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Law, Hermeneutics and Rhetoric

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Series Preface

Collected Essays in Law makes available some of the most important work of scholars who have made a major contribution to the study of law. Each volume brings together a selection of writings by a leading authority on a particular subject. The series gives authors an opportunity to present and comment on what they regard as their most important work in a specific area. Within their chosen subject area, the collections aim to give a comprehensive coverage of the authors' research. Care is taken to include essays and articles which are less readily accessible and to give the reader a picture of the development of the authors' work and an indication of research in progress.

Introduction

Legal theory is a fragmented enterprise. The natural law tradition sought certainty in a theological or normative realm that existed independently of legal practice. Under this view, the goal of legal theory is to identify the proper boundaries of legal practice that are established by moral reality. Later, legal positivism sought to reverse the priority by taking legal practice seriously in its own right, independent of moral truths that may or may not exist. As a result of this shift in orientation, legal theory undertook the analytical project of understanding the concept of law implied by the practices at hand. Legal theory progressed from establishing normative limits to clarifying the concepts at work in practice. There are many variants on these classic approaches to law, fueling debates that seem to circle endlessly around, and talk past, each other.

The essays collected in this volume were published over two decades and each was motivated by a different topic or a different occasion. Nevertheless, these essays are closely related by a guiding theme: legal practice is a hermeneutical and rhetorical event that can best be understood and theorized in those terms. The title of this volume, *Law, Hermeneutics and Rhetoric*, perhaps could have been improved by changing it to *Law **as** Hermeneutics and Rhetoric*. But it is important to keep in mind the independent status of each domain. We cannot reduce law to hermeneutics and rhetoric, nor can we reduce the latter to law. My effort has been to pursue interdisciplinary thinking without surrendering to intellectual colonization (Mootz 1995). Hermeneutical philosophy and rhetorical studies are traditions of thought with their own history and integrity, and should not be reduced to tools that might aid legal theorists. It is only by respecting the disciplinary distinctiveness of these modes of thinking that genuine interdisciplinary insight is possible.

What does it mean to say that legal practice is hermeneutical and rhetorical in nature? At the most general level, this is a claim that legal practice is a social endeavor rather than a cognitive task undertaken by an individual. It is possible for a single person to resolve a math problem, but the nature of legal practice is such that a single person never poses and resolves the issues that arise. It might seem painfully obvious to state that law is a practice that is founded on interpreting situations (texts, contexts and facts in the world) and then seeking to persuade others of the correctness of a course of action in a situation that does not lend itself to determinate analysis and definitive answers. And yet, it is often the "obvious" that is forgotten when scholars turn their gaze to a practice. Legal theorists are far too quick to abstract from the

legal practices in question to find more solid theoretical ground from which to assess the practices. Lawyers may "know how" to engage in legal practice, but theorists aspire to "know that" legal practice is a certain form of activity that has features which can be explained.

Hermeneutical and rhetorical philosophy provide a guide to a rigorous and critical exploration of legal practice without the distorting abstraction that Steven Mailloux has called, "the theoretical urge" (Mailloux 1985, 620–28). Interpreting and persuading are at the heart of legal practice, and so hermeneutical and rhetorical philosophy are the most pertinent theoretical frames to employ. This is not a matter of profound modern insight that wipes away centuries of dogmatic confusion, as so often occurs in realms that are defined by the natural sciences. Rather, this insight into legal practice is very old, as old as the Western tradition itself. The ancient Greek legacy of the Pre-Socratics, Isocrates and Aristotle – after being absorbed and amended by Quintilian and Cicero in republican Rome – provides a canonical understanding of law and civic life in terms of the rhetorical practices by which they are constituted. This legacy was not unchallenged. The Platonic quest for truth, as it was established by the forms, was at war with the rhetorical inquiries of the Sophists. The Roman thinkers rejected Greek thought on account of its Platonic character and sought to overcome the indulgences of philosophy in favor of the civic virtues of rhetorical reasoning. In the end, however, the philosophical frame superseded the rhetorical frame as modernity cast aside the imprecision of dialogue in favor of the certainty of calculation.

Similarly, the tradition of hermeneutical philosophy extends back to the Greek myths that celebrated the role of Hermes in transmitting (and translating) messages from the Gods to humans. The precarious nature of interpretation is an important element of the Greek tragedy, in which the protagonist fails to appreciate the significance of the situation, and fails to understand completely the messages that are conveyed. Hermeneutics is most closely associated with religious interpretation, a legacy that begins with the messages communicated through the oracles and extends to the contemporary interpretation of sacred texts. During the genesis of the modern era, hermeneutics was at the center of Talmudic and biblical exegesis, which in turn were at the center of social, economic, and political life in the West. With the desuetude of religious belief in the modern age, and the concomitant glorification of perspicacious meaning that requires no mystical "interpretation," hermeneutics has joined rhetoric on the sidelines of intellectual life.

A volume that celebrates the deep connections between law, hermeneutics, and rhetoric is not a new advance in thinking, then, but should be regarded as a return to traditional modes of thought that have been important and productive before recently being marginalized by contemporary intellectual discourse.

This does not mean that the essays are antiquarian or simply descriptive of past achievements in the liberal arts. Although hermeneutical and rhetorical philosophy reach back to the beginning of the Western tradition, they have undergone important changes over the millennia. To "return" to hermeneutics and rhetoric as touchstones for law is to embrace dynamic traditions that have undergone significant change during the past century. Moreover, we no longer inhabit the world of the polis, and so the challenges of contemporary legal systems pose different questions to these traditions. The emerging global order – in which nation states grounded in ethnic communities and geographic spaces cease to play the central role – poses incredible challenges for rhetorical and hermeneutical theorists who seek to foster persuasion and understanding as an antidote to the trend toward bureaucratization in accordance with expert administration, violent suppression, or both. What was once old must become new again.

This volume is organized thematically rather than chronologically. This might suggest that I have pursued a grand intellectual plan that was executed out-of-sequence, but nevertheless guided by a firm outline of the scope of inquiry. Nothing could be further from the truth. During the past twenty-two years I have worked on various problems and responded to various provocations, and it is only in the hindsight that this volume affords to me that I can interpret the arc of my work more generally.[1] Perhaps the most significant development was my movement from an exclusively hermeneutical account of law to embrace a rhetorical approach as well. This movement was motivated by twin recognitions. First, hermeneutical philosophy too easily falls prey to idealist tendencies that tend to ignore the agency of actors who are not simply offering materials for interpretation, but are seeking to persuade others. There is a certain wariness of the hermeneutical experience that follows from acknowledging the rhetorical aims of one's interlocutors. Second, I came to regard the hermeneutical experience as a rhetorical accomplishment, and to regard this underdeveloped insight by Gadamer as the answer to the charge by his critics that his philosophy lacks critical bite. These essays, then, reflect a

[1] This is all the more true because the same is true of each individual article at the time that it was written. As Merleau-Ponty reminds us, it is pure conceit to believe that we outline an article in intellectual terms and then simply record the path of thinking. Scholarship is an ongoing engagement in which one's designs are given over to the project:

> This book, once begun, is not a certain set of ideas; it constitutes for me an open situation, for which I could not possibly provide any complex formula, and in which I struggle blindly on until, miraculously, thoughts and words become organized by themselves. (Merleau-Ponty 1962, 369).

coherent theme that emerged without the guiding discipline of a method; this, of course, is a fitting tribute to the subject matter at hand.

I. Legal Hermeneutics and Theory

Part I provides an overview of the relationship between contemporary hermeneutical philosophy and legal theory. Chapter 1, "The New Legal Hermeneutics," is a short review essay that evidences my optimism in 1994 that hermeneutical philosophy would gain traction and help to transform legal theory. Today, in the United States, we have the Roberts Court and the ascendance of "new originalism" theory, and so this optimism appears to have been badly misplaced. At the time, though, the warrant for optimism was clear. The book under review provided a wonderful example of multidisciplinary inquiry by law professors, theologians, political theorists, and literary scholars. The theme of my review was a simple one: Francis Lieber's translation of the romantic hermeneutics of the nineteenth century provides a model for how the philosophical hermeneutics of the twentieth century can be translated to contemporary legal concerns.

My premise was not far-fetched. Lieber's treatises were vastly influential and continue to define (even if without being acknowledged) much of contemporary jurisprudential dialogue. There appears to be no reason why contemporary hermeneutical philosophy should not have the same impact on law and legal theory as Lieber's hermeneutics, and so optimism that legal theory might reorient accordingly was warranted. I was reviewing a book that divided the chapters into "history," "theory," and "practice," but the implicit theme was that philosophical hermeneutics could uncover the deep connections between these three valences of legal practice. The answer that I argue emerges from the contested essays in the volume is that we must abandon the effort to find a theoretical "quick fix" to ease the anxiety occasioned by a thoroughly historical practice such as law. Philosophical hermeneutics shows how we can develop a reasonable and constrained interpretation of the law and facilitate its implementation without engaging in theoretical overreaching.

Chapter 2 is a much more detailed account of the hermeneutics of legal practice. Drawn from my Master's thesis at Duke University Graduate School, the chapter is a comprehensive effort to bridge the chasm between contemporary European philosophy and law. It is plain that my initial scholarly effort represents the foundation for my subsequent work. The target of my analysis, given the 1980s context, was the false dichotomy between the elusive goal of certainty (objectivity/meaning as a fact) and radical indeterminacy (subjectivity/meaning as a literary creation). In response to this unhelpful dichotomy, I offered the

phenomenological analysis of play, as developed in Gadamer's philosophical hermeneutics, as an antidote. The unresolved question, I admitted, was how there can be critique if there is no *telos* to which legal practice gestured, nor a definitive method according to which legal practice should unfold. My thesis is that we might read Habermas's critical theory methodologically by drawing on the work of Paul Ricoeur, without surrendering the lessons of Gadamer's hermeneutical ontology for law. In this early work I argued strenuously that Gadamer was a critical theorist, even if he underemphasized this element of his philosophy, and it is this gesture that later motivates my turn to rhetorical theory in order to make good on my claim. I wrote: "Thus, Gadamer is correct to call reading a 'risk' [and the] corresponding transformations of text and reader are central to Gadamer's explication of the concept of play. As such, the foundation for critical theory lies at the core of its opponents' thesis."

I looked to the constitutional litigation regarding the death penalty that culminated in *Gregg v. Georgia* as an example of my thesis. There is perhaps no more open-ended and freely interpreted clause of the Constitution than the prohibition of cruel and unusual punishments in the Eighth Amendment, and so critics might charge that I loaded the deck with this choice of example. It is important to keep in mind that my goal was not to demonstrate that constitutional adjudication lacked a formal or deductive quality, but instead to show that there was integrity in what appeared to be a free-ranging and unconstrained exercise of judicial power. I concluded that:

> ... [the] eighty-eight page *Gregg* decision is a tribute to the type of discussion that hermeneutical differences should encourage [because] the Justices have not shunned the unavoidable playful encounter with the eighth amendment but instead have openly embraced play by trying to articulate their appropriation of words on a page into the context of a practical decision.

In this open-ended and contested dialogue there is a thread of hermeneutical reason that provides the basis for understanding, and criticizing, the practice at issue.

In Chapter 3 I provide a much more detailed account of hermeneutical reason as a form of practical reasoning that withstands the postmodern critique of rationalism. The relentless attack by hermeneutical philosophers on the "theoretical urge" and its legacy in modern thinking might suggest that hermeneutical insights should lead one to reject the significance of theory and instead seek to insulate practice from theoretical insights. But, of course, philosophical hermeneutics is a theoretical disposition, and so it is folly to attribute to Gadamer a simplistic rejection of theory. Hermeneutical philosophers contend that theory is not superordinate to practice, but they

recognize that theory is a way of knowing that is distinct from engaging in practice.

I trace the creative development by contemporary philosophers of *episteme*, *techne*, and *phronesis*, three intellectual virtues first identified by Aristotle. My theme is that this reworking of Aristotle's subtle distinctions of knowing provides the resources for facing the postmodern challenge without having to abandon reflection and critique. Theory is not a capability that is separate from practice, but instead is embedded within practice: "Once theory is reconceived as a disposition within practice – as an engagement in practice with a distinct comportment – its unavoidable significance becomes clear."

This revision of our understanding of theory emerges from a careful assessment of theory as a comportment of "working out" a practice while remaining true to the practice and yet not just engaging in the practice. Martin Heidegger regarded theory as a "tarrying" motivated by caring, drawing from Aristotle's distinction between *episteme* as the knowledge of necessary truths and *techne/phronesis* as different forms of knowledge regarding matters that can be otherwise. His student, Hans-Georg Gadamer, praised theory by differentiating the action-oriented knowledge of *phronesis* from the production-oriented knowledge of *techne*, arguing that the former is manifested in hermeneutical practical reasoning. Finally, Joseph Dunne questions the sharp distinction between *techne* and *phronesis* that marked Gadamer's advance, returning to the subtleties of Aristotle's account to show how practical reasoning can exhibit both production and judgment.

This detailed account provides a conception of theory that is appropriate for law. The challenge is to embrace this chastened approach to theory, to have the courage to think beyond the technical mastery of the natural world that seemingly sets the standard for theoretical orientation. I draw upon an example that might at first seem strange: psychotherapy. I argue that psychotherapeutic dialogue, as understood after the cleansing fire of postmodern insight, is a theoretically-informed practice that does not fall victim to the modern conception of theory. Important postmodern approaches to psychotherapy regard theory as a comportment of "not-knowing," an effort to distance oneself from ordinary conversational patterns not for the purpose of directing the conversation from outside, but rather to permit a more genuine conversation. The philosophy of not-knowing is a provocative challenge to the practical discourse of therapy that is designed to facilitate the discourse rather than to direct it.

The three chapters in Part I span fifteen years, but there is a guiding thread. Philosophical hermeneutics promises to provide a basic orientation to legal practice that can promote greater understanding and critical insight. Hermeneutics is not an atheoretical posture, but instead invokes a different conception of theory that is rooted in the etymological root of the word. In

ancient Greece, *theoria* referenced the activity at a festival, when the ordinary laws were suspended and plays enacted the essential elements of the cultural binds. Theory was not a removal from the practices of daily life, but instead was a comportment by which the practices could be more fully realized in an alternative setting. Hermeneutical philosophy attempts to capture this original sense of theory by attending to insights that we might gain by stepping back from, but not leaving, everyday practices. The "theoretical urge" is to be resisted at all costs, but the answer is not to reject theory. As I relate in Chapter 3:

> The role and possibilities of theory under postmodern conditions are best explored with a neo-Aristotelean model that links the insights of Heidegger, Gadamer, and Dunne. The principal lesson of this model is cautionary. Critical legal theorists must not fall victim to the modernist project of framing then objectifying the focus of their study. The very point of critical legal theory, as one expression of the broader project of critical theory, is to challenge the modernist project, which now indelibly shapes all human practices. Proposing a theoretical intervention to "correct" legal practice from the "outside" would be to reinforce modernity's sharp distinction between theory and practice, and therefore would undermine the recovery of an originary comportment beneath the sharply distinguished dispersions of "theory-as-research-agenda" and "practice-as-implementation-of-technologies."

This orientation has provided my guiding reference, but to realize this theoretical goal I found it necessary to engage with the tradition of rhetoric.

II. Law, Hermeneutics and Rhetoric

In Chapter 4 I raise the fundamental question that faces contemporary legal theorists: How can justice serve as a guiding concept in a global/multicultural world? The challenge posed by radical deconstructionist thinking is that it makes such a goal seem improbable, if not wholly fanciful. It is problematic enough to try to elucidate the principles of justice within a particular juridical system, but the idea of justice seems wholly empty when considering the plethora of traditions and practices that comprise the modern world. I respond to this challenge by pairing the hermeneutical philosophy of Gadamer with the rhetorical philosophy of Perelman to provide an account of the hermeneutical-rhetorical situation of legal practice that is capacious enough to account for the quest for justice. My thesis is that we can gain and develop rhetorical

knowledge, and that this accomplishment is what sustains legal practice and provides a basis for seeking justice in the face of postmodern *ennui*.

The idea of a rhetorical hermeneutics is not wholly new, but I break new ground by developing an account of this orientation in detail in the context of legal practice. From Gadamer I take the metaphor of hermeneutic understanding as a conversation, but develop an account of a conversation as an active rhetorical exchange. The element of critical distance is introduced by drawing out Gadamer's oblique suggestion that a textual interpreter is like a rhetor rather than a passive audience that absorbs the text. Justice is then presented as an open and challenging conversational exchange rather than a fixed state of affairs, and I develop Gadamer's emphasis that legal practice is exemplary. From Perelman I take the idea of justice as persuasion by securing the reasonable adherence of the audience in situations of uncertainty without using force. Perelman argues that justice is a "confused notion" that must constantly be worked out in a dialogue that begins with accepted premises and seeks to invent new bases of understanding. Perelman also regards legal practice as exemplary, and so it is natural to connect these two philosophers to provide an account of legal reasoning.

The synergy of rhetorical hermeneutics comes from bringing Gadamer's focus on the ontological ground of understanding into contact with Perelman's focus on the activity of persuasion. As I wrote, "[a]n account of rhetorical knowledge emerges from ... Gadamer's hermeneutic ontology and Perelman's rhetorical methodology. Rhetorical knowledge is co-equal with logical and empirical knowledge, but it is a different way of knowing." Rhetorical knowledge is a positive accomplishment rather than a grudging concession to the limits of knowledge, and Gadamer and Perelman are productive interlocutors precisely because they acknowledge that there is something at work that is more than a merely a skill or knack that must be subordinated to rational inquiry. I draw the conclusion that justice is the effort to cultivate rhetorical knowledge through inventive reasoning and persuasion that shapes the contours of legal practice to meet the changing needs of society.

The pragmatic deliberation about the requirements of justice in a given case is no more relativistic than the kind of reflection and discussion engaged in by an individual confronted with a moral dilemma about how to act in a given situation. The absence of a definitive answer to moral dilemmas does not mean that this reflection and deliberation is irrational and emotive, and no person in the midst of such a situation regards her reasoning in this way. The condition of undecidability does not mean that decisions are made without any reasonable basis. The "dialogical unendingness" in which rhetorical knowledge is encountered does not signify a "complete relativism" any more than a person's life is an arbitrary collection of life experiences. In both cases we are

not only already committed in certain ways, we also strive – in a manner that can be reasonable rather than just random – for a coherence and closure that we know will never be achieved absolutely. Just as a particular conversation has a history and develops a topic, so too an individual's life and a social practice like law develop criteria of reasonableness and the rhetorical means to continue the ongoing project. A just legal practice, like a life well lived, does not circle around a determinate ground of truth but instead spirals forward from a shared tradition in the form of reasonable judgments about how to proceed.

To summarize: justice is an open rhetorical/hermeneutical engagement rather than a set of prescriptions.

Although this might suggest that there is no role for critical legal theorists, I assert that theory must play a central role but that theory is no less rhetorically-structured than the practice under consideration. Theory cannot step outside the practice to direct it from the heights of certain knowledge; rather, critical legal theory is an inquiry seeking rhetorical knowledge about the practice of law, which is a practical effort to generate rhetorical knowledge about contested legal issues. I delineate the different roles of doctrinal, critical, and philosophical theory but insist that they all are rhetorical at their core. It is not that critical legal theory is a different kind of endeavor that produces a different form of knowledge; rather, critical legal theory is a different orientation to legal practice that engages different audiences as conversation partners but which cannot claim to be any more definitive than the rhetorical knowledge gained in legal practice. My conclusion was that by working from the guiding idea of rhetorical knowledge, "theorists will be better equipped to explore the rich potential for achieving knowledge in the practice and critical appraisal of law."

Chapter 5 develops the idea of rhetorical knowledge in what may be a surprising manner: by aligning it with some of the elements of the classical natural law tradition. Although the natural law tradition would appear to be inevitably at odds with rhetorical and hermeneutical inquiry, my goal is to demonstrate that the opposite is true. The secular language of positivism eclipsed natural law after faith in the existence of univocal norms that rise above social dissensus eroded, but legal theorists and practitioners have been unable to convert substantive issues of social organization into questions that can be resolved by technical rationality. In the face of this crisis, which Steven Smith aptly has termed "law's quandary," self-styled, critical, postmodern and deconstructive legal theorists have concluded that legal reasoning is a mirage. In response, I argue that Gadamer's hermeneutical philosophy reinvigorates natural law thinking by recalling the classical natural law tradition that has most recently been developed by Lon Fuller and Lloyd Weinreb, and that this dimension of legal practice is exemplified in Justice Souter's concurring

opinion in the assisted suicide cases. At the time I wrote this article it seemed to be a curious intellectual linkage that I could highlight as an interesting aside to my broader research agenda; however, in retrospect, this article concerns a central feature of my account of rhetorical knowledge.

As part of explaining my concept of rhetorical knowledge, I argue that Justice Souter's insistence that the legal tradition is a "living thing" can best be explained as a natural law claim that exemplifies Gadamer's recuperation of Aristotelian (pre-Thomistic) natural law at a key point in the argument of *Truth and Method* as well as Perelman's celebration of the classical natural law tradition. Rhetorical knowledge is possible only because there is a "historically contingent, yet deeply constitutive, ground of law and morality." The reality of moral action and deliberation is realized in the rhetorical-hermeneutical engagement of finite and historical beings. The fact of normative reality undercuts the theoretical desire to locate an abiding normative realm outside of what Perelman termed "the realm of rhetoric."

Lon Fuller's intellectual legacy often is reduced to the caricature of serving as the last protest of a watered-down natural law tradition at the time that H.L.A. Hart was setting the course for modern legal positivism. I find in Fuller's eunomics a rich and creative orientation that can be developed and best realized through contemporary hermeneutical and rhetorical philosophy. Fuller's key contribution was his effort to investigate the natural laws of social dynamics without relapsing to the comforting but misguided quest to develop a comprehensive natural law system of substantive moral principles. His procedural approach to natural law was not a grudging concession to the inadequacies of substantive natural law, but rather a recognition that normativity is lodged in the practices at work.

Similarly, Lloyd Weinreb's recuperation of classical Greek conceptions of *nomos* and *kosmos* connects well with the neo-Aristotelian approaches pursued by Gadamer and Perelman. Weinreb rejects the deontological conception of natural law as the capacity of human reason to deliver moral prescriptions in favor of the classical ontological conception of natural law that affirms the objective reality of morality in social life. Although real, normativity is not univocal. In legal practice there is a dialectic between freedom and equality that cannot be solved, but rather is developed in continuing dialogue. Weinreb's discussion of affirmative action in these terms provides an example of rhetorical knowledge at work.

Natural law is not found in the skies, then, but in our human nature as hermeneutical and rhetorical beings. Natural law theory does not provide prescriptions for resolving social conflict, but it is not merely a therapeutic affirmation of normativity. The reality of rhetorical knowledge in legal practice implies that theorists can develop rhetorical principles to serve as aids in

exercising good judgment when choosing between competing interpretations, and a "methodology of rhetorical knowledge" is possible to some degree, extending Fuller's insight that natural law philosophy can provide insights into procedures for substantive decisions.

III. Critical Hermeneutics and Legal Rhetoric

Avoiding the idealistic tendencies of a purely hermeneutical approach has subtended my development of the concept of rhetorical knowledge to explain legal practice and to outline the agenda for legal theory. In more recent work I have expressly worked through the critical dimension of rhetorical knowledge by confronting Nietzsche's legacy for hermeneutical and rhetorical philosophy. Chapter 6 presents a detailed account of rhetorical knowledge that embodies Nietzschean critique. In response to Allan Hutchinson, a critical legal theorist who draws from Nietzsche a radically postmodern account of law as a play of power, I argue that Nietzsche grounds his relentless social criticism in the perspectival character of human nature. Nietzsche configures the authority of critical activity by propounding a perspectivist ontology that he asserts is a true account of the human condition in all human perspectives, even as he rejects the efforts to describe an essential, non-perspectival human nature. The result is a rhetorical practice that does not imply relativism, and a quest for rhetorical knowledge that does not imply methodologism.

This reading of Nietzsche goes against the competing accounts offered by postmodernists and empiricists. My goal is not to uncover the "true Nietzsche," which would be a very un-Nietzschean task, but instead to read Nietzsche in a responsible manner that adds depth to my account of rhetorical knowledge. A lengthy quote is appropriate to set the context for the critical account I draw from Nietzsche:

> Nietzschean critique is a rhetorical activity that acknowledges its rhetoricity. Nietzsche challenges the cultural understandings of his day through genealogical criticism that simultaneously loosens the encrustations of habitual thinking and refashions a dramatically new understanding of cultural traditions. He employs a naturalistic critique because he appeals to the emerging interpretations that define social reality, even if they remain repressed and are denied. His famous announcement of the death of God is not a suggestion for change made by an all-knowing critic; rather it is a commentary on what already has occurred, a rhetorical assessment of shifts that are underway but remain unacknowledged. Nietzsche's critical activity is consistent with his perspectivist ontology, because rather than proposing an

> eternally valid description of the human condition he offers an interpretation of a shared reality that is subject to criticism and refinement. Nietzsche confronts the human condition with joy and openness rather than hiding behind the fable that no longer ring true (Christianity) or the new fables that similarly obscure the human condition (positivist natural science).

I argue that this reading of Nietzsche, for which there is no real precedent, correlates with Gadamer's philosophical hermeneutics. I draw from Gianni Vattimo's "weak thought" to describe my approach, even while acknowledging that Vattimo describes his approach as a Nietzschean critique of Gadamer. Nietzschean critique is a destabilizing, but necessary and unavoidable, element of rhetorical knowledge.

Such a reading against the grain (virtually no scholar has considered Gadamer and Nietzsche together, and certainly not in an effort to develop a critical legal hermeneutics) might appear too vague and meliorative to clarify the character of legal practice. I bring my account of critical hermeneutics to bear on legal practice by turning to three Supreme Court cases in distinct doctrinal areas that consider issues that fall within the broad category of "gay rights." I demonstrate that the Supreme Court dialogue in these three cases is not just a matter of doctrinal analysis, nor just an expression of policy judgments regarding the status of gays and lesbians in contemporary society. The case of *Lawrence v. Texas*, then pending before the Supreme Court, provides the practical setting for my conclusion that legal analysis is a critical intervention, but that it is a "working through" (*Verwindung*) rather than an "overcoming" (*Uberwindung*). This somewhat chastened account of critique provides a basis for understanding rhetorical knowledge in law.

Finally, the volume concludes with a later essay that seeks to collect and extend my Nietzschean reading of rhetorical knowledge. Framed as a response to P. Christopher Smith's argument that Nietzsche provides a better account of the *agon* of legal argumentation than Gadamer, I recuperate Heidegger's notion of *Destruktion* as a dialogic encounter rather than a poetic event. Gadamer's significance is that he shows how "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'." The answer lies in Gadamer's focus on conversation and the logic of question and answer, even if Gadamer does not develop this theme expressly. The destabilizing experience of a genuine conversation generates the critical insight that challenges the assumptions with which one entered into dialogue.

The Ongoing Dialogue

There is a discernible thematic development in the essays included in this volume. Legal practice involves hermeneutical discernment, but it also is the product of rhetorical actors. This activity is reasonable, even though there can be no rational reconstruction of the practice that delivers a methodology for continuing the practice. The reason that is at work in legal practice does not produce scientific knowledge, nor is it simply an aesthetic or ornamental disposition. Legal reasoning produces rhetorical knowledge. The task of the critical theorist is to facilitate rhetorical knowledge in law, and the iconoclastic figure of Nietzsche provides a model of critical theory as a working through rather than an overcoming. The result is not a definitive answer to the nagging questions of the day; instead, it is an improved dialogue in which we can formulate and articulate questions and also seek provisional (which is to say, defeasible) answers.

At the end of the day, is this too little? Does the linguisticality of human understanding consign us to an unending conversation, such that we can never really progress toward truth? It is in response to this broad skeptical question that the practice of law takes on special significance. Both Gadamer and Perelman look to law as an exemplary site for rhetorical knowledge, in effect arguing that legal reasoning provides a practical example of their philosophy. As a legal theorist I seek clarification from hermeneutical, rhetorical, and critical philosophy. Philosophers turn to law for validation of their theories about the character of human understanding. I have sought to play a small role in clearing a path that accesses the interstices of these intellectual currents through genuine interdisciplinary dialogue. The scholarly role of the legal theorist is to join an unending conversation about the unending conversation of law. Gadamer emphasizes that this task should not be taken up begrudgingly, as if it is a concession to the impossibility of genuine knowledge. Rather, he insists that:

> ... hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in conversation. But this means: always recognize in advance the possible correctness, even the superiority of the conversation partner's position. Is this too little? Indeed this seems to me to be the kind of integrity that one can demand only of a professor of philosophy. And one should demand as much. (Gadamer 1985a, 189).