHER SMITH, THE HERMENEUTICS OF ORIGINAL ARGUMENT: DEMONSTRATION, DIALECTIC, RHETORIC 13-34 (1998) (discussing MARTIN HEIDEGGER, ONTOLOGY: THE HERMENEUTICS OF FACTICITY (John Van Buren trans., Ind. Univ. Press 1999) (1988)). Smith argues that Heidegger fails to pursue the project anticipated in his early lecture, *id.* at 312 n.5, and throughout the book he repeatedly invokes Gadamer's focus on the social realm of everyday speech as an antidote to Heidegger's elitist, monological quest to apprehend truth through poetry.

114. P. Christopher Smith, *The Uses of Aristotle in Gadamer's Recovery of Consultative Reasoning:* Sunesis, Sungnômê, Epieikeia, *and* Sumbouleuesthai, 76 CHI.-KENT L. REV. 731, 731 (2000).

115. SMITH, *supra* note 113, at 219-20.

116. Smith, *supra* note 114, at 740.

abstraction from an original being-with-another-in-language in which two people "hear" each other in deliberation.

> In other words, language, audible speech, is not invented by private individuals to signify thoughts they already have but is the gift of the community that allows the individual to think in the first place. Not *cogito ergo sum* ["I think, therefore I am"] is the truth of the matter, rather *loquimur ergo cogito* ["We speak, therefore I think"].[117]

This originary hermeneutical bond is argumentative, though, because it does not simply involve the passive reception of a "message." Instead, two persons in consultation experience and adjust to each other, and it is this tension and adjustment that is the source of critical understanding.

Original argument occurs in the hermeneutical-rhetorical realm of communicative praxis and is defined by three characteristics: (1) it consists of reasoning through use of topics or commonplaces in a naturally flowing conversation; (2) it concerns "contingent, temporal, ever self-contradictory things and comes, accordingly, only to likelihoods and inconclusive 'conclusions'"; and (3) it is voiced and heard in natural language.[118] Platonic argument covers over this original experience of deliberating together by privileging the narrow subset of demonstrative argument. Demonstrative argument involves the application of logic to concepts defined by symbolic language; it is an argumentative style that strives for the certainty of mathematics. Smith recognizes that Plato was attempting to answer the perceived threat of sophistic manipulation. He concludes, however, that by demanding such high standards of rationality Plato in fact facilitated our current state of affairs, which is defined by interminable partisan bickering over matters of politics and ethics.[119] Smith's project is to read Aristotle's *Rhetoric* and other ancient texts destructively in order to uncover how original argument occurs in communication

117. *Id.* at 735.

118. SMITH, *supra* note 113, at 4.

119. *Id.* at 10-11 (concluding that the impossibility of meeting Platonic requirements means that "apparent rationality and pseudo-demonstrative 'logic' only blind us to the irrational horror of it all"). Smith emphasizes this point in clear and succinct terms:

> And if, having seen that in mathematical science demonstration effectively wards off sophism, one were then to seek to argue demonstratively about these ethical and political matters, one would, we have seen, in fact only open the door to sophistical deception. For sophists can argue for their own advantage most persuasively precisely by disguising their own arguments as objective demonstrations grounded in intuitively certain first principles and by thus concealing these arguments' real ground in the speaker's *êthos*, his or her life "choice" of self-aggrandizement, and in his or her disingenuous manipulation of the affects.

Id. at 217.

that takes place on a heart-to-heart, visceral level that grips the listener in a psychosomatic manner.[120]

In many ways, legal practice exemplifies the nearly complete subordination of original argument to the encrustation of demonstrative reasoning. As one commentator accurately summarizes, "the *particular* rhetoric that law embraces is the rhetoric of foundations and logical deductions . . . [and] is one that relies, above all else, upon the denial that it is rhetoric that is being done."[121] Similarly, Smith concludes that "judicial reasoning . . . has effectively displaced and buried the original ways we exist and talk with each other in availing ourselves of the words said from time out of mind that we have first heard from others."[122] The play of original argument, in the communicative praxis of two persons taking counsel with each other, lies hidden behind the assertive mode of demonstrative argument that appears to define the work of lawyers and judges. The rhetorical and affective dimensions of legal argumentation are wholly repressed.

It may not be immediately clear how an examination of communicative praxis and original argument help to clarify the problem of ideology critique. Smith emphasizes that there are "important, challenging consequences" if we acknowledge that the demonstrative argumentation exemplified in legal practice is predicated on a form of reasoning that "originates in our belonging together . . . in a community of reasoners."[123] However, Smith does not expressly describe the consequences of his radical challenge to demonstrative reasoning, nor does he claim to achieve anything other than providing a more accurate description of reasoning by recuperating the hermeneutics of original argument.[124] My claim is that Smith and Schrag are important windows not only to the

120. *See id.* at 217-90 (chapter 6, entitled "Embodied Argument as Patho/logical: The Original Fusion of *Pathos* and *Logos*"). Smith persuasively rejects Derrida's claim that texts have priority over oral communications in uncovering hermeneutical experience. *See id.* at 134-56.

121. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1555 (1990).

122. Smith, *supra* note 114, at 749.

123. *Id.* at 748.

124. Smith ends his book with an acknowledgment that he has made the case for a hermeneutical retrieval of the aural dimensions of original argument only by means of a written text that employs demonstrative argumentation. SMITH, *supra* note 113, at 310. As a result, his demonstration of the "true" character of our being-with-others ironically tends to undermine his thesis. Perhaps it is this irony that keeps Smith from pressing the conclusions of his research, since such an effort would particularly threaten to devolve into demonstrative argument. In what follows I hope to "demonstrate" that the critic must abandon the demonstrative argumentation of a strong conception of critical theory. My strategy is to embrace the irony.

experience of understanding—what Balkin prosaically terms an "economy of exchange"—but also to the critical agency that is enabled by this experience.

Balkin mistakenly limits the experience of understanding by investing the self-as-critic with the duty to manage the hermeneutical experience of understanding through careful selection of the influences that she will suffer. To avoid the ego-centric conclusions that follow from his narrow reading of hermeneutical experience, Balkin then embraces a transcendental argument that attempts to explain the subject's never-ceasing embrace of new experience as a result of the lack of complete self-possession. Balkin's project, although quite promising in its descriptive stages, ultimately does violence to his own presuppositions in order to provide an account of ideology critique. In contrast, Schrag and Smith begin with Gadamer's more satisfactory account of human understanding, and then develop this account in ways that open the space for a hermeneutical account of critical legal theory.

Schrag connects the inherent responsiveness of the "postmodern self"—reconceived as a performance within communal practices—to the critical agency that results from a transversal rationality that lies across historically conditioned discourses. Smith links the post-modern self to the hermeneutics of original argument, in which another person is "heard" in a way that changes the *listener* as opposed to changing only the listener's *mind*.[125] Smith provides a historical account of the ambivalence in Plato and Aristotle as they covered over the Homeric tradition and set the course for modern "rationality," but once his persuasive recovery of original argument is complete there is an additional and crucial point to be drawn. The critical agency of the postmodern self is found in the experience of original argument, in which one's insularity is disrupted and continually reconfigured.

In his exchange with Habermas, Gadamer steadfastly refused to surrender to the theoretical urge to demarcate a critical rationality that looked behind hermeneutic experience. But Gadamer's

125. Smith explains:

> Thus, what someone undergoes in embodied argument and rhetoric is much more than a change of *mind* from dissent to assent, from "I don't see it that way" to "I do." On the contrary, it is a change of heart, a change in how one *feels* about something, which is to say, a "gut" change sometimes even from rebellious refusal to consent, from "Over my dead body!" to "Yes, I will." This response is not just intellectual. On the contrary, such hearing is in a fundamental sense visceral.

Id. at 220.

ontological stance does not discount the lesson that I draw from my reading of Schrag and Smith: *critical rationality inheres within hermeneutic experience.* Hermeneutic experience is never passive reception, nor is it orchestrated by an individual who methodologically directs her own understanding. Hermeneutic experience involves friction; it is not a dance that glides effortlessly. Rather than a choreographed scene with Fred Astair and Ginger Rogers, hermeneutic experience is more akin to the collective experience, or fusion of horizons, in a mosh pit. Against the deep and rich background of communal understandings and practices, two persons in consultation with each other experience a disruption and challenge. If hermeneutic experience did not generate critical distance, it is difficult to understand how we could even perceive another person as "other." In front of the "other" person (or text, or practice), we continually are brought up short and thrown into a transversal rationality that operates without secure foundations that can be elaborated solely by logical implications. Transversal rationality is the activity of operating between and across localized discourses and practices, and therefore involves some measure of critical distance from particular contexts. The important point is that this critical distance, this friction, this intermingling of consensus and dissensus, is always a product of hermeneutic experience.

An example might clarify this point. The intense partnership of a successful marital or life-partner relationship provides a model of the operation of human understanding. Within such a relationship two persons undoubtedly experience a fusion of horizons, and together they develop a shared background through time that subtends present experience as an abiding "agreement." But Gadamer's analysis does not capture the full depth of such a relationship if it ends with a rosy, Hollywood picture of a complete and timeless fusion of horizons. In my experience, parties to an intense, lifelong relationship find that their individuality is *heightened* when they are with their partner. Communicative praxis does not flatten individuality into an undifferentiated shared existence; instead, a deeply relational existence provides a sense that one's "self" is uniquely realized precisely because one is so deeply entwined with another. This reality is the lifeblood of classic situation comedies, in which spousal relationships exhibit a constitutive "oneness" even as each person is revealed as (a humorously idiosyncratic) individual. As an exemplar of hermeneutical experience, life-partner relationships demonstrate that a hermeneutical experience resulting in a fusion of horizons

imports within it a critical distance that provides perspective on oneself and the world. I expect that most people regard their life-partner relationship as beneficial for this very reason: it is the means by which they become the best person possible just because they gain perspective on themselves (and the world) by virtue of their relationship with another. It is only when interacting with a superficial and casual acquaintance that the "everydayness" of the experience tends to leave no imprint on oneself, for it is the lack of a full-bodied hermeneutical experience that leaves one's sense of self (a prejudiced forestructure) unchallenged.

Having recovered the critical dimension of hermeneutical experience, it is now abundantly clear that Balkin's "transcendental move" is not just unnecessary to account for critique, it is also misleading. To this point, the discussion has focused on hermeneutical experience, or what Gadamer would term the phenomenology of human understanding. The problems with Balkin's transcendental account are made even clearer by shifting attention from describing the dynamics of understanding to providing an account of critical theory. Balkin expressly acknowledges the reflexive character of critical theory, but his transcendental turn empties his recognition of any radical significance. Balkin's critic, as an analyst wary of being hermeneutically co-opted, is driven by an "inexhaustible urge" to define justice; she does not find her motivation within hermeneutical encounters. Indeed, it is her urge toward justice that keeps her from wholly surrendering herself to hermeneutical encounters. By positing a transcendental source of the critic's motivation, Balkin effectively exempts the critic from analysis by leaving it to the critic, now invested with the qualities of a relatively robust subjectivity, to monitor her hermeneutical experience.

Beginning with a Gadamerian account of understanding, and adopting the elaborations proposed by Schrag and Smith, I propose a new account of ideology critique. Balkin's characterization of ideology is correct: ideology is not the result of defective modes of understanding, it is a normative assessment of the unacceptable results flowing from certain understandings. Philosophical hermeneutics suggests a very different role for the critical theorist, however, and in doing so provides an alternative to Balkin's unsatisfactory transcendental turn. Because critique is a feature of hermeneutical experience, it is appropriate to view the critic of ideology as one who can foster this experience and overcome the superficiality that defines

too many encounters in contemporary life. Critical theory, under this view, is the facilitation of a suppressed feature of hermeneutical experience. The critic does not employ a special methodology that stands outside ordinary hermeneutical encounters. Instead, the critic adopts a distinct posture within hermeneutical encounters that maximizes the critical element already present in these encounters.

In a recent article, I have explained this approach in greater detail by using the practice of postmodern psychotherapists as a model for critical legal theory.[126] Postmodern psychotherapy provides a model for critical legal theorists because it is a theoretically informed hermeneutical activity; the therapist adopts a theoretical posture to assist her client, but she does not pretend to stand outside her hermeneutical engagement with the client in dialogue. Postmodern psychotherapists disavow the traditional conception of psychoanalysis as a comprehensive theory that permits the "expert" analyst to "see through" the patient's neuroses. Instead, they adopt a philosophical position of "not-knowing." Postmodern psychotherapists locate the critical dimension of therapy in a collaborative dialogue with the client rather than claiming the authority to artfully direct the client's review of life options from the therapist's presumed position of superiority. Under their account, the therapist is an expert in facilitating the patient's attempts to fashion a satisfactory life narrative, rather than an expert in diagnosing what is wrong with the patient according to a theoretically derived template.

Postmodern psychotherapists regard therapeutic dialogue as a hermeneutical, rhetorical, and narrative experience that exploits the critical element of all dialogue. Changing the focus from uncovering psychic reality by means of a theory to engaging a client in a productive dialogue, postmodern therapists characterize their practice as helping the client to interpret her situation and then deliberating with the client about the possibilities for change. As interpretation and persuasion, postmodern psychotherapy is not just a collection of techniques wielded by an expert for the purpose of "creating" mental health. Psychotherapeutic dialogue explores the client's situation and illuminates the resources available for overcoming perceived inadequacies, working from an understanding that life is narratively structured. The therapist enters into dialogue

126. Francis J. Mootz III, *Psychotherapeutic Practice As a Model for Postmodern Legal Theory*, 12 YALE J.L. & HUMAN. 299 (2000). My description of this model in the text that follows is an overview of the detailed argument that I present in the above article, to which I refer the reader who seeks elaboration and citations to the literature.

with the client to hear a troubled narrative and to lend her assistance to the client's efforts to revise the narrative. Because the client's prenarrative experience permits a range of narrative constructions rather than just a single accurate representation, therapy is always a contextualized and pragmatic assessment in which the therapist acts as a facilitator of the client's narrative revisions.

Postmodern therapists employ critical theory in a unique manner. Their goal is not to establish a template of mental health that they can place over client narratives; rather, they theorize about how to foster a genuine dialogue with their clients, because critical insight is only gained within such a dialogue. Clients require assistance in recognizing that their life narratives have become unduly rigid, usually because they have inappropriately extrapolated one mode of responding to particular situations (e.g., anger) to a more generalized mode of being (e.g., depression). The therapist's goal is to establish equilibrium in the client's life by fostering a dialogue in which the client experiences the false sense of necessity and rigidity that defines the client's life. Psychotherapy is a process in which the therapist and client together uncover options in the client's life by exposing the contingent and multivalent character of socially constructed narratives that the client had formerly regarded as inflexible and given. The important point is that postmodern psychotherapeutic practice is oriented toward facilitating this dialogue rather than charting the "correct" narrative that will "cure" the patient.

Gadamer's hermeneutical philosophy embraces the critical theory of "not-knowing" that postmodern psychotherapists espouse. In *The Enigma of Health*,[127] Gadamer argues that the practice of psychotherapy exemplifies the hermeneutical nature of medical practice. Although psychotherapeutic dialogue often is disparaged as a set of verbal techniques that cannot match the efficacy of psychopharmacological cures, Gadamer contends that this specialized form of discourse in fact embodies the inescapable hermeneutical nature of the healing arts.[128] Gadamer famously argued against Habermas's psychoanalytic model of critical social theory,[129] but he acknowledges that psychotherapeutic dialogue, as understood by

127. 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).

128. *See id.* at 77.

129. For my review of the Gadamer-Habermas debate, see Mootz, *supra* note 126, at 306-41; Mootz, *Ontological Basis*, *supra* note 26, at 568-96.

many postmodern psychotherapists, provides a model of the critical element of hermeneutical experience.[130] This distinction is best explained by concluding that Gadamer criticizes the Freudian conception of psychoanalysis as a theoretically guided method of revealing the patient's true psychological state, but that he acknowledges the significance of psychotherapeutic dialogue carried out within a hermeneutic engagement, however fragile and tentative, between therapist and patient.

Schrag and Smith expand Gadamer's philosophy in a way that connects with this psychotherapeutic model of critical theory. The ability of transversal rationality to open the space for critique is precisely what is impaired in the person who seeks psychotherapy, and so it is possible to construe the practice of psychotherapy as a practical reconstruction of transversal rationality by overcoming narrative rigidity. Moreover, postmodern psychotherapy exemplifies the hermeneutics of original argument in practice, since the therapist "hears" the client's narrative and then deliberates with the client rather than attempting to "demonstrate" the path to a "cure." When postmodern psychotherapists theorize about their practice, then, they are modeling what it means to do critical theory if one accepts Gadamer's ontology of human understanding.

My psychotherapeutic model of critical theory stands in sharp contrast to Balkin's subject-centered critical approach. Although purporting to disavow traditional conceptions of critique, Balkin repeatedly describes the critic as an "analyst" who engages in dialogue with an "analysand" in order to expose the analysand's ideological effects. Wary of the obvious implications of using such scientistic language, Balkin emphasizes that ideological analysis is akin to a "narrative reconstruction" in which the analyst acknowledges that she does not have access to a unitary "correct" narrative for the analysand, and she characterizes her work with the analysand as fashioning a new narrative within a plural universe.[131] Balkin keeps the critic in the driver's seat, though, even if he recognizes that there are multiple routes to arriving at the goal of securing autonomy for the analysand. The critic stands apart from the patient, and it is only by virtue of doing so that she generates a critical perspective on the patient's condition.

The psychotherapeutic model of critical legal theory yields

130. *See* GADAMER, *supra* note 127, at 163-73.
131. *See* BALKIN, *supra* note 2, at 201-03.

important insights into the nature of critique. If a legal theorist is persuaded that the philosophical stance of "not-knowing" will facilitate her critical practice to the greatest degree possible, what further guidance does the psychotherapeutic model provide for her critical activity? I believe that the model redefines the theorist's project in terms of two general, and related, goals: first, the critical theorist should disrupt rigid narrative constructions that are proving problematic to the client; second, the critical theorist should expose how particular responses have been unsatisfactorily abstracted from discrete situations into a more generalized mode of being. In the psychotherapeutic context these goals are pursued by carefully attending to the client's story and engaging in dialogue oriented toward expanding the client's (and the therapist's) narratively structured mode of existence. By adopting this practice as a model of critical legal theory, I propose to extend these defining features to the different context of legal critique.

Modeling critical legal theory on these features of psychotherapeutic practice appears problematic because there is no presenting client seeking the assistance of the therapist. But this difference underscores the very point of applying the model: critical legal theorists must regard the legal tradition as a "presenting client." The legal tradition speaks no less than an individual client; the legal tradition is nothing more than the accumulated voices of individuals that have been rendered into texts that have a history of continuing effects. A psychotherapeutic model of critical legal theory rejects the idea that "law" is a concept awaiting explication in favor of the view that law is a narratively structured social process. The participants in legal practice present their anxieties no less than an individual entering psychotherapy. The model counsels the critical legal theorist to attend to the "presenting" rather than forcing a theoretically derived template over the legal tradition. The critical legal theorist must take lawyers and judges struggling with practical problems seriously, rather than regarding them as self-deluding simpletons who must be diagnosed rather than dialogically engaged.

The critical legal theorist can disrupt unproductive abstractions and the sense of false necessity within legal discourse only by means of a hermeneutical-rhetorical engagement that seeks to recover a broader, narratively structured sense of unity from within a situation of apparent contraries that are manifested in the practice. The theorist has no recourse to, nor any need for, an external standard of critique against which practices can be assessed, because the critical

project involves an identification and opening of possibilities within the narratively structured social realm of law. In other words, the goal of critical legal theory is not to develop an ideal legal narrative and then to import it into practice, but rather to demonstrate the malleability of narrative reality to participants in the practice in order to promote the possibility of overcoming unhelpful, static conventions and to open the possibility for more satisfactory participation in the ongoing process of creating and transforming legal meaning. The psychotherapeutic model counsels the critical legal theorist to engage in this dialogue like a postmodern psychotherapist: not by attempting to preserve a distinct and superior theoretical knowledge of the client, and yet also not like a friend (or adversary) wholly engaged in ordinary conversation (or legal argumentation). The theoretical posture of "not-knowing"[132] describes the goal of a critical theorist working within a hermeneutical experience to maximize critical insight.

The psychotherapeutic model is not just a technique, but rather speaks to the personal qualities of the critic. The critical legal theorist must undertake a critical project with the curiosity and flexibility that will permit the tradition to speak more fully, since a theoretically informed methodology for reconceptualizing the tradition will only further contribute to the narrow rigidity that is the principal target of critique. Critical legal theorists must be ready to suspend premature judgment in favor of a cooperative effort to define reasonable resolutions, must refuse to hide behind theoretical abstraction and engage in the plural universe that they seek to reveal, and must accept responsibility for the fact that their activity is more ethical than it is cognitive. This approach to the critique of ideology remains faithful to Gadamer's description of human understanding, but it is not a comforting assurance that "critique just happens." My psychotherapeutic model of critical theory poses a substantial challenge for critical legal theorists who are far more disposed to adopt an "all-knowing" theoretical posture, since it demands that they put themselves at risk in hermeneutic experience. Gadamer emphasizes this challenge by claiming that

> hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in a conversation. But this means: Always recognize in advance the possible correctness, even the superiority of the conversation partner's position. Is this too

132. *See* Mootz, *supra* note 126, at 366-72.

> little? Indeed, this seems to me to be the kind of integrity one can demand only of a professor of philosophy. And one should demand as much.[133]

Critical legal theorists must abandon the easy route of pursuing a strong conception of theory and must embrace the risky play of transversal rationality in original argument.

Critical theory is not an expression of a deep-seated personal urge toward justice that emerges from "the wellsprings of the human soul,"[134] as Balkin would have it. Rather, critical theory is the practice of maximizing the critical distance that occurs only within hermeneutical engagements. Critique is always a social experience, and critical theory is just a reflection on facilitating this social experience. Following the model of postmodern psychotherapists, critical legal theorists are best counseled to abandon the effort to demonstrate the answers to social problems and to attend much more to hearing the questions posed within the tradition and then deliberating about these questions with others.

CONCLUSION

Balkin defines the problem of critical theory in the postmodern age with great skill, but his transcendental response reflects a failure of nerve. Philosophical hermeneutics provides an account of the ontology of human understanding that leaves sufficient room for the experience of critique and the project of critical theory. By rereading Gadamer in response to the problems posed by Balkin's work we can uncover the subtle connections between understanding and critique, belonging and distanciation. Critical theory and interpretation emerge not as contestants in an age-old battle; rather, they emerge as features of what Gadamer broadly terms our hermeneutic situation. Philosophical hermeneutics opens a pathway for refusing to take the transcendental turn in the face of the postmodern challenge but without surrendering the aspirations of emancipatory critique with nihilistic resignation. Whether critics will be able to meet the ethical, cognitive, and affective demands of putting themselves at risk in a manner designed to maximize the critical dimension of hermeneutic experience is, of course, the real question.

133. HANS-GEORG GADAMER, *On the Origins of Philosophical Hermeneutics*, *in* PHILOSOPHICAL APPRENTICESHIPS 177, 189 (Robert R. Sullivan trans., MIT Press 1985) (1977).

134. Balkin, *supra* note 67, at 1139.