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Responding to Nietzsche: The Constructive Power of *Destruktion*

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As a student of Hans-Georg Gadamer, and later a translator and important commentator on Gadamer's philosophy, P. Christopher Smith is widely acknowledged to be a leading hermeneutical philosopher. In a series of works, Smith has argued that Gadamer provides an important corrective to Nietzsche's caustic critical challenges, but that Gadamer's hermeneutics has no relevance for legal theory because law is just the manifestation of will to power. In this paper I argue that Smith misunderstands the nature of legal practice. Starting with a re-reading of the debate between Gadamer and Jacques Derrida about the legacy of Nietzsche's philosophy, I argue that Gadamer responds to Nietzsche's challenge in a manner that is exemplified in the critical dimensions of legal practice. Using the example of family law that Smith offers, I contend that Smith underestimates the critical and interpretive elements inherent in legal practice and captured in Gadamer's philosophy. I conclude that Gadamer offers a persuasive answer to Nietzsche's challenge. *Law, Culture and the Humanities* 2007; **3**: 127–154

I. Recovering Shades of Gray in Nietzsche's Shadow

More than one hundred years after his death, Nietzsche's long shadow continues to cloud the self-assurance of legal reasoning to the point of casting legality itself into doubt. There is no convincing demonstration that law can survive Nietzsche's scathing insights, which are carried forward today through various critical interventions; there is no alleviation of the suspicion that the "rule of law" is yet another modernist fable that conceals the play of power. For the most part, theorists either turn away from the corrosive effects of Nietzschean critique, or they revel in the anarchy seemingly invited by Nietzsche. In this article, I respond to Nietzsche's formidable challenge more directly by way of confession and avoidance: Even if we accept Nietzsche's claims in their full radicality, I argue that it is possible to defend both a critical engagement *with* law and the critical potential *of* law. I endorse Gadamer's thesis that *Destruktion* is

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a constructive power that girds legal practice, even if all too often this critical power is suppressed.

Nietzsche's as-yet unanswered challenge to law has been carefully recounted by P. Christopher Smith in the course of his efforts to recover "the hermeneutics of original argument."[1] Smith locates original argument in consultation and deliberation with others. He describes how the communal understanding of reasoning that animates the pre-literate Homeric epics – in which one takes counsel with others by *hearing* them and *feeling* the force of their demands – has, since Plato, increasingly been covered over by the univocal and demonstrative model of modern argumentation in which insular contestants seek to *demonstrate* a truth that they have *seen* with their solitary mind's-eye. Smith lauds Nietzsche for forcefully undermining the pretense of logical-deductive legal reasoning and the conceit of demonstrative legal argumentation by uncovering the untamed, embodied *pathos* that resides at the heart of all reasoning and persuasion. Unfortunately, Smith charges, law turns a deaf ear to this challenge and embraces a hopelessly abstract model of reasoning. 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."[2]

Smith's creative readings of Greek philosophy and drama in the course of recovering the experience of original argument inspire me to undertake the complementary project of investigating the role of original argument in legal practice. By doing so, however, I challenge Smith's characterization of legal practice as the institutionalization of an inauthentic form of understanding. At first, Smith suggested that his work on original argument has "important, challenging consequences" for "judicial theory," and he emphasized that all reasoning, "even judicial reasoning, originates in our belonging together, our [embeddedness in tradition], in a community of reasoners . . ."[3] More recently, however, Smith retrenches his claim in important respects by suggesting that Gadamer's hermeneutics does not provide a model for legal argumentation, but rather a "challenge."[4] The task for legal theory, Smith

1. See P. Christopher Smith, *The Hermeneutics of Original Argument: Demonstration, Dialectic, Rhetoric* (Evanston, IL: Northwestern University Press, 1998).
2. P. Christopher Smith, "The Uses of Aristotle in Gadamer's Recovery of Consultative Reasoning: Sunesis, Sungnômê, Epieikeia, and Sumbouleuesthai," *Chicago-Kent Law Review* 76 (2000), p. 749.
3. Op. cit., pp. 749–50.
4. P. Christopher Smith, "From Strife to Understanding: Pathological Argument in Nietzsche and Gadamer," unpublished conference paper, p. 21, 2003 Annual Meeting of the Association for the Study of Law, Culture and the Humanities, New York University. An earlier version of Smith's paper was published as P. Christopher Smith, "Nietzsche and Gadamer: From Strife to Understanding, Achilles/Agamemnon to Achilles/Priam," *Continental Philosophical Review* 35 (2002), p. 379, but the published version does not contain Smith's application of his thesis to legal hermeneutics. I am grateful to Chris for permitting me to quote from his unpublished manuscript.

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argues, is "to acknowledge the inevitably contentious, derivative nature of legal reasoning and, by establishing its boundaries, prevent its usurpation of the entire ethical realm of conversational deliberation . . . Indeed, the way must always be left open to recover the deliberative community from which legal reasoning removed itself in the first place."[5] Smith concludes that Gadamer and Nietzsche both offer insights into understanding and interpretation, but that Gadamer's approach holds no real significance for the demonstrative contest of legal argumentation. More pointedly, Smith appears to argue that legal argumentation must be demystified by Nietzschean critique and then cabined, given that legal argumentation precludes genuine hermeneutical exchanges.

In response, I contend that contemporary legal practice need not be a paradigm of modernity's forgetfulness of original argumentation, even if it too often plays this role. My thesis is that Nietzsche announced the destruction of a certain understanding of legal argumentation but not the destruction of law, and that the hermeneutical characteristics of legal practice have not been occluded irreversibly by the ascendency of technical rationality and the clash of wills to power. Working from Smith's creative and stimulating insights, but against his conclusions, I pursue a hermeneutical defense of law and critical legal theory in response to Nietzsche's challenge.

This paper is organized in two parts. In the first part, I reclaim the constructive elements of Heidegger's *Destruktion* as an appropriate response to Nietzsche's seemingly uncompromising rejection of the potential for philosophy in the face of will to power. Gadamer extends the guiding concept of *Destruktion* by connecting it to the experience of dialogue, focusing on life as it is lived rather than abstract philosophical concepts. I return to the 1981 encounter between Gadamer and Derrida and argue that Gadamer effectively answered Derrida's Nietzschean reading of Heidegger, as evidenced in the reverberations of this debate in their subsequent writings. I conclude that Gadamer's elaboration of Heideggerian *Destruktion*, particularly in response to Derrida's Nietzschean critique, provides a viable response to Nietzsche's unremitting critical challenge.

In the second part, I bring Gadamer's philosophy to bear on legal practice and legal theory. Gadamer's argument that dialogical risk in conversation fuels *Destruktion* does not provide a methodology for correct decision making, but it does clarify how legal practice might be facilitated by acknowledging the nature of hermeneutical understanding and critical insight. I conclude by demonstrating the power of this perspective to answer Smith's Nietzschean critique of law by working through Smith's example of the agonistic contest of family law litigation.

5. Smith, "Strife," p. 21.

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II. Reclaiming Heidegger's Legacy: Revisiting the Gadamer-Derrida Encounter

A hermeneutical response to Nietzsche must begin with Heidegger, who directly confronted the power of Nietzsche's thought as part of his masterful recasting of the philosophical tradition. Heidegger's initial effort in *Being and Time* to construct a fundamental ontology of the finitude of existence collapsed of its own weight,[6] leading to his "turn" away from the "language of metaphysics." In his later period, Heidegger waited upon the gods, who speak through the ineffable language of poetry. Heidegger's account of the experience of truth reflects this development in his thought: evolving from his early notion of truth as emerging from a tarrying with the disclosure of meaning, to truth as the product of a momentary grasping (*Augenblick*), and finally to truth experienced as a flash of insight that strikes like lightning loosed by the gods.[7] With his "turn," in which truth is no longer a project but only an event, Heidegger would appear to have encountered the dead-end of Nietzsche's relentless critical theory. This judgment is perhaps most clearly supported by Heidegger's intimation to family members shortly before his death that Nietzsche had "ruined" him.[8] One plausible interpretation of this self-evaluation is that, in the end, Heidegger found it impossible to philosophize while simultaneously remaining true to Nietzsche's radical dismantling of the philosophical enterprise.

Heidegger's lament need not become a cause for resignation. His original and provocative thinking has been carried forward in productive ways that grapple with Nietzsche's legacy. Gadamer and Derrida represent two major divisions of thought that follow Heidegger's lead, with the resulting debate (to paraphrase Paul Ricoeur) between hermeneutical dialogue (belonging) and deconstructive wariness (suspicion). I endorse Gadamer's claim that his "philosophical hermeneutics" pursues Heidegger's "turn" away from fundamental ontology in a productive, even if surprising, way. Gadamer brings life to Heidegger's turn by "re-turning" to Heidegger's early path-breaking interpretations of Aristotle's philosophy of factical life, interpretations that had jolted the student Gadamer like "an electric shock."[9] If

6. Gadamer succinctly explains this collapse as Heidegger's recognition that he had not made a complete breakthrough in his challenge to the idealism of consciousness. "For what he called the 'fundamental ontology of Dasein' could not – despite all the temporal analyses of how Dasein is constituted as *Sorge* ["care"] – overcome its own self-reference and hence a fundamental positing of self-consciousness. For this reason, fundamental ontology was not able fully to break away from immanent consciousness of the Husserlian type." Hans-Georg Gadamer, "*Destruktion* and Deconstruction," in Diane P. Michelfelder & Richard Palmer, eds., *Dialogue and Deconstruction*: *The Gadamer-Derrida Encounter* (Albany, NY: State University of New York Press, 1989), p. 104 (Geoff Waite and Richard Palmer, trans.).
7. Robert J. Dostal, "Gadamer's Relation to Heidegger and Phenomenology," in Robert J. Dostal, ed. *The Cambridge Companion to Gadamer* (Cambridge, UK: Cambridge University Press, 2002), p. 247.
8. Op. cit., p. 261 (quoting from an interview with Gadamer, "Heidegger und Nietzsche: Nietzsche hat mich kaputtgemacht!," *Aletheia* 5 (1994), pp. 6–8.
9. Hans-Georg Gadamer, *Philosophical Apprenticeships* (Boston, MA: The MIT Press, 1985), pp. 46–47 (Robert R. Sullivan, trans.).

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Heidegger, in the end, awaited an unrequited conversation with the gods, Gadamer "re-turns" to Heidegger's origins and finds in ordinary conversation the key to responding to Nietzsche's initiatives.

2.1 Destruktion as Dialogic Encounter, not Poetic Event

Gadamer is surprisingly silent about Nietzsche,[10] but he did grapple with Nietzsche's philosophy in his infamous (non–)encounter with Derrida in 1981. After acknowledging that he and Derrida are both indebted to the later Heidegger, Gadamer used his introductory comments to recount important differences in their developments of Heidegger's insights. Against Derrida's deconstructive criticism of Heidegger for remaining in the grip of the language of metaphysics and failing to embrace the depth of Nietzsche's critique, Gadamer insists that Heidegger was "not exhausted in a mere gesture of protest, as was the case with . . . Nietzsche. Rather, he attacked his task as being a matter of hard conceptual labor, which one should learn from the study of Aristotle."[11]

Heidegger's early Aristotle lectures pursued *Destruktion* of the philosophical tradition, and Gadamer insists that with his "turn" Heidegger "actually held to his fundamental project by maintaining, in a sublimated form, the *destruktive* achievement present in its beginnings."[12] Gadamer joins Hannah Arendt and others who find in the early Heidegger the key to understanding his later philosophical initiatives.[13] Gadamer argues that Heidegger's early Aristotle studies provide models of *Destruktion*, in which he abandons the philosophical pretensions problematized by Nietzsche without abandoning philosophical critique altogether.

Anticipating Gadamer's notion of "fusion of horizons," Heidegger wrote regarding the destruction of Aristotle and the tradition based on him,

10. Elsewhere I have argued in detail that reading Gadamer and Nietzsche together as challenging supplements to each other is not only possible, but productive. Francis J. Mootz III, "Nietzschean Critique and Philosophical Hermeneutics," *Cardozo Law Review* 24 (2003), p. 967.
11. Gadamer, "*Destruktion*," p. 110.
12. Op. cit., p. 109.
13. See John van Buren, *The Young Heidegger: Rumor of the Hidden King* (Bloomington, IN: Indiana University Press, 1994). Ironically, Heidegger's autobiographical tendency to dismiss his early work as having been superceded by his "turn" served to undermine his themes of flux and plurality and contributed to the scholastic development of "Heidegger, Inc." Op. cit., pp. 21–23. Summarizing the ambivalence in Heidegger's self-assessment, van Buren writes:

    > In his autobiographies, the right hand does not appear to know what the left hand is doing. On the one hand, he indicated that his enduring topic was discovered in his youthful thoughtpaths, and that this topic is characterized by a radical openness and diversity of byways, incomplete ways, and errant ways. On the other hand, he downplayed and often even dismissed his youthful thought, placing it into a hierarchical-teleological relationship to "the way" of his subsequent writings.
    > Op. cit., p. 9.

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> "Corresponding to our position, the original position is to be again worked out anew, i.e., corresponding to our altered historical situation, it is something other and yet the same." The "effective possibility" of Aristotle's thought "for its future" was to be sprung loose through "repetition," in which it kairologically and "constantly becomes a new present." The young Heidegger, Gadamer reported, was an "Aristotle redivivus."[14]

Heidegger's creative repetition of Aristotle's "hermeneutics of facticity" not only animates Heidegger's later work, it fueled Gadamer's philosophical hermeneutics.

Heidegger uses the word *Destruktion* to mean "dismantling and reviving," rather than "obliterating and moving past." The purpose of *Destruktion* "is to take concepts that have become rigid and lifeless and fill them again with meaning. Such an activity does not serve the purpose of pointing back to a mysterious origin, an *arché*, or the like. That is a fatal misunderstanding, which gets used as an objection above all against the later Heidegger."[15] Gadamer insists that Heidegger's philosophical

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14. Op. cit., p. 226 (quoting from the author's translations of the German texts of the following books: Martin Heidegger, *Phenomenological Interpretations of Aristotle* (Bloomington, IN: Indiana University Press, 2001) (Richard Rojcewicz, trans.); Martin Heidegger, *Ontology: Hermeneutics of Facticity* (Bloomington, IN: Indiana University Press, 1999) (John van Buren, trans.); and Hans-Georg Gadamer, *Truth and Method* (New York, NY: Crossroad Publishing, 2nd rev. ed., 1989) (Joel Weinsheimer and Donald G. Marshall, rev. trans.).
15. Hans-Georg Gadamer, "Letter to Dallmayr," in Diane P. Michelfelder & Richard Palmer, eds., *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* (Albany, NY: State University of New York Press, 1989), p. 99 (Richard Palmer and Diane Michelfelder, trans.). Later, Gadamer offers a similar definition, explaining that in *Destruktion* the goal "is to let [an encrusted concept] speak again in its interwovenness in living language. This is a hermeneutical task. It has nothing to do with obscure talk of origins and the original." Op. cit., p. 100. Heidegger provides a succinct account of the role of *Destruktion* in the Introduction to *Being and Time*:

    > If the question of being is to achieve clarity regarding its own history, a loosening of the sclerotic tradition and a dissolving of the concealments produced by it is necessary. We understand this task as the [*Destruktion*] of the traditional content of ancient ontology which is to be carried out along the *guidelines of the question of being.* This [*Destruktion*] is based upon the original experiences in which the first and subsequently guiding determinations of being were gained.
    > This demonstration of the provenance of the fundamental ontological concepts, as the investigation which displays their "birth certificate," has nothing to do with a pernicious relativizing of ontological standpoints. The [*Destruktion*] has just as little the *negative* sense of disburdening ourselves of the ontological tradition. On the contrary, it should stake out the positive possibilities of the tradition, and that always means to fix its *boundaries* . . . the [*Destruktion*] does not wish to bury the past in nullity; it has a *positive* intent. Its negative function remains tacit and indirect.

    Martin Heidegger, *Being and Time* (Albany, NY: State University of New York Press, 1996), p. 20 [§6] (Joan Stambaugh trans., 7th German ed., 1953).
    Heidegger's famous promissory note for Part II described his intent to outline the basic features "of a phenomenological [*Destruktion*] of the history of ontology on the guideline of the problem of temporality." Op. cit., p. 35 [§8]. Gadamer's philosophical hermeneutics offers payment on this promise by carrying forward the project of *Destruktion* while still avoiding the metaphysical entanglements that Heidegger came to recognize in the first part.

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practice of *Destruktion* is a creative activity that creates a future through a de-structuring repetition of the situation. *Destruktion* occurs within an ongoing philosophical conversation; it is *not* achieved by "freeing" ourselves from metaphysics by casting it aside as if it were an historical artifact.[16] In other words, it is an empty gesture to *reject* the language of metaphysics rather than to *work through* this heritage by means of a *Destruktion*.

Gadamer revives early Heideggerian *Destruktion* against Heidegger's later claims to deconstruct the "language of metaphysics," arguing that Heidegger's embrace of Nietzschean excess temporarily – but never completely – derailed his initiatives.[17] Gadamer's contribution is to locate the *Destruktion* of stale concepts within the de-centering experience of dialogue rather than in the solitary efforts of the great philosopher, advancing Heidegger's early initiatives by taking "the path from dialectic back to dialogue, back to conversation."[18] Gadamer readily admits that Heidegger was disappointed by Gadamer's philosophical direction, and that he considered Gadamer's hermeneutical philosophy to be insufficiently radical. But Gadamer insists that his return to the practical engagement of dialogue uncovers the key to undermining the "subjectivity of the subject" by disrupting the assumption "that the subject takes hold of empirical reality with methodological self-certainty by means of its rational mathematical construction, and that it then expresses this reality in propositional statements."[19] Gadamer concludes that his contribution to post-Heideggerian philosophy

> is the discovery that no conceptual language, not even what Heidegger called the 'language of metaphysics,' represents an unbreakable constraint upon thought if only the thinker allows himself to trust language; that is, if he engages in dialogue with other thinkers and other ways of thinking. Thus, in full accord with Heidegger's critique of the concept of

16. Gadamer argues that *Destruktion* represents a feature of an unending tradition of philosophical thinking, and so even Plato's dialogues provide resources and are not just a metaphysical straight-jacket against which Nietzsche and Heidegger rightfully struggled. Gadamer, "Dallmayr," p. 101.
17. Gadamer argues that Heidegger's mistaken efforts to follow Nietzsche's most extreme paths in an attempt to break free of the language of metaphysics led to "*Holzwege*, the kind of circuitous dead-ends cut by loggers on wooded hillsides. And these paths, after the *kehre*, or turn of the way of Heidegger's thinking toward Being, led into impassable regions [and] remained an adventurous journey into error." Gadamer, "*Destruktion*," p. 104.
18. Op. cit., p. 109.
19. Hans-Georg Gadamer, "Text and Interpretation," in Diane P. Michelfelder & Richard Palmer, eds., *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* (Albany, NY: State University of New York Press, 1989), p. 26, 29 (Dennis J. Schmidt and Richard Palmer, trans.).

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> subject, whose hidden ground he revealed as substance, I tried to conceive the original phenomenon of language in dialogue.[20]

Too respectful of Heidegger's pathbreaking work to say it directly, Gadamer develops philosophical hermeneutics as a means of realizing Heidegger's ambition to confront Nietzsche without getting lost in the later Heidegger's elitist and poetic monologue.[21]

Gadamer places great importance on Heidegger's work for showing that *Destruktion* occurs not just as a product of genuine dialogue between two persons, but also in a dialogic confrontation with tradition. In both cases, truth is not experienced as a flash of insight, but rather emerges from a tarrying and attentiveness to a challenging disclosure that takes time and requires the relinquishment of subjective designs. This engagement is revealed in the colloquial expression, "falling into a conversation," which signals that a conversation is more than the goal-oriented strategies of its participants, and that it develops over time rather than being accomplished instantly. Gadamer's focus on dialogue leads him to conclude that there simply is no mistaken "language of metaphysics" that we can identify from afar and then abandon once and for all through deconstructive thinking that purports to be radically Nietzschean.

> There is only a metaphysically thought-out coinage of concepts that have been lifted from living speech. Such coinage of concepts can, as in the case of Aristotelian logic and ontology, establish a fixed conceptual tradition and consequently lead to an alienation from the living language. . . . Thus, the task of a *Destruktion* of the conceptuality of metaphysics was posed. This is the only tenable sense of talk about the "language of metaphysics": this phrase simply refers to the conceptuality that has been built up in the history of metaphysics.
>
> Early on, Heidegger was to put forward as a rallying cry the task of a *Destruktion* of the alienated conceptuality of metaphysics: the ongoing task of contemporary thinking. With unbelievable freshness, he was able to trace in thinking the concepts of the tradition back to the Greek language, back to the [now forgotten] natural sense of words and the hidden wisdom of language they contain, and in so doing, to give new life

20. Op. cit., p. 23.
21. In an essay on Hegel's continuing relevance to contemporary philosophical dialogue, Gadamer most clearly makes the case that he is continuing Heidegger's later initiatives precisely by returning to dialogue. Hans-Georg Gadamer, "The Heritage of Hegel," in *Reason in the Age of Science* (Cambridge, MA: The MIT Press, 1981), pp. 56–58 (Frederick G. Lawrence, trans.). Suspicious of Heidegger's turn away from everyday dialogue, Gadamer finds the key to *Destruktion* in the challenge to subjectivity that comes from dialogue, and he rejects the claimed expertise of the profound thinker who is able to gain access to an event that is invisible to most persons.

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> to Greek thought and its power to address us today. Such was Heidegger's genius. He had a penchant for restoring to words their hidden, no longer intended sense, and then from this so-called etymology to draw fundamental consequences for thinking.[22]

Hermeneutical retrieval of philosophical concepts is a *Destruktion* that opens the potential for breaking the grip of stale conceptualism and undermining the pervasive subjectivism that is the legacy of this calcified tradition. Gadamer's signature insight that "we understand in a *different* way, *if we understand at all*," emphasizes the dynamic effects of dialogic understanding.[23]

Gadamer's retrieval of Heideggerian *Destruktion* responds to Nietzsche's challenge by returning to dialogue and factical life. In this manner, Gadamer avoids the increasingly insular and enigmatic qualities of the later Heidegger without relapsing to the abandoned project of devising a fundamental ontology. In essence, Gadamer is arguing that Nietzsche's philosophical challenge to modernist subjectivity is realized in the de-centering experience of dialogue, a broad term that Gadamer uses to characterize hermeneutical experience. Gadamer argues that a variety of experiences – engaging a work of art, participating in a genuine conversation, and even rendering a legal judgment – exemplify the kind of de-centering experiences that Nietzsche seeks to promote with his disruptive interrogations of received wisdom. Of course, Gadamer does not suggest that a quick walk through a museum, casual chit-chat, or the bureaucratic practices of traffic court inevitably promote a Nietzschean *Destruktion* of the metaphysical tradition. His point is that these practices and experiences simultaneously reveal and conceal the de-centering of subjectivity anticipated by Nietzsche. By working through these practices and experiences and recuperating their dialogic character, Gadamer suggests, we can *live* Nietzsche's critique rather than just *study* it.

2.2 Confronting Derrida's Nietzschean Critique of Heidegger

Gadamer used the occasion of his exchange with Derrida to show that the dialogic conception of *Destruktion* that he developed by reading Heidegger's "turn" through the lens of Heidegger's early work provides an intriguing

22. Gadamer, "*Destruktion*," p. 107. Put succinctly, Heidegger's project claimed that Aristotelian conceptual analysis had been lost in translation – first into Latin and then into modern language – thereby literally rendering "Aristotle's commentary speechless." Gadamer, "Dallmayr," p. 99. Gadamer's point is that "this alienation confronts us with a task: the task of *Destruktion*." Op. cit.
23. Gadamer, *Truth and Method*, p. 297 (emphasis in original).

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response to the Nietzschean challenge. In the course of describing his response to Nietzsche, Gadamer attempted to give full recognition to Derrida's Nietzschean rebuttal:

> Now Derrida will certainly object that I do not take Nietzsche seriously enough: that is to say, the end of metaphysics, that break which, since Nietzsche, makes all identity and continuity with oneself and with the other illusory. He takes these to be logocentric illusions from which even Heidegger did not escape, as [Heidegger's] Nietzsche-interpretation shows.[24]

Gadamer insists that human finitude precludes attaining a "complete" or "timeless" understanding, but he acknowledges Derrida's persistent challenge that he still has conceded too much "to reciprocal understanding and mutual agreement" in the face of irreducible difference, and that his celebration of dialogue betrays an implicit assumption that we truly can come to know another, whether the other is a person, idea, or culture.[25] Gadamer responds that Derrida's efforts to move beyond *Destruktion* and to escape the grip of metaphysics through deconstruction is a hopeless dream, one that builds on Heidegger's *failures* in his response to Nietzsche, rather than on Heidegger's earlier *innovations*.

Unfortunately, Derrida did not engage Gadamer directly on these issues during their exchange. It should not be surprising that Gadamer, the sensitive and responsive hermeneutic critic, attempted to anticipate and fairly articulate Derrida's challenges to his approach. But it was surprising to many that Derrida's response to Gadamer's detailed effort to take account of convergences and departures in philosophical hermeneutics and deconstruction came in the form of "three questions" that appeared to be wholly non-responsive.[26] For example, in response to Gadamer's emphasis on the interpreter's willingness to allow a text to speak rather than subordinating the text to the interpreter's designs, Derrida questions whether hermeneutical "good will" merely re-instantiates the Kantian metaphysics of will.[27] In Derrida's principal paper, he elliptically mused about the difficulty of ascribing positions to Nietzsche and

24. Gadamer, "Dallmayr," p. 96.
25. Gadamer, "Dallmayr," p. 97.
26. Gadamer's reply to Derrida's brief questions begins by making clear his puzzlement: "Mr. Derrida's questions prove irrefutably that my remarks on text and interpretation, to the extent they had Derrida's well-known position in mind, did not accomplish their objective. I am finding it difficult to understand these questions that have been addressed to me." Hans-Georg Gadamer, "Reply to Jacques Derrida," in Diane P. Michelfelder & Richard Palmer, trans. and eds., *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany, NY: State University of New York Press, 1989), p. 55.
27. Jacques Derrida, "Three Questions for Hans-Georg Gadamer," in Diane P. Michelfelder & Richard Palmer trans. and eds., *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany, NY: State University of New York Press, 1989), pp. 52–53.

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Heidegger, thereby effectively refusing to engage Gadamer directly on their different interpretations of Heidegger's confrontation with Nietzsche's thought.

In the space created by Derrida's silence, some of Derrida's followers joined the debate and argued that Gadamer's exegetical optimism reflects a misunderstanding of the Nietzschean challenge with which Heidegger grappled and which gives rise to Derrida's deconstruction. John Caputo characterizes Gadamer's hermeneutical reading of Heideggerian *Destruktion* as "half-hearted, indeed reactionary, even resistant to the momentum, the direction, the tendency of Heidegger's critique of metaphysics."[28] Advancing a "radical hermeneutics," Caputo argues that Gadamer missed the radicalism of Heidegger's *Kehre* and that Derrida has surpassed Heidegger's initiatives.[29] For Caputo, Derrida's mysterious approach to the debate demonstrates that there "is a more Nietzschean side to Derrida than in Heidegger or Gadamer, a more deeply suspicious eye, a greater sense of the fragility of our thought constructions and the contingency of our institutions."[30] In a later book Caputo treats Gadamer with a gentler hand, but he continues to indict philosophical hermeneutics for failing to address Nietzsche's radicalism.[31] Caputo's Derridean critique of Gadamer exemplifies the received wisdom among self-proclaimed radical theorists: Gadamer's *Destruktive* return to dialogue remains trapped within the metaphysics of presence.

Gadamer's commentators responded in kind, criticizing Derrida for failing to risk his ideas in dialogue with Gadamer. Neal Oxenhandler alleges that Derrida chose to subject Gadamer to "the cutting edge of irony" rather than entering a dialogue with him, despite the considerable overlap in the motivation and implications of their work.[32] In more accusatory tones, G.B. Madison suggests that Derrida would risk "alienating that specialized audience which is composed of the addressees of his particular brand of ultra-ironic discourse" if he dialogically engaged Gadamer on the problem of power within hermeneutic understanding, concluding: "How else are we to make sense of what in Derrida's response to Gadamer (and in remarks of his elsewhere) is manifest nonsense, a caricaturial misreading of Gadamer

28. John D. Caputo, "Gadamer's Closet Essentialism: A Derridean Critique," in Diane P. Michelfelder & Richard Palmer, eds., *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany, NY: State University of New York Press, 1989), p. 261.
29. John D. Caputo, *Radical Hermeneutics: Repetition, Deconstruction, and the Hermeneutic Project* (Bloomington, IN: Indiana University Press, 1987), pp. 95–119.
30. Op. cit., p. 97.
31. John D. Caputo, *More Radical Hermeneutics: On Not Knowing Who We Are* (Bloomington, IN: Indiana University Press, 2000), pp. 8, 41–59.
32. Neal Oxenhandler, "The Man with Shoes of Wind: The Derrida–Gadamer Encounter," in Diane P. Michelfelder & Richard Palmer, eds., *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany, NY: State University of New York Press, 1989), p. 265.

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and hermeneutics? Can it be anything other than a calculated and deliberate misunderstanding?"[33] Similarly, Donald Marshall suggests that to "read so feeble a 'response' from the most distinguished French philosopher since Sartre is certainly embarrassing and can be explained only on the assumption that Derrida knows little or nothing of Gadamer's work and was too preoccupied with what he intended to say in his own lecture on this occasion to give much attention to Gadamer's remarks."[34]

The perceived incommensurable interpretations of Nietzsche by Gadamer and Derrida is an enduring legacy of the commentary on the 1981 encounter, but the standoff is overly dramatized. Caputo's endorsement of Derridean deconstruction does not fall victim to simplistic readings of Derrida's radically Nietzschean perspective by abandoning reasoning to chaotic flux. Instead, he reaffirms that he is "trying to restore the difficulty in life, not to make it impossible," which is to say that he regards deconstruction as problematizing congealed forms of understanding, rather than precluding understanding altogether.[35] Having misread Gadamer for polemical reasons, Caputo fails to recognize that deconstructive interventions challenging all claims of necessity, universality, and timelessness without precluding ongoing debates about which understandings better serve social needs in present circumstances are the very hallmarks of Gadamer's philosophical hermeneutics. Gadamer's emphasis on dialogue provides a non-subjectivist means of breaking the grip of subjectivism that provides a more promising response to Nietzsche than Caputo's polemical account of Derrida's deconstruction. Caputo is not wholly to blame, inasmuch as Derrida's refusal in 1981 to engage an actual "other" in a dialogue that would risk his self-understanding and prejudices was rather remarkable in light of his longstanding attention to "the Other." Derrida's undeniable dexterity in reading texts – literary, philosophical, poetic, legal – was exhibited in a *tour de force* of exegetical originality rather than devoted to a dialogic exchange with another thinker. This is the most dramatic and telling lesson of his 1981 meeting with Gadamer: Derrida literally was unable to hear and respond to another thinker, even one with whom he shared substantial common ground and who was approaching him in an earnest attempt to identify helpful points of departure for discussion.

Gadamer's supporters have too often attempted to freeze the debate in its unproductive 1981 posture rather than pursuing its developing legacy, thereby violating a fundamental tenet of philosophical hermeneutics. Oxenhandler reports that Derrida conceded in a private conversation that "nothing really happened" at the Paris encounter because developing

33. G.B. Madison, "Gadamer/Derrida: The Hermeneutics of Irony and Power," in Diane P. Michelfelder & Richard Palmer, eds., *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany, NY: State University of New York Press, 1989) pp. 198, 194.
34. Donald G. Marshall, "Dialogue and *Écriture*," in Diane P. Michelfelder & Richard Palmer, eds., *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany, NY: State University of New York Press, 1989), p. 206.
35. Caputo, *Radical Hermeneutics*, p. 209.

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a "position in response to Gadamer . . . would take a great effort and that is not what I want to do now."[36] Pejoratively characterizing Derrida as a disseminating prophet who necessarily is "exclusionary" in that he has "many acolytes but no equals," Oxenhandler concludes that "the time will come when Derrida will assume the responsibility of developing 'a position in response to Gadamer' . . . " and that it will prove to be productive.[37] Madison also concedes that if Derrida ever took this risk, "a genuine and lively dialogue would surely ensue,"[38] a project that regrettably is now left to their commentators in light of the recent deaths of both philosophers.

Rather than focusing on the personalities involved in the highly charged event, commentators should seek openings for a fresh reading of the debate. Gadamer's philosophy poses important questions that remain unanswered by those who promote a deconstructive reading of Nietzsche's critique. Can the role of deconstructive prophet (whether the later Heidegger or Derrida) facilitate *Destruktion*, or does this posture inevitably reinforce the grip of subjectivist metaphysics even as it strives to become ever more radical? Is Nietzsche's challenge a call to philosophical radicalism, or is Nietzsche best interpreted as issuing a call to live life without hiding behind philosophical walls of any kind? In the end, isn't it only putting oneself at risk in dialogue that can facilitate the *Destruktion* of metaphysics, which is the experience of being brought up short by one's engagement with an actual other, rather than the product of philosophical lessons about "the Other?" Doesn't Gadamer's dialogic risk embody the Nietzschean critical spirit – the dangerous maybe – in ways that the efforts by Heidegger and Derrida do not?

Following the Paris encounter, Derrida's work undoubtedly closed the gap that Gadamer identified between their positions. This movement is perhaps most starkly illustrated by Derrida's surprising conference address, "Deconstruction and the Possibility of Justice," which he begins by noting that it would be easy to refuse to see any connection between deconstruction and justice, but that such a posture would reveal the speaker to be not only "in a bad temper," but also "in bad faith."[39] Derrida does not explain this seeming reversal of his critique of Gadamerian hermeneutic charity, but the

36. Oxenhandler, "Shoes of Wind," p. 268 (quoting a private conversation with Jacques Derrida at Hanover, NH on 8 July 1987).
37. Op. cit., p. 268.
38. Madison, "Gadamer/Derrida," p. 198.
39. Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'," *Cardozo Law Review* 11 (Mary Quaintance, trans., 1990), p. 921. Derrida dramatically announced that deconstruction has always been concerned with justice, and stated his intention "to show why and how what is now called Deconstruction, while seeming not to 'address' the problem of justice, has done nothing but address it, if only obliquely, unable to do so directly." Op. cit., p. 935. Derrida's reflections on law are quite congenial to Gadamer's argument that law exemplifies the hermeneutical situation. Derrida's address was substantially enlarged in 1994 and the complete version first appeared in translation to English in Jacques Derrida, *Acts of Religion* (New York, NY: Routledge, 2002) pp. 230–98 (Gil Anidjar, ed. and rev. trans.).

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gesture appears to be intentional. He characterizes the conference title as requesting a violent "either/or," in the form of a polemic, to which he attempts to respond with an attitude of (what he apparently would call) good faith.[40] Similarly, Derrida, in his homage to Emmanuel Levinas, asks whether "without exonerating myself in the least, decision and responsibility are always *of the other*," and "whether the ethics of hospitality that we will try to analyze in Levinas's thought would be able to found a law and a politics, beyond the familial dwelling, within a society, nation, State, or Nation-State," even if the hope of *deducing* such a politics is without warrant.[41] In these and other developments of his thought, Derrida might very well have provided a basis for a dialogue with Gadamer that was not present in 1981.[42]

I do not wish to argue that Gadamer convincingly "won" their debate such that no additional dialogue is necessary. Rather, I argue only that following the path Gadamer blazed in response to the posture of deconstruction in 1981 remains a productive path for responding to Nietzsche's challenge that is not as starkly opposed to Derrida's important initiatives as the commentators have supposed.[43] Gadamer's insistence that

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40. Op. cit., p. 923.
41. Jacques Derrida, *Adieu: To Emmanuel Levinas* (Stanford, CA: Stanford University Press, 1999), pp. 23, 20 (Pascale-Anne Brault & Michael Naas, trans.). See also Jacques Derrida, *Spectres of Marx: The State of the Debt, the Work of Mourning, and the New International* (New York, NY: Routledge, 1994) (Peggy Kamuf, trans.); Jacques Derrida, *Politics of Friendship* (New York, NY: Verso Press, 1997) (George Collins, trans.).
42. Caputo admits that "insofar as Derrida, very much under Levinas's influence, has come to regard faith as the medium in which we communicate – as soon as I open my mouth, I try to speak the truth – his work has come closer to Gadamer than to Heidegger." Caputo, *More Radical Hermeneutics*, p. 42.
43. Jean Grondin concludes his biography of Gadamer by quoting Derrida's published reaction to the news of Gadamer's death in 2002: "how right he was, then [in 1981] and still today!" Jean Grondin, *Hans-Georg Gadamer: A Biography* (New Haven, CT: Yale University Press, 2003), p. 338 (Joel Weinsheimer, trans.) (quoting Jacques Derrida, "Wie recht er hatte! Mein Cicerone Hans-Georg Gadamer," *Frankfurter Allgemeine Zeitung* (28 March, 2002)). In an interview near the end of his life, Gadamer claimed that Derrida later understood that his allegation of "logocentrism" was a "gross misunderstanding" of Gadamer's position, and that "in the meantime, Derrida and I became quite well attuned to one another . . . Since then he has been entirely on my side." *A Century of Philosophy: Hans-Georg Gadamer in Conversation with Riccardo Dottori* (New York, NY, Continuum, 2004), pp. 60–61 (Rod Coltman with Sigrid Koepke, trans.).

    It is my natural lawyering instinct to quote these "party admissions" prominently in my text as conclusive proof of my thesis, but to do so would surely undermine my thesis. Gadamer and Derrida do not represent fixed interpretations of Nietzsche that collided in 1981, with one to emerge finally as a "victor." Rather, their dialogue itself became the test case for their interpretations, and Derrida's gracious comments can perhaps best be interpreted as an agreement that Gadamer's invitation to converse would have been a more productive, more provocative, more piercing experience. In this sense, Gadamer was a cicerone, or guide, for Derrida. But it is Gadamer's insights that prevent me from declaring an easy "victory" over Derrida, and lead me instead to call for a more probing engagement of Nietzsche in light of the dynamic challenge of Derrida's deconstruction. Gadamer's indication that they later both recognized the commonality between their approaches is offered in the spirit of dynamic hermeneutical understanding, as revealed by his concluding observation on the 1981 encounter: "The horizon of interpretation changes constantly, just as our visual horizon also varies with every step that we take." Op. cit.

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conversational dialogue breaks the gripping prejudice of insular subjectivity, and the connection between this experience and the philosophical project of *Destruktion* in which one critically engages with tradition, provide a compelling orientation for critical legal thinking. Gadamer's elaboration of Heidegger's *Destruktion* opens a path between unthinking conventionalism and unceasing challenge, but his philosophy remains notoriously silent about how we can facilitate the work of ordinary dialogue to overcome "unproductive prejudices." Rather than asking how a challenging *Destruktion* of law becomes possible, he asks whether modernity's prejudices can completely silence the *Destruktion* of legal practice. As with Derrida, Gadamer's later work appeared to take more account of his opponent's insights,[44] but nevertheless the role of critical legal theory remained woefully underdeveloped. Having argued that Gadamer responds to Nietzsche to the extent that he avoids the problems encountered by Heidegger and Derrida, I now develop Gadamer's response to the Nietzschean challenge in its own right by returning to Smith's critique.

III. *Destruktion*, Law and Critical Legal Theory

Gadamer's philosophical hermeneutics does not translate to the setting of legal practice and theory in an obvious manner. What do legal theorists gain, even if I am correct that Gadamer has effectively responded to Nietzsche's philosophical challenge? Can Gadamer's emphasis on dialogic risk in conversation, which serves as the engine of *Destruktion*, shed light on the role and prospects for critical legal theory? The answer to these questions is not a matter of specifying what Gadamer's philosophy can teach legal practitioners and legal theorists from the supposed heights of philosophical insight. Gadamer does not provide a unique and determinant methodology for engaging in legal practice or critical legal theory, and his philosophy pointedly disclaims any such goal. Notwithstanding this limitation, theorists can illuminate Gadamer's themes by referring to legal practice, and can also suggest how legal practice might be facilitated by an explicit recognition of those themes. These seemingly modest accomplishments are more than sufficient to permit us to see beyond Nietzsche's shadow.

3.1 Philosophical Hermeneutics and Legal Practice

At a critical juncture of *Truth and Method* Gadamer turns to Aristotelian practical philosophy to characterize the activity of interpretation, and he suggests that legal practice provides an excellent model of this interpretive practical engagement.[45] Likewise, in his exchange with Derrida, Gadamer

44. I believe that Gadamer's attention to multiculturalism in his later work reflects this recognition of the significance of work by Derrida and others.
45. Gadamer, *Truth and Method*, pp. 324–41.

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turned to legal interpretation at a key point of his discussion of the philosophical significance of textual interpretation.[46] At first glance, however, Gadamer's characterizations of legal practice appear to be self-contradictory, if not incoherent. After carefully reconstructing Gadamer's assessment of legal hermeneutics, I will explore how his philosophy provides a model of critical legal theory that responds to Nietzsche's legacy.

Gadamer regards "reading and understanding" as the process of leading the "announcement" of the text back to its "original authenticity," by which he means back to the communicative event from which the text now appears as a residue.[47] Due to the inevitability of textual distanciation, drafting legal texts must be "especially exacting," with the effort "always to avoid strife, to exclude misunderstandings and misuse, and to make univocal understanding possible."[48] To the extent that this characterization suggests that legal texts can be promulgated in a manner that permits a later interpreter to creatively reconstitute the original directive as intended by the text's author, Gadamer appears to endorse the romantic conception of hermeneutics that has always been one of his principal targets.[49] Needless to say, Gadamer's invocation of a "univocal meaning" resonates with conservative themes and appears to align him with metaphysical commitments to a knowing subject before whom the textual object of interpretation can be rendered fully present.

A careful assessment of Gadamer's discussion of legal hermeneutics, however, disrupts any such romantic or conservative reading. References to returning to the "original communicative event" and attempting to express a "univocal meaning" do not signal Gadamer's belief that legal texts are capable of fixing a perspicacious meaning that can be recovered intact and then applied. Gadamer begins with the longstanding recognition that laws cannot be construed as simple directives that are self-executing, but instead must always be read according to their general sense. "Accordingly, we must say that a text is not simply a given object but a phase in the execution of the communicative event [*Verständigungsgeschehen*]."[50] This means that a legal text always contains the "free space of meaningful concretization, a concretization that has to carry out the interpretation for the purpose of practical application."[51] Legal texts do not require interpretation only when they are vague, as a prelude to their application to a particular problem; instead, understanding is

46. Gadamer, "Text and Interpretation," pp. 35–36.
47. Op. cit., p. 35.
48. Op. cit., pp. 35–36.
49. In *Truth and Method*, Gadamer specifically relies on Heidegger's hermeneutic phenomenology to avoid the pitfalls of Wilhelm Dilthey's romantic hermeneutics. Gadamer, *Truth and Method*, pp. 218–64.
50. Gadamer, "Text and Interpretation," p. 35.
51. Op. cit., p. 36.

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possible at all only in an interpretive application of the law to a case at hand.[52] Gadamer concludes that legal "decisions, precedents, or the prevailing administration of the law therefore always have a creative legal function" by applying the law to a set of facts.[53]

These seemingly contradictory themes, once properly understood, underscore why Gadamer emphasizes that the concrete setting of legal practice reveals the hermeneutical situation with "exemplary clarity,"[54] and why the hermeneutical situation can accommodate Nietzschean critique. Legal hermeneutics always involves the interpretation of binding texts, texts that make a claim on the interpreter and to which the interpreter must submit if she is to understand the law. This motivates the legal practitioner's claim that she can discover a univocal meaning: the rule of law requires that the law is obeyed, and that the interpreter does not freely twist the law to her subjective designs. An interpreter who objectifies and contorts a text for his own purposes risks nothing and remains within the grip of a subject-centered orientation that precludes genuine interpretive activity. The rule of law depends on the interpreter's good faith, which means that the interpreter acts in accordance with the law and does not manipulate the legal texts in a cynical, strategic, or ironic manner. Although this reality is particularly evident in legal practice where a decision must be made in accordance with law, it is true no less of ordinary conversational exchange and of the activity of reading literature.

The experience of giving oneself over to the text does not mean that legal texts are self-executing, such that the interpreter disappears and meaning emerges solely from the circumscribed and fixed world of the text. Lacking an insular, acontextual and autonomous meaning, texts acquire meaning only through their application to a particular concern. Legal hermeneutics exemplifies this lesson, inasmuch as attorneys and judges recognize that legal texts have meaning only in the context of a particular case. Legal practice reveals clearly that interpretation always involves application, which is to say that meaning is always meaning for the interpreter, in response to the questions posed by the interpreter. This "free play" through

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52. In *Truth and Method*, Gadamer stresses that the fundamental problem of hermeneutics is application, and that interpretation "is not an occasional, *post facto* supplement to understanding; rather, understanding is always interpretation" that occurs in application. Gadamer, *Truth and Method*, p. 307. He elaborates:

    > The work of interpretation is *to concretize* the law in each specific case – i.e. it is a work of *application*. The creative supplementing of the law that is involved is a task reserved to the judge, but he is subject to the law in the same way as is every other member of the community. It is part of the ideal of the rule of law that the judge's judgment does not proceed from an arbitrary and unpredictable decision, but from a just weighing up of the whole.

    Op. cit., p. 329. Gadamer's extended discussion of legal hermeneutics serves to reveal that "all reading involves application, so that a person reading a text is himself part of the meaning he apprehends." Op. cit., p. 340.
53. Gadamer, *Text and Interpretation*, p. 36.
54. Op. cit.

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application does not collapse into a celebration of the unfettered subjective manipulation of the text. As a law professor I constantly hear students propose interpretations of legal texts that don't make any sense and would never be advanced by competent lawyers, despite the linguistic plausibility of their analysis. Free play in the interpretation is never unbounded and indiscriminate, even if these boundaries always are in flux and subject to free play.

Gadamer's point, then, is that legal interpretation shows in particularly vivid ways that textual interpretation is conversational in structure no less than a spoken exchange between two persons. Understanding is not the product of a methodology that can be imposed on a text as if it were an object; rather, it emerges from the dialogic risk of conversational engagement. Legal practice reinforces the historically-effected character of interpretation, in which the interpreter's horizon of pre-understanding fuses with the text's effective-history of reception and re-circulation within a particular culture to generate a meaning within a context. Gadamer's conversational model of understanding accords with Nietzsche's perspectivism and emphasis on rhetoric, but it also accommodates his genealogical critique.[55] Nietzsche's critique emerges from within contemporary practices, and he finds in tradition sufficient resources for overcoming the historical contingencies that have solidified into dogma. Gadamer's development of Heideggerian *Destruktion* pursues similar goals. Gadamer places emphasis on the legal tradition precisely because the everyday experience of lawyers involves *Destruktion*, despite the irony that lawyers and judges attempt to suppress the nature of their dynamic activity by describing it as 'just following the rules.'

3.2 Critical Legal Theory and **Destruktion** *as a Practical Engagement*

Smith endorses Gadamer's characterization of the hermeneutical situation, and he acknowledges that Gadamer exposes a limitation in Nietzsche's account by revealing that genuine dialogue and consultation may lead to understanding. Nietzsche's unremitting critical posture renders him "unable to conceive of any communicative experience except contention for dominance,"[56] and thus he is blind to the communal experience of understanding that Gadamer characterizes by the notion of a "fusion of horizons." Emphasizing the kinship that makes understanding possible, Gadamer successfully avoids an overly-intellectualized account of interpretation by rejecting all manner of foundationalism and formalism.[57]

55. I have drawn the connections between Gadamer and Nietzsche in these ways in some detail in Mootz, "Nietzschean Critique."
56. Smith, "Strife," p. 19.
57. Op. cit., pp. 12–14.

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But Smith cautions that Gadamer has not responded to the full depth of Nietzsche's critique, which extends beyond rejecting the primacy of foundational and logically formalistic reasoning. Smith argues that Nietzsche exposes the radically corporeal root of will to power, and that Gadamer exhibits a "residual intellectualism" by failing to acknowledge fully that understanding also is rooted in our corporeal existence.[58]

Smith concludes that Gadamer's advance over Nietzsche regarding the possibility of understanding through conversation does not extend to Gadamer's account of law. Simply put, Gadamer errs by attempting to translate the corporeal and affective experience of hermeneutical understanding that can occur between two people to the very different institutional setting of legal practice. Even if it is possible for interpersonal understanding to rise above a Nietzschean contest of wills, Smith insists that matters addressed in the legal realm are subject only to the bureaucratic management of an agonistic contest of wills. He then offers an intriguing illustration:

> Obviously, where the will to power ruins any possibility of *Zugehörigkeit*, where all sense of kinship and belonging together in an ethical community is destroyed, the only thing standing between civility and the collapse into Hobbes's anarchic "pursuit of power after power," is the rule of law, the *Rechtszustand* or legal status. For example, when a marriage degenerates into a *Machtkampf*, an *agôn* for power and property, or when, for that matter, any partnership devolves into . . . irreconcilable antagonism . . . , only regulation by a legal instance of authority can prevent the domination and exploitation of one party by the other.[59]

Smith agrees that kinship leading to understanding is possible, but he regards it as a rare and fragile achievement. Legal practice is just a means of dealing with *failures* of kinship and *breakdowns* in a consultative being-with-another. In response to hermeneutical impasse, legal practice vaguely acknowledges and then seeks to buffer the Nietzschean side of our embodied, affective lives by retreating behind formalistic and deductive shibboleths. When an organic relationship such as a marriage dissolves in fact, the law can only step in and provide neutral (which is to say, disembodied) procedures to divide the material residues of the relationship so as to avoid an open enactment of the ongoing conflict. The essence of legal practice is best understood as the management of Nietzsche's "contest of wills," Smith concludes, rather than Gadamer's notion of friendship, deliberation and understanding.

58. Op. cit., p. 19.
59. Op. cit., p. 20.

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Smith's Nietzschean critique of Gadamer's hermeneutical account of legal practice has undeniable power, and it echoes Derrida's interrogation of hermeneutics. Surely it is idealistic, if not naive, to suggest that legal practice is a "conversation" oriented toward "understanding," rather than recognizing that legal practice is a bureaucratically-managed exercise of power.[60] Under my reading, though, Gadamer's claim that legal practice exemplifies hermeneutical understanding does not fall victim to such a simplistic view. Legal practice is conversational in structure, which means that it is structured as a playful movement of questioning and answering, but this is not to say that legal practice unfolds as if two intimates are engaged in a meaningful conversation. Law is structured conversationally even if it clearly is not just a conversation. Gadamer's response to Derrida establishes the basis for demonstrating the significance of philosophical hermeneutics in response to Smith's Nietzschean critique.

Smith is correct to insist that there is a critical difference between interpersonal conversation and textual interpretation, but this distinction has always been an important feature of Gadamer's hermeneutics. Arguing against Derrida's deconstructive reversal that the distanciation of textual interpretation reveals more about interpretative encounters than the personal character of oral exchanges, Gadamer steadfastly insists (as does Smith) that hermeneutical understanding is rooted in a (literal) "full-bodied" encounter with another.[61] Nevertheless, Gadamer gives textual interpretation its due in our modern literate culture. A principle goal of his exchange with Derrida was to explore the extent to which Derrida's focus on textuality provides important guidance to modern hermeneutical philosophy. Gadamer does not posit a fanciful account of law as a conversation among friends seeking agreement in the agora. He acknowledges that a new hermeneutical experience is called forth in

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60. Sanford Levinson's assessment of the law and literature movement twenty years ago included what may be the best succinct articulation of this criticism.

> Yet there are obvious difficulties in adopting Rorty's metaphor of the conversation (rather than the argument), for the principal social reality of law is its coercive force vis-à-vis those who prefer to behave other than as the law 'requires.' As Chairman Mao pointed out, a revolution is not a tea party, and the massive disruption in lives that can be triggered by a legal case is not a conversation. The legal system presents a conversation from which there may be no exit, and there are certainly those who would define hell as the vision of their least favorite constitutional interpreter, whether the Court or a benighted law professor.

Sanford Levinson, "Law as Literature," *Texas Law Review* 60 (1982), p. 386. Septicism about conversational models of law was famously voiced several years later by Robert Cover. Speaking about the function of law in convicting and sentencing criminal defendants, Cover writes:

> . . . I do not wish us to pretend that we talk our prisoners into jail. The 'interpretations' or 'conversations' that are the preconditions for violent incarceration are themselves implements of violence. To obscure this fact is precisely analogous to ignoring the background screams or visible instruments of torture in an inquisitor's interrogation. The experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated.
> Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986), p. 1608.

61. Smith, *Original Argument*, pp. 134–56.

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modernity by a text-based culture that facilitates increasingly complex forms of social organization.

Smith's elegant book, *The Hermeneutics of Original Argument*, provides a case in point of this new hermeneutical situation. Drawing from multiple resources in the Western canon, with a particular emphasis on Nietzsche and Gadamer, Smith chronicles the abstraction from our affective life that has accompanied the ascent of modern technical and logical models of thinking that are removed from the aural nature of deliberating with another person. In concluding his study, though, Smith acknowledges the irony of having made the case for a hermeneutical retrieval of the aural (corporeal) dimensions of original argument by means of a complex and lengthy text that is produced and shipped off to anonymous readers.[62] Smith concedes that his account unavoidably is demonstrative rather than deliberative, and his demonstration of the "true" character of our corporeal being-with-others occurs only by virtue of his disembodied, textual being-with-readers. Gadamer's emphasis on legal hermeneutics is important for this very reason: he embraces this irony and investigates the hermeneutical character of reality not only in the modern literate world, but also in the emerging postmodern world of computerized data and text processing. I would not hesitate to cite Smith's book as an exemplary instance of inviting hermeneutical understanding in the manner described by Gadamer and as exemplified in legal practice.

Derrida took Heidegger's *Destruktion* as the starting point for his deconstruction, but Gadamer's different development of *Destruktion* proves its worth by responding to Nietzsche's challenge by articulating the potential for the creative and critical development of a textual tradition. This carries forward Heidegger's insight that *Destruktion*

> of Western metaphysics does not destroy or even destructure metaphysics; on the contrary, it decomposes or decompiles metaphysics' sedimented historical layers, reconstructing their hidden ontotheological structure and seeking to uncover the 'decisive experiences' responsible for this shared structure (experiences which Heidegger hopes will help us to envision a path beyond ontotheology).[63]

Smith's textual uncovering of the depth of Nietzsche's challenge is an example of this *Destruktion* in action. Although there can be no methodology of *Destruktion*, there is a critical engagement with textual tradition that opens pathways for more productive thinking by working through the inadequacies of that tradition.

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62. Op. cit., p. 310.
63. Iain Thomson, "Ontotheology? Understanding Heidegger's *Destruktion* of Metaphysics," *International Journal of Philosophical Studies* 8 (2000), p. 323, n.2.

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> Heidegger's hope is that careful philosophical study of such roads not taken might help us envision alternatives to our own metaphysical epoch of 'enframing.' This it might do not only negatively, by contesting the necessity of the Nietzschean metaphysics underlying our increasingly homogenized 'age of technologically-leveled world-civilization,' and thereby clearing the conceptual space for understandings of Being other than the metaphysics of the atomic age (now fulfilling itself in the almost uncontested spread of the cybernetic paradigm), but also positively, by recovering concrete (if fragmentary) historical examples of a non-metaphysical understanding of Being, elements of which (such as the temporal dynamism of Heraclitean *physis* and the active conception of truth as a historical clearing inherent in Parmenidean *alētheia*) we might draw on in order to elaborate heretofore unthought-of historical paths leading beyond our own late-modern Nietzschean impasse. Here we touch again upon the later Heidegger's central philosophical project, the vision behind his enigmatic call for 'an other beginning,' a beginning which he always insisted could only emerge out of a renewed and sustained hermeneutic altercation with the first beginnings of Western thought.[64]

To recover from the bad dream of modernity we need not rise above our situation through the prowess of critical insight; instead, we must invite and enact a *Destruktion*. Nietzsche's genealogical critique and rhetorical philosophy anticipate this development, but it is through Gadamer's dialogical development of Heideggerian *Destruktion* that it becomes concrete.

The best means of illustrating the practical significance of Gadamer's development of *Destruktion* is to work through Smith's contrast between the hermeneutically-defined marital relationship and the clash of power-interests that occurs in family court. At the outset, Smith errs by sharply distinguishing the public realm of law from the private realm of familial relations.[65] The kinship of the marital relationship is not purely a hermeneutical encounter between two persons. The relationship unavoidably is shaped and enabled by law inasmuch as marriage is a legal term rather than a natural term. To be married is to be recognized as such in the eyes of the law, and to see oneself accordingly. It is the legal character of the marriage relationship that motivates some gays and lesbians to seek such recognition of their life partnership, and leads other gays and lesbians to eschew any such legal status for their relationship. Marriage, for better or worse, has lived significance by virtue of our legal framework and heritage; hermeneutical intimacy is inextricably entwined with law.

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64. Op. cit., pp. 319–20.
65. Debunking this distinction has been one of the lasting contributions of the critical legal studies movement and has been particularly emphasized by feminist scholars. Examples include Frances E. Olsen, "The Myth of State Intervention in the Family," *University of Michigan Journal of Law Reform* 18 (1985), p. 835; Ruth Gavison, "Feminism and the Public/Private Distinction," *Stanford Law Review* 45 (1992), p. 1. See generally Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction," *University of Pennsylvania Law Review* 130 (1982), p. 1349.

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In addition, marriage is shaped by more than the family law statutes that define the legal significance of marriage. The general law of property, contract and torts enables the civil, social and economic world in which life partners realize their shared plans. This general structuring is now supplemented by the vast regulatory reach of the modern administrative state, which channels and facilitates the life plans of all couples in countless ways. To be married is just to take up one's life with another person in the complex matrix that is significantly, although certainly not exclusively, shaped by legal norms. Smith mistakenly regards the married couple as existing in a pre-legal state, reducing the legal system to its dispute resolution function.

By way of reply to this general critique, Smith might join with Habermas in concluding that the lifeworld of interpersonal relations has been colonized by juridical imperatives,[66] and then argue further that this colonization is nothing less than the covering over of original argument by a derivative manner of being-with-another as legal subjects. Habermas presses this point against Gadamer with a vengeance, arguing that we cannot reverse the colonization by technocratic rationality of the lifeworld by introducing "conversational" capacities from the bygone era of the *polis* at the level of system in the modern bureaucratic state.[67] But this rejoinder is likely to blunt the force of Nietzsche's critique rather than to reinvigorate it. Theorists tend to fall victim to one of two equally disabling orientations: either they follow Habermas in positing a quasi-transcendental principle to save the day, or they embrace a wistful and romantic desire to return to the dialogic encounters of the agora. Gadamer chooses instead to recognize the textuality of modernity, to identify the misunderstandings of understanding that textuality has spawned, and to characterize the hermeneutical situation by identifying legal practice as an exemplar of the activity of understanding in textual culture.

Although there is no definitive separation between law and personal life, certainly there is a valid and meaningful distinction that can be drawn between the understanding fostered by marital intimacy and the understanding achieved in legal interpretation. Smith compares the family law response to a failed marriage to the kinship of a healthy marriage in concluding that law does not recuperate the hermeneutics of original

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66. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: The MIT Press, 1996), pp. 94–99 (William Rehg, trans.) (describing the breakdown of natural law paradigms and the modern necessity of justification of social organization through legal principles of human rights and sovereignty). For extended discussions of these themes, see Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society I* (Boston, MA: Beacon Press, 1984), pp. 243–71 (Thomas McCarthy, trans.) (discussing Max Weber's analysis of the rationalizing role performed by law in the wake of the demythologization of religious and metaphysical worldviews) and Jürgen Habermas, *The Theory of Communicative Action: Lifeworld and System, A Critique of Functionalist Reason II* (Boston, MA: Beacon Press, 1989), pp. 356–73 (Thomas McCarthy, trans.) (analyzing the juridification of family relations and educational relationships as an instance of the colonization of the lifeworld by instrumental reason and the supplanting of communicative reason).
67. Habermas rejects the hermeneutic account of modern legal systems in Habermas, *Between Facts and Norms*, pp. 199–200.

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argument. However, his distinction works only by confusing the level at which law operates in a conversational manner. No competent lawyer or judge would suggest that the purpose of family law is to rekindle the failed relationship, but the marital relationship is not the only community served by law.[68] The failure of a marriage reverberates throughout the social fabric, and this personal strife risks introducing violence and recrimination into this broader community. Family law is just an assertion of communal values to shape the manner in which the effects of the failed marriage are felt by the couple, their children, and the wider community in which they will continue to live.

The division of the marital property undeniably can be a contest of wills in the sense that each spouse's attorney seeks the maximum economic value for her client, but this battle is fought against the backdrop of legal norms that are articulated through the case at hand, or are legislated in response to the accumulation of experience in cases. The rules regarding alimony and

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68. I do not want to discount the importance of, and perhaps the growing significance of, the "therapeutic jurisprudence" movement. This trend is represented generally in the work of scholars who argue that law should provide more than a dispute resolution procedure, and have encouraged the reconsideration of legal procedures and institutions in light of their effect on the parties. Examples include *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*, ed. Dennis P. Stolle et al. (Durham, NC: Carolina Academic Press, 2000); *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, eds. David B. Wexler and Bruce J. Winick (Durham, NC: Carolina Academic Press, 1996); *Essays in Therapeutic Jurisprudence*, eds. David B. Wexler and Bruce J. Winick (Durham, NC: Carolina Academic Press, 1991). This movement recognizes that the legal imposition of communal values can exacerbate the personal strife of the individuals engaged in a dispute, and attempts to resolve matters in an integrated manner that attends both to the needs of the community and to the lived experience of those involved in the specific legal matter.

There are a number of related developments, such as the rise of the mediation movement. For example, Nancy Welsh has written about the potential for mediation to introduce procedural justice into the settlement of litigated civil cases, thus affirming the social value and dignity of litigants who then are more likely to perceive the courts and their settlement efforts as legitimate. Nancy A. Welsh, "Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice," *Journal of Dispute Resolution* (2002), p. 179; Nancy A. Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?," *Washington University Law Quarterly*, 79 (2001), p. 787.

More specifically, the principles of "therapeutic jurisprudence" have had a large impact on family law scholarship and law reform. As explained recently in the context of exploring how courts deal with substance-abusing fathers,

> therapeutic jurisprudence involves the study of family law as a social force in the lives of family systems affected by paternal substance abuse with acknowledgment that legal proceedings can have both positive and negative consequences for fathers, mothers, and children. Ultimately the value of any legal process is determined by the extent to which it enhances the well-being of the people it affects, and the goal of legal reform is to restructure court systems so that they maximize the therapeutic consequences of legal intervention.

Thomas J. McMahon and Francis Gianni, "Moving from Popular Stereotypes to Therapeutic Jurisprudence," *Family Court Review*, 41 (2003), pp. 347–48. Toward this end, a number of scholars advocate for a unified family court system that would serve families therapeutically, rather than merely responding sporadically to discrete legal conflicts that involve members of the family. Examples include Barbara Babb, "Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court," *Southern California Law Review*, 71 (1998), p. 469; Barbara Babb, "An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective," *Indiana Law Journal*, 72 (1997), p. 775.

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property settlement reflect communal understandings of how we should justly recognize the couple's history together and then fairly appraise how they can best move into the future as individuals within the broader community. These rules constantly are in play as new situations arise that require clarification of these values. For example, when an unmarried cohabitating partner demands alimony-type payments after the termination of the relationship, or when a lesbian demands child support payments from her partner after their (necessarily) non-marital relationship ends, the law must simultaneously invent and reinscribe the norms of the wider community. The legal resolution of these issues is not designed to rebuild the hermeneutical ground of the couple's relationship, but rather is designed to reaffirm the broader bonds of the community in which the former life partners continue to live. The communal interest is even more apparent in the heart-wrenching battles over child custody, when the law seeks to elevate the communal value of promoting the "best interests of the child" over the bitter strife of the competing parents who may be pursuing venal and mean-spirited ends.

One should not confuse the hermeneutical function of law with a rosy-eyed view that litigation effectively instantiates justice in all cases. The law, no less than life partners, too frequently devolves into a contest of wills that betrays its important role in facilitating community. But to recognize that a "perfect" legal system is as elusive as the "perfect" marriage only highlights that it is the very idea of "perfect" in these contexts that raises difficulties. Gadamer's lesson is not that legal practice is a guarantor of hermeneutical integrity, but rather that legal practice reveals the hermeneutical *potential* of textual traditions, which have indelibly shaped the modern age. Legal practice has the potential to enact a form of Smith's "original argument," although the predominantly textual character of legal practice certainly means that the risky openness to another is experienced differently. A more genuine "conversation" emerges in legal practice when the parties break from the routinized bureaucracy and attend to the questions of justice in the case at hand. This provides the opening for Nietzschean critical insight, not as a dictate from principles on high, but as an announcement from *within* practice.[69] Nietzsche's announcement that Christianity had run its course in Western culture drew from his many contemporaries and precursors and itself was a product of Christian acculturation. Similarly, lawyers who challenge the conventional understanding of family law in new contexts simultaneously work within and against legal traditions (as well as within and against cultural, political, and economic traditions).

Gadamer's notion of interpretive *Destruktion* incorporates critical insight. Law is neither a purely mechanical and deductive exercise, nor is it just a clash of power. The decision in *In the Matter of Jacob*[70] by the New York

69. This is the enduring wisdom of Holmes's pragmatism: law is not a "brooding omnipresence in the sky" that operates "logically," but rather is a practical engagement grounded in "experience."
70. 636 N.Y.S. 2d 716 (1995).

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Court of Appeals provides an example of the *Destruktive* element at work in the family law context. The Court considered a consolidated appeal regarding two petitions for adoption: in one case the biological mother wished to consent to the adoption of her child by her co-habitating partner, and in the other case the biological mother wished to consent to the adoption of her child by her co-habitating female partner. These petitions were problematic because the adoption statutes permitted only an "adult unmarried person" or "an adult husband and his adult wife" to adopt, and also provided that upon adoption the "natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child . . ."[71] Reading these statutory provisions in a crudely literal manner suggested that the biological mothers' legal rights must be terminated upon the adoption of the children by their co-habitating partners. Reading these statutory provisions against the background assumption that adoption was not designed to permit an unmarried adult to share parental rights with the biological mother suggested that the adoptions could not proceed in the first instance. By a narrow margin, the Court read the adoption statutes to permit the biological mothers to retain parental rights when their co-habitating partners adopted the children.

The dissenting judges assailed this case as an example of improper judicial lawmaking, arguing that "cobbling law together out of interpretive ambiguity that transforms fundamental, societally recognized relationships and substantive principles is neither sound statutory construction nor justifiable lawmaking."[72] Partisan political campaigns emphasize the social stakes for judicial appointments in similar terms, concluding that judicial will to power is the name of the game rather than reasoned elaboration. But a careful reading of the case makes clear that the majority does not simply recognize unmarried partners as suitable adoptive parents and then spin a gossamer of legal analysis to hide its exercise of raw power. The majority opinion provides a detailed interpretation of the statutes in the context of the case at hand, and delivers a critical assessment of that context. Space constraints preclude a detailed reconstruction of the opinion, but the court clearly is thinking through inherited concepts and language in charting a new path for the development of law rather than creating an entirely new path. If it appears other-worldly to talk of *Destruktion* as the revitalizing of lifeless concepts by working through them without purporting to overcome them, the majority opinion in *Jacob* provides a concrete example of this process at work.

The Court begins by noting the underlying purpose of the adoption statute – to secure the best possible homes for children – and then concludes that the adoption statutes do permit two unmarried adults who function as a child's parents to obtain legal status as parents. This is not

71. The court was interpreting N.Y. Domestic Relations Law § 110 and N.Y. Domestic Relations Law § 117.
72. *In the Matter of Jacob*, 636 N.Y.S. 2d at 733 (Bellacosa, dissenting).

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purely a result-oriented exercise, inasmuch as the court carefully recounts legislative developments and administrative regulations that have effectuated this purpose under the statutory scheme. The court articulates what the law means in the current context and does not create law *ex nihilo*, even if the interpretation of the statutes involves a simultaneous critique of the context in which it is applied. This is *Destruktion* in action, and is precisely what Gadamer attempts to capture by characterizing legal texts as containing a "free space of meaningful concretization that has to carry out the interpretation for the purpose of practical application" through the "creative legal function" of applying the law to a set of facts. This is possible by virtue of the community of legal interpreters who reinscribe (which is to say, critically and creatively apply) communal values in the manner in which they adjudicate family law disputes. Interestingly, both formalists and radical deconstructionists would argue that *Destruktion* provides cover for the imposition of political will, with the former retreating to a mythical linguistic "plain meaning" to serve as an anchor while the latter embrace the "free play" of the text. Both perspectives ring hollow in the ears of lawyers and judges who struggle through the de-centering experience of interpretation, and experience of *Destruktion* that animates Gadamer's middle path.

Finally, Smith's family law example assumes that the role of the lawyer is just to resolve interpretive disputes within a textual tradition. In fact, the lawyer's role as counselor is paramount, even though it is often forgotten in the litigation models that dominate even Gadamer's image of legal practice. Much of legal practice involves deliberating with one's clients in order to determine the best means (often in tandem with other professionals such as accountants, therapists, doctors, and others) of realizing their clients' goals within the given situation. The first hermeneutical challenge for a lawyer is to hear her client's story and to enable the client to understand competing stories told by the client's adversary and by the society writ large. The rhetorical exchanges that comprise the lawyer–client relationship in the initial interviews preceding a divorce are key features of an original argument that eventually might be translated and filtered into legal briefs and motion arguments. The client's pain and anguish is heard and felt by the lawyer when she is representing her client effectively, and it is this corporeal experience that the lawyer brings into the legal venue for a hearing. The interactions of lawyers and judges in settlement conferences, pretrial hearings, negotiations and even within the stylized drama of litigation raise the potential for understanding through full-bodied original argument.

IV. Conclusion

Smith's argument that law is a contest of wills that might benefit from Nietzschean insight but cannot aspire to Gadamerian dialogue rests on too narrow a reading of Gadamer's revival of Heideggerian *Destruktion* and too narrow a picture of legal practice. The hermeneutical-rhetorical reality of

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legal practice points toward a text-based experience of "original argument" that cannot be completely covered over by the pretense of logical formalism. Gadamer is correct: legal practice is exemplary. Because the rhetoric of legal practice is to deny its rhetoricity, however, legal practice cannot be taken at its word, but only in its activity. Smith argues that legal practice covers over the original argument of belonging, but Gadamer shows that legal practice resists the leveling descriptions offered by too many of its participants and instead represents a belonging-together and community-of-interest that is mediated textually rather than corporeally. The task of critical legal theory is to facilitate *Destruktion*, a creative overcoming that is always potentially present but all too often is concealed in the overt moves of practice. Legal theorists oriented by this understanding of law can avoid the twin dangers of deductive formalism and postmodern *ennui*. Rather than attempting to set a methodological agenda that would straight-jacket practice with top-down conceptions of how practice should unfold, or standing aloof by ironically refusing to engage in the dynamism of practice, critical legal theory should work from a Nietzschean model of critique and on the basis of a Gadamerian dialogic model of interpretation. In this paper I have charted the ontological space in which this critical activity can flourish, with a few examples offered as guideposts. The project of critical legal theory is to unleash the dynamism of practice through *Destruktion*, to render original argument audible once again, even if only as a whisper amidst the cacophony of power and domination that mark the bureaucratic imperatives of modern law.

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