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CONTENTS

SYMPOSIUM ON
PHILOSOPHICAL HERMENEUTICS AND
CRITICAL LEGAL THEORY

Symposium Editor
Francis J. Mootz III

I. HISTORICAL PERSPECTIVES ON CONTEMPORARY HERMENEUTICS

THE USES OF ARISTOTLE IN GADAMER'S
RECOVERY OF CONSULTATIVE REASONING:
SUNESIS, SUNGNÔME, EPIEIKEIA,
AND SUMBOULEUESTHAI

P. Christopher Smith

Using Hans-Georg Gadamer's exposition of Aristotle's adjuncts to phronêsis, or the knowing that guides deliberation, namely understanding, forbearance, and clemency, this Article attempts to retrieve a communal reasoning still evident in Homer but increasingly covered over beginning with Plato and continuing through Hobbes and Locke, in the English-language tradition, and, more recently, Rawls and Toulmin. This Article shows that, in Gadamer's reading of him, Aristotle emerges as a crucial interruption of this tendency of Western thought to abstract from the communal origins of reasoning and to start instead from what an isolated individual sees for himself or herself and only then communicates to someone else.

AMATORY JURISPRUDENCE AND THE
QUERELLE DES LOIS

Peter Goodrich

Early common law, both Anglo-Saxon and Anglo-Norman, offered plaintiffs a choice between love and law. Lovedays were more frequent than lawdays, and love explicitly took precedence over formal law. The judgment of love took the form of agreement through amity rather than enmity, affect rather than agon or trial. Using the institution of lovedays as a starting point, Goodrich's Article goes on to trace a longer-term continental history of courts and judgments of love that spans over five centuries and plays out in poetry, theater, and literature as much as in any secular legal institution. Offering a synopsis of the tradition of laws of love, this Article ends by spelling out the distinctive features of such a system of lovers' laws or amatory jurisprudence.
As INTERPRETATION

This Article situates the field of law within the interpretive disciplines and analyzes a number of key legal issues as problems of interpretation. The discussion begins with some historically important interpretive paradigms and methodological metaphors in the natural sciences, the humanities, and the social sciences. Then, within the field of law, a common law narrative, a constitutional narrative, and a community-society paradigm are described and explicated as basic interpretive frameworks of legal decision making.

II. HERMENEUTICS AND CRITIQUE: DIALOGUE OR DISJUNCTION?

BORDERS OR HORIZONS?
GADAMER AND HABERMAS REVISITED

In this Article, Dallmayr examines the status of borders and demarcations. Are borders markers of separation and exclusion, or are they more like hyphens or horizons indicating a correlation without sameness, a distinctness opening up to alterity? This Article investigates this question by returning to the so-called “Gadamer-Habermas Debate.” While Part I recapitulates some of Hans-Georg Gadamer’s teachings, especially with reference to a “universal hermeneutics,” Part II reviews some of Jürgen Habermas’s critical rejoinders and initiatives aiming basically at a parcelling of forms of human knowledge. In the concluding part, an effort is made to highlight the significance of the debate for the ongoing process of globalization and the possibility of a “dialogue of civilizations.”

GADAMER, HEIDEGGER, AND THE SOCIAL DIMENSIONS OF LANGUAGE: REFLECTIONS ON THE CRITICAL POTENTIAL OF HERMENEUTICAL PHILOSOPHY

Beginning with an account of recent efforts, like Georgia Warnke’s, to demonstrate Hans-Georg Gadamer’s relevance to legal theory, this Article looks at Gadamer’s conception of language and tradition, claiming that, while he shares important features of Heidegger’s thought, Gadamer productively grounds his view of language and tradition in such a way that the everyday realm of public discourse, characterized by a healthy injunction to foster reasoned debate amongst divergent perspectives and interpretations, has a vital and integral role to play. While Gadamer critiques the Enlightenment’s hostility to tradition, paradoxically, his concept of linguistically mediated tradition has far more in common with Jürgen Habermas’s continuation of the Enlightenment project, a commitment to foster a public domain where all are vigilant against forces of domination and where claims to truth and rightness are subject to justification via a process of argumentation.

HOW TO BE CRITICAL

Many opponents of critical legal thought assert that it is easy to be critical but hard to be constructive. From this perspective, critical legal activity is simple, while traditional theory is difficult. Feldman argues otherwise. Hans-Georg Gadamer’s emphasis on the role and power of tradition in the hermeneutic process suggests how tradition forcefully constrains us. Our prejudices, derived from our communal traditions, limit what we can understand and perceive. Thus, to perform critical activity proves often to be a formidable challenge. It requires the writer somehow to disrupt the reader’s basic and deep-seated assumptions, assumptions that typically emerge from a dominant culture and that have been inculcated and reinforced for much (or all) of the reader’s life. Despite the difficulty of doing critical work, Gadamer’s persuasive explanation of the hermeneutic process also elucidates how critical activity is possible in the first place. Even so, Gadamer does not attempt to develop any method to guide critical activity. Feldman thus argues that Gadamer’s philosophical herme-
neutics can be combined with Jürgen Habermas's communicative theory or Jacques Derrida's deconstruction to help guide us toward critical activity.

Foucault and Gadamer: Like Apples and Oranges Passing in the Night

This Article explores some points of connection between Michel Foucault's "governmentality" approach and Hans-Georg Gadamer's hermeneutics and concludes that Gadamer's project does not easily mesh with the Foucaultian critique. Instead, this Article argues that Foucault's reading of Heidegger diverges significantly from Gadamer's, and that an attempt to link the philosophers through their common heritage is unavailing. In conclusion, this Article suggests that the divide between hermeneutics and critical theory (in a Foucaultian sense) cannot be bridged easily, despite the few vague family resemblances evident in the literature.

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

In his recent book, Cultural Software, Jack Balkin offers a new approach to ideology and critical theory in an effort to overcome the deficiencies he finds in Hans-Georg Gadamer's hermeneutical account. This Article demonstrates that the productive aspects of Balkin's theory are central to Gadamer's philosophy, and the unproductive elements in Balkin's theory are best explained by his deviation from Gadamer's philosophical hermeneutics. Mootz rejects Balkin's transcendental argument in favor of Gadamer's insistence that critique is a feature of hermeneutical experience and that critical theory is the practice of maximizing the critical distance that occurs only within hermeneutical engagements. Relying on a model derived from rhetorical exchange and psychotherapeutic practice, Mootz concludes that critique is always a social experience and that critical theory is the practice of reflecting on how best to facilitate this social experience.

III. Hermeneutics and Critique in Legal Practice

Traces of Violence: Gadamer, Habermas, and the Hate Speech Problem

This Article offers fresh insight into the controversial issue of hate speech regulation by borrowing major themes from the works of Hans-Georg Gadamer and Jürgen Habermas. Wright emphasizes Gadamer's connection between language and historical traditions to demonstrate how hate speech differs from any real attempt at genuine speaking. Wright then focuses on Habermas's notion of a communicative ideal that helps differentiate between speakers who intend to invite open discourse and typical epithet speakers who likely have no such purpose. Wright concludes that the contributions of Gadamer and Habermas enable us to determine what types of speech promote the values underlying freedom of speech and, thus, allow us to restrict speech that fails to do so.

Work-in-Progress: Gadamer, Tradition, and the Common Law

In this Article, Hutchinson provides an account of the common law tradition of judging that draws upon Hans-Georg Gadamer's writings that advance the intellectual project of critical legal theory. Hutchinson contends that Gadamer's hermeneutics can be utilized to offer a more radical and transformative reading of the common law tradition and explores what it means to treat law seriously as a living rhetorical tradition. This Article explores Hutchinson's theory by concentrating on the recent U.S.
Supreme Court physician-assisted suicide decision in Washington v. Glucksberg. This Article relies upon the notion of "work-in-progress" as a productive optic through which to view and appreciate the dynamic and unfinishable quality of law, interpretation, and criticism.

**INTERPRETATION, CRITIQUE, AND ADJUDICATION: THE SEARCH FOR CONSTITUTIONAL HERMENEUTICS**

John T. Valauri 1083

This Article seeks a model for a constitutional hermeneutics in an examination of two key debates in philosophical hermeneutics—the Gadamer-Betti debate over the role of author's meaning in interpretation and the Gadamer-Habermas debate over transcendence and critique. It compares these to the framers' intent and nonoriginalism disputes in constitutional theory. But the result is not another method of constitutional interpretation. Rather it is a hermeneutically informed way of viewing the practice of constitutional adjudication itself.

**CRITICAL HERMENEUTICS: THE INTERTWINING OF EXPLANATION AND UNDERSTANDING AS EXEMPLIFIED IN LEGAL ANALYSIS**

George H. Taylor 1101

Understanding and explanation are often viewed as oppositional: understanding is considered a search for the meaning a text provides, while explanation employs a critical, analytic method that maintains a distance from the text it interrogates. This Article demonstrates that in legal interpretation, understanding and explanation are not opposed but inextricably interconnected. Drawing first on the work of Robert Bork and Justice Antonin Scalia, this Article shows how elements of critique are present even within forms of legal interpretation that seek to maintain fidelity to the "understanding" of authorial meaning. Second, it illuminates the converse, that theories drawn to methods of explanation—such as Judge Richard Posner's invocation of the social sciences—must contextualize this evidence within larger, debatable theories of interpretive understanding. Third, critical hermeneutics provides a means to recast the interrelation of understanding and explanation in its portrayal of the circular intertwining between explanatory part and interpretive whole. Critical hermeneutics offers a method that accommodates the critiques Judge Posner has launched against "top down" (deductive) and "bottom up" (inductive) methods. Finally, this Article recovers a sense of "law" that encompasses both understanding and explanation. As in theories of evolutionary biology, law need not be based primordially on determinative explanation but can integrate explanation within a larger appeal to narrative understanding.

**COMMENTARY**

**ARE THERE NOTHING BUT TEXTS IN THIS CLASS? INTERPRETING THE INTERPRETIVE TURNS IN LEGAL THOUGHT**

Robin L. West 1125

This Article examines the impact of the twenty-year-old "turn" toward interpretation in legal and constitutional scholarship. In part, because of the impact of Hans-Georg Gadamer's work, scores of critical legal scholars, including some of those writing for this Symposium, now think of adjudication and legal discourse generally as primarily interpretive, rather than economic or political or distinctively legal enterprises. This turn toward interpretation has opened the way for new insights and ways of thinking, but it has also come with costs. It has, for example, diverted attention from the ways in which constitutional law might be appropriately criticized by reference to values drawn from somewhere other than competing texts. This Article assesses those costs, and in light of them, urges a partial return to noninterpretive or preinterpretive ways of thinking about law and its consequences.
THE KENNETH M. PIPER LECTURES

THE NEW DEAL AT WORK

Peter Cappelli 1169

The traditional employment system with secure, lifetime jobs offering predictable advancement and stable pay has given way to a new, more open-ended arrangement that is continually being negotiated between employer and employee. Evidence is presented both about the factors driving this new relationship and the subsequent changes in labor market outcomes. Tighter labor markets have, perhaps temporarily, shifted power from employers to employees, leading to new problems for employers and fundamental challenges to traditional models for management. These developments also raise new challenges for society and in particular to the long-standing interest in protecting employees from some of the destructive aspects of market forces.

MELTING INTO AIR? DOWNSIZING, JOB STABILITY, AND THE FUTURE OF WORK

Sanford M. Jacoby 1195

Contrary to popular belief, career-type employment practices remain the norm in the U.S. labor market, and employers continue to shoulder risks for employees. Evidence to support this claim is drawn from a variety of sources: data on tenure and mobility; analysis of new job creation and job quality; recent employer responses to labor-market tightness; and data on wage premiums, fringe benefits, and training. Yet employees are bearing more risk today, including risk of job loss and of compensation fluctuations. This is an important change from the past. Nevertheless, there are limits—economic, demographic, and political—to the risk-shifting process.

THE LOUIS JACKSON NATIONAL STUDENT WRITING COMPETITION

NONMAJORITY UNIONS, EMPLOYEE PARTICIPATION PROGRAMS, AND WORKER ORGANIZING: IRRECONCILABLE DIFFERENCES?

Carol Brooke 1237

The debate over section 8(a)(2) of the National Labor Relations Act and the appropriate role of employer-sponsored employee participation plans (“EPPs”) in the workplace coincides with growing attention to the usefulness of nonmajority unions (“NMUs”) in providing a voice for workers. This Note examines the effectiveness of an NMU in a manufacturing plant in rural North Carolina, and the interaction of that worker-run organization with EPPs established by management. The experience of these workers suggests that section 8(a)(2) should be amended to require employers with EPPs to offer equal support and assistance to NMUs.

FARMWORKERS, NONIMMIGRATION POLICY, INVOLUNTARY SERVITUDE, AND A LOOK AT THE SHEEPHERDING INDUSTRY

Kimi Jackson 1271

Congress should abolish the nonimmigrant visa for farmworkers because of its inherently abusive and unjust nature. The visa allows abuse of farmworkers to flourish because guest workers, who live in the United States only for a short period of time, have no hope of becoming permanent residents. The workers constantly fear deportation and are unlikely to assert their rights in court. Because guest workers, by nature of their visas, may only work for one employer and the consequence for quitting is deportation, the workers may be forced to endure abusive treatment. Legal coercion prevents agricultural guest workers from leaving their employers, and so they labor in a state of involuntary servitude. Guest workers do not receive the same statutory protections as other farmworkers, and courts and the Department of Labor have been reluctant to enforce the few rights guest workers do have. The guest worker visa for farmworkers should be discontinued because the availability of cheap foreign
workers who cannot choose their employer, negotiate their wages or hours, or even quit, causes overall lower wages and inferior conditions for all farmworkers, and the loss of jobs for U.S. workers.

BAD MEDICINE: THE ANTICOMPETITIVE SIDE-EFFECTS OF PHYSICIAN UNIONIZATION

Thomas Hamilton Segars 1303

In response to the predominance of managed health care, ever-increasing numbers of physicians are turning to unionization as a means of negotiating contracts with larger insurers. While physician unionization has a history of both political and legal controversy, recent federal legislation aims to make the practice legitimate. This Note discusses the trend toward physician unionization, the resulting anticompetitive effects, as well as possible alternatives for physicians seeking to bargain with the powerful health care insurance industry.

STUDENT NOTES

POLICING THE "WILD WEST" WORLD OF INTERNET PHARMACIES  
Kerry Toth Rost 1333

An Internet pharmacy sells medications through its Web site. Legitimate, law-abiding Internet pharmacies benefit modern healthcare in numerous ways; however, some Internet pharmacies conduct illegal and unsafe prescribing and dispensing practices that can endanger the health of the patients the pharmacy serves. Controversy exists over which regulatory body should govern the sale of prescription drugs over the Internet and how Internet pharmacies should be regulated. This Note contends that cooperation of state and federal regulatory agencies and careful updating and utilization of current regulatory avenues can adequately promote the safety of Internet pharmacies. This Note further contends that the dangers posed by foreign Internet pharmacies will grow until international regulatory cooperation is established.

SO WHAT? THE INDIVIDUAL RIGHT TO THE OWNERSHIP OF FIREARMS UNDER THE NINTH AMENDMENT

Robert E. Bodine 1363

This Note argues that the Second Amendment to the United States Constitution fails to resolve the debate over the existence of a fundamental, individual right to keep and bear arms because the Ninth Amendment is in fact the proper source for that right. This Note performs a historical analysis of the creation of the Constitution, reviews the little Supreme Court precedent regarding the right, and then demonstrates how the Supreme Court has applied the Ninth Amendment in cases dealing with other issues. Bodine concludes that applying the Ninth Amendment in that same manner necessarily leads to an inference of a fundamental, individual right to keep and bear arms.