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## A FUTURE FORETOLD: NEO-ARISTOTELIAN PRAISE OF POSTMODERN LEGAL THEORY\*

*Francis J. Mootz III*<sup>†</sup>

What does it mean to theorize? Is theory defined by its practical effects, or by its refusal to become complicit in everyday practices? Is the urge to theorize a product of modernist ideology that leads us astray, or our openness to enlightenment? These questions may have become more pressing in the postmodern age, when strong conceptions of theory have come under challenge, but these questions are timeless. Therefore, it should not be surprising that contemporary readings of Aristotle can provide a helpful guide for uncovering the possibilities of postmodern legal theory. It is natural to turn to Aristotle, who is well known for his analysis of intellectual virtues, and particularly for his succinct discussion in the *Nicomachean Ethics*<sup>1</sup> in which he draws distinctions between *epistēmē* (scientific knowing) as exhibited in *theoria*, *technē* (knowledge governing productive activity) as exhibited in *poiesis*, and *phronēsis* (moral-practical wisdom about the right course of action in a situation) as exhibited in *praxis*.<sup>2</sup> From these divisions it would appear that Aristotle

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<sup>1</sup> ARISTOTLE, *NICOMACHEAN ETHICS* (Christopher Rowe trans., 2002).

<sup>2</sup> In the recent translation, these key distinctions are made in the following way. "Systematic knowledge" (*epistēmē*) concerns knowledge of things that cannot be otherwise—that is to say, of necessary universals—and is capable of being demonstrated by working from correct starting points. *Id.* at 179 (1139b). In contrast,

sets theory, as the source of true and indubitable knowledge, apart from both making and acting, even while admitting that these latter activities are guided by knowledge in some form.<sup>3</sup>

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“technical expertise” (*technē*) and “wisdom” (*phronēsis*) both concern matters that can be otherwise, in which there is an element of skill in creating a product or making a correct decision about a course of action. But these intellectual virtues are also distinct from each other:

Within the sphere of what can be otherwise, there are both things that belong within the realm of production and things that belong within that of action; but production is a different thing from action . . . so that rational disposition in the sphere of action will also be different from rational productive disposition.

*Id.* at 179 (1140a). Aristotle also introduces “intellectual knowledge” (*sophia*) and “intelligence” (*nous*) as intellectual virtues, but makes clear that intellectual knowledge is just the result of the combination of intelligence and systematic knowledge. The philosophical knowledge of *sophia* represents the highest attainment, in which the person not only can determine what follows from the fixed starting points by means of demonstration (*epistēmē*), but also has a true grasp of these starting points, which Aristotle describes as systematic knowledge getting its “head . . . in place.” *Id.* at 181 (1141a).

Wisdom is different from systematic knowledge because it requires deliberation rather than demonstration, and it is different from technical expertise because it involves judgment following from lived experience rather than making.

An indication of this is that we also call those in a specific field wise if they succeed in calculating well towards some specific worthy end on matters where no exact technique applies. . . . Now nobody deliberates about things that can not be otherwise, or about things that he has no possibility of doing. So if in fact systematic knowledge involves demonstration, and there is no possibility of demonstrating the sorts of things whose starting points can be otherwise . . . wisdom will not be systematic knowledge, and neither will it be technical expertise: not systematic knowledge, because what is in the sphere of action can be otherwise, and not technical expertise, because action and production belong to different kinds.

*Id.* at 180 (1140a-1140b).

<sup>3</sup> Aristotle is ambiguous about whether there is a hierarchy of knowledge, and it is precisely this ambiguity that Heidegger, Gadamer and Dunne exploit in their contemporary readings. At first glance, by characterizing the philosophical knowledge of *sophia* as the marriage of intelligence and systematic knowledge, Aristotle would appear to be privileging it as the highest form of knowing. Consider the following:

So intellectual accomplishment will be a combination of intelligence and systematic knowledge—systematic knowledge, as it were with its head now in place, of the highest objects. For it is a strange thing to think—if anyone does—that political expertise, or wisdom, is what is to be taken most seriously; unless, that is, man is the best thing there is in the universe.

*Id.* at 181 (1141a). But then, in the course of discussing wisdom (*phronēsis*), Aristotle appears to say the opposite:

And the person who is without qualification the good deliberator is the one whose calculations make him good at hitting upon what is best for a human being among practicable goods. Nor is wisdom only concerned with universals: to be wise, one must also be familiar with the particular, since wisdom has to do with action, and the sphere of action is constituted by particulars. That is why sometimes people who lack universal knowledge are more effective in action than others who have it—something that holds especially of experienced people. Suppose someone knew that light meats are easily digestible and so healthy, but not what sorts of meat are light: he won't make anyone healthy, and the [experienced] person [lacking in systematic

This is precisely the paradox that we face in trying to understand the role of theory in thinking about law. On one hand, how can theoretical knowledge have any real-world effect if it is sharply distinguished from making and acting; and, perhaps more problematically, is practicing law more like making a product or choosing the correct course of action? On the other hand, how can theoretical knowledge be regarded as genuine knowledge that rises above mere appearance if it remains tied to making and acting?

In this Article, I argue that Aristotle can serve as an important touchstone for rethinking the assumptions that lead to the paradox of theory. I begin by describing this paradox in greater detail, with reference to the challenges posed by postmodern thinking. In the next Section, I briefly recount the readings of Aristotle by contemporary philosophers Martin Heidegger, Hans-Georg Gadamer and Joseph Dunne, and explore the different but related ways in which they tease out ambiguities and subtleties in Aristotle's work. In the following Section, I gather the insights from these contemporary readings of Aristotle and propose a neo-Aristotelian account of the relationship of theory and practice under postmodern conditions. I then bring this description to bear in the setting of legal theory by looking to postmodern psychotherapy as a model of the relationship between theory and practice, a model that can lead us to praise the role of theory even if we accept the postmodern critique of traditional accounts of theory. Postmodern psychotherapists exemplify a dynamic of theory and practice that generates concrete suggestions for how critical legal theorists can productively contribute to legal studies. The practical demand for judgments, combined with the normative injunction to do justice, makes law a particularly

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knowledge] who knows that meat from birds is light and healthy will do so more. But wisdom has to do with action; so we need to have both sorts of excellence—no, *we need wisdom more*.

*Id.* at 182 (1141b) (emphasis and bracketed material added). This tension, of course, is the continuing tension between theoretical knowledge and practical knowledge that is the subject of this article.

A similar opposition is evidenced by Aristotle's distinction between demonstration through dialectic and persuasion through rhetoric. Although Aristotle at points appears to regard rhetoric as a kind of remedial mode of persuading simple minds unable to appreciate a scientific demonstration, at other points he is much more responsive to the sophistic insight that rhetorical deliberation is true reasoning. Along the lines of analysis in this article, I discuss contemporary readings of Aristotle's assessments of dialectic and rhetoric in Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDISC. L.J. 491, 519-25, 549 (1998) (assessing Chaim Perelman's interpretation of the complexities of Aristotelian rhetoric).

important venue for investigating the entwinement of theory and practice. I conclude by suggesting that critical legal scholarship by Bill Eskridge and Kathryn Abrams provide examples of this dynamic of theory and practice.

## I. THE PARADOX OF THEORY

In common understanding, academic life is synonymous with theory. Academics theorize about people engaged in practical affairs from a vantage point outside those practices. During the past few decades, increasing numbers of American law professors have embraced this model of academic life, abandoning the professional model in which professors synthesized legal developments into policy arguments for use by the practicing bar in favor of the academic model of a university professor engaged in interdisciplinary theoretical inquiry.<sup>4</sup> It would now appear to be beyond question that law professors, like all true academics, theorize.

There are sharply conflicting views of what it means to be a professor who theorizes. Outside the university, many lampoon academic life as a retreat to an ivory tower. The pithy phrase, "those who can't do, teach," captures this common perception that academic theorizing masks an escape from reality, most likely fueled by the professor's inadequacies in practical matters. Under this view, law professors have abandoned the real world of legal practice to promote theories that are not subject to reality checks in courtrooms and legislatures, but rather are tested only in the effete discourse of legal theory. Judge Harry Edwards's protest that the legal academy has abandoned the concerns of the bar and judiciary crystallized the extent to which this is now the view of many non-academic lawyers as well as the predominant view of the general citizenry.<sup>5</sup>

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<sup>4</sup> Step Feldman charts this development and argues that law professors should embrace their role as interdisciplinary scholars within the university. See Stephen Feldman, *Toy Story Too (or What Buzz Lightyear Can Teach Law Professors About Their Future—and Their Past)* (unpublished manuscript, on file with author).

<sup>5</sup> See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Edwards makes the point clearly and succinctly:

The [law] schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners *can use*. . . . But many law schools—especially the so-called "elite" ones—have abandoned their proper place, by emphasizing *abstract theory* at the expense of practical scholarship and pedagogy. . . . As a consequence, it is my impression that judges,

Academics tend to respond to this skeptical view of theorizing in two ways. Some theorists contend that the remove from day-to-day practical life marks an ascent from the dark cave of unreflective habit to the shining forth of knowledge. It is not surprising that this view is attractive to academics, who would like to think of themselves as overcoming the grubby affairs of the practical world through the power of theory. Another popular response to the skeptical view regards theory as an instrumental means of motivating new and improved practices. As scholars are quick to remind their critics, "there is nothing as practical as a good theory."

Most contemporary legal theorists embody these contradictory visions of theory in their work. Only the most unreflective person could participate in the life of the academy without a gnawing fear that academic life is a form of intellectual self-pleasuring that shields the theorist from the rigors of full-time legal practice. The criticism that theory is a flight from reality is probably not far from the law professor's mind, because—unlike philosophers, sociologists or political theorists who trained only for academic life—a substantial number of law professors practiced law, at least for a few years, before joining the academy.<sup>6</sup> Legal practice is not so easily objectified as a target for theory when one's professional life commenced by participating in the practice.

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administrators, legislators, and practitioners have little *use* for much of the scholarship that is now produced by members of the academy.

*Id.* at 35 (emphasis added). Judge Edwards also lambastes the practicing bar for moving to the opposite extreme by emphasizing "pure commerce" over the professional values of ethical practice. *Id.* at 34. He does not advocate a simple-minded rejection of the significance of theory in law schools, however. Judge Edwards concludes that there is a role for theory in a pluralistic academic setting that integrates theory, practice, skills and ethical considerations. See Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567, 572-73 (1997) (lauding NYU's adoption of such an approach to legal education).

George Taylor reminded me that in a related—although different—vein, Judge (formerly Professor) Richard Posner argues that weak and "spongy" moral theory holds no relevance for legal practice, which is properly grounded only in "facts" determined by the strong theoretical disciplines of the social sciences, and then are accounted for in the pragmatic (which is to say, non-theoretical) activities of legal reasoning. See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999). I direct the reader to George Taylor's excellent critique of Posner's attempt to demarcate the boundaries and roles of theory and practice, in *Critical Hermeneutics: The Intertwining of Explanation and Understanding as Exemplified in Legal Analysis*, 76 CHI-KENT L. REV. 1101 (2000).

<sup>6</sup> This may well be changing as increasing numbers of recently hired law professors have no experience with legal practice other than a few high profile judicial clerkships. An undercurrent of the criticism of this trend is the tendency it may have to produce a heavily theoretical, overly intellectualized approach to law.

Many legal theorists endorse both conceptions of theory offered in rebuttal of the skeptical challenge. For example, theorists within the law and economics movement descriptively argue that legal discourse obscures the underlying reality that law is a process of institutionalized wealth (or preference) maximization, and they simultaneously make the normative claim that certain legal doctrines interfere with this reality and should therefore be abandoned. On the other side of the political spectrum, feminist legal theorists undertake theoretical projects to expose the gendered constitution of legal practice, but also to suggest ways that law can overcome its patriarchic roots. Despite their skeptical fears, then, legal scholars often view legal theory as a means of getting at a reality that is deeper than the self-understanding of legal practice, and also as a means of reforming legal practice.

Postmodern thinking puts severe stress on the identity of legal theorists because it appears to underwrite a particularly corrosive version of the skeptical attitude while also undermining the defensive responses. The philosophical critique of grand narratives, coupled with the radically pragmatic return to localized practices, has rendered theorizing suspect. Postmodern critics argue that an embodied, linguistically situated, social being cannot escape from the cave of existence. Theory, like faith in God, appears to be a quaint vestige of previous "bad faith" refusals to accept the finitude of human existence. As a result of this critique, postmodern discourse tends to regard theory as nothing more than a provocative aesthetic, or it restricts theory to humble assertions that it is competent only to describe the impotence of theory. In short, postmodern critique reinforces the layman's suspicions that academic theorists are irrelevant to the real world of social practices.<sup>7</sup>

Stanley Fish pursues this line of thought with dogged determination, asserting that theory-talk has consequences only to the extent that it constitutes an accepted rhetorical move within legal practice, despite the pretense that theory governs practice from the outside.<sup>8</sup> Fish concedes that theory-

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<sup>7</sup> For example, when postmodern thinkers defend leftist political commitments, they often find it necessary to talk about leaving theory behind, or moving beyond theory. See generally *WHAT'S LEFT OF THEORY: NEW WORK ON THE POLITICS OF LITERARY THEORY* (Judith Butler et al. eds., 2000).

<sup>8</sup> STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 316-467 (1989).

talk might be employed within legal practice if it meets the rhetorical needs of that practice, but he insists that it is fantasy to assume that any philosophical perspective could *justify, determine or change* legal practice.<sup>9</sup> For example, he argues that Ronald Dworkin's jurisprudential critique of competing conceptions of law, "however persuasive or unpersuasive it might be," is beside the point since no theoretical conception of legal practice provides a "program according to which a judge might generate his practice."<sup>10</sup> Fish argues that Dworkin's theory of "law as integrity," if it is anything, is "either the name of what we already do (without any special prompting) or a rhetorical/political strategy by means of which we give a certain necessary coloring to what we've already done."<sup>11</sup> Theory, then, has consequences only to the extent that it is a practice in its own right (the practice of academic discourse), or to the extent that its theoretical devices are already enmeshed in legal practice, but theory never "stands in a relationship of precedence and mastery to other practices."<sup>12</sup>

But the postmodern position is even more complex, because postmodern anti-theorists tend to employ perplexing jargon and wield sophisticated concepts in their work. Fish adopts a deceptively simple and plain-spoken rhetorical ploy (using baseball as a metaphor, for example<sup>13</sup>), but in many instances postmodern critique exemplifies the kind of abstract and impractical discourse that fuels disdain outside the academy. Gianni Vattimo offers the only plausible answer to the postmodern puzzle of whether one can challenge theory without theorizing. Vattimo admits that his Nietzschean-inspired philosophy of "weak thought" must be regarded as a provisional interpretation that can claim no special epistemic status deriving from theoretical insight.<sup>14</sup> Thus, genuine

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<sup>9</sup> See Stanley Fish, *Play of Surfaces: Theory and the Law*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 297, 309 (Gregory Leyh ed., 1992).

<sup>10</sup> FISH, *supra* note 8, at 357.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 337.

<sup>13</sup> Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 *YALE L.J.* 1773 (1987).

<sup>14</sup> See generally GIANNI VATTIMO, *BEYOND INTERPRETATION: THE MEANING OF HERMENEUTICS FOR PHILOSOPHY* (David Webb trans., 1997). Vattimo summarizes:

That there are no facts, only interpretations, as Nietzsche teaches, is not in its turn a certain and reassuring fact [that is theoretically grounded], but "only" an interpretation. This renunciation of presence confers on post-metaphysical philosophy, and above all on hermeneutics, an inevitably



postmodern critique accepts its own “weak” status, which means that it rejects strong conceptions of the power of theory, but nevertheless continues the theoretical interrogation of practices in some form. But what this means for legal theorists remains, at best, opaque.

I address the postmodern puzzle regarding the nature of theory and its relationship to practice by drawing from the contemporary appropriations of Aristotle’s practical philosophy by Martin Heidegger, Hans-Georg Gadamer and Joseph Dunne. My goal is to outline the role that critical legal theorists can play in light of the neo-Aristotelian account of theory that emerges from this discussion. Although this account reinforces the postmodern critique by revealing that the image of the sovereign theorist who stands as expert commentator to the side of legal and social practices is an ideological myth, this does not mean that theory is irrelevant. Once theory is reconceived as a disposition within practice—as an engagement in practice with a distinct comportment—its unavoidable significance becomes clear.

## II. RECUPERATING THE TENSIONS IN ARISTOTLE’S ACCOUNT OF THEORY

### A. *Heidegger’s Rediscovery of Theory in Aristotle*

William McNeill recently connected Heidegger’s early lectures on Aristotle to themes that run throughout Heidegger’s work.<sup>15</sup> McNeill’s comprehensive account of Heidegger’s critique and renewal of Aristotle’s understanding of theory provides the starting point for developing a postmodern account of theory. Heidegger undermines the modern prejudice that divorces theory and practice by rediscovering an account of genuine human experience in Aristotle’s subtle phenomenology that maintains the lived tension between practice and theory. Heidegger concludes that

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“fallen” character. The overcoming of metaphysics, in other words, can only take place as nihilism. The meaning of nihilism, however, if it is not in its turn to take the form of a metaphysics of the nothing—as it would if one imagined a process at the end of which Being is not and the nothing is—can only think of itself as an indefinite process of reduction, diminution, weakening.

Gianni Vattimo, *The Trace of the Trace*, in RELIGION 79, at 93 (Jacques Derrida & Gianni Vattimo eds., David Webb trans., 1996).

<sup>15</sup> WILLIAM MCNEILL, *THE GLANCE OF THE EYE: HEIDEGGER, ARISTOTLE AND THE ENDS OF THEORY* (1999).

the Western philosophical tradition ultimately reduced the tensions in Aristotle's account to a reductionist conception of technocratic reason, but he finds inspiration by returning to Aristotle to rediscover an originary *praxis* in which thinking is bound up with action.

The self-understanding of modern science reduces *technē* to calculative and manipulative technology and limits *theoria* to philosophical abstraction in the service of technology, thereby separating both from *praxis*. Heidegger regards Aristotle's *Nicomachean Ethics* as critically important because it demonstrates that there is a "seeing" that is between immediate sensory involvement and abstract philosophical seeing: it is the *Augenblick*, or "glance of the eye," which involves a momentary grasp of the presencing of an object. The *Augenblick* is not theory, practice or making in our modern usage of these terms. Rather, it is the phenomenological ground for these experiences, which only later are differentiated and opposed. Heidegger argues that the modern separation of theory, practice and making conceals the "originary rootedness of *theoria*, *praxis*, and *poiesis* in the unitary and worldly being of Dasein."<sup>16</sup>

The ancient word, *theoria*, had numerous meanings, but Heidegger identifies a primary use as referring to an envoy sent to participate in a ritual festival.<sup>17</sup> In this usage, *theoria* was a celebratory immersion in the divine and a break from mundane routines, but this immersion involved an intense involvement in the world rather than an escape from worldly affairs. Heidegger emphasizes that our originary experience of the world is a form of *praxis*. It is a tarrying with "what is becoming" that is different from unthinking habit and mere curiosity. He argues that the experience of great art recalls this originary experience of tarrying, in which theory, practice and action are bound up in a response to the other.

The great work of art thus acts as the shock and thrust, the stimulus of a steadfast reminder or recollection of the play of being and nonbeing, prompting our wonder and astonishment.<sup>18</sup>

The call that issues from the work itself to tarry in its presence, in the face of the extraordinary, of the divinity of the Earth, i.e.[,] of what we might call the Earthworld, thus invites a response akin to

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<sup>16</sup> *Id.* at 281.

<sup>17</sup> *Id.* at 263-66.

<sup>18</sup> *Id.* at 291.

that of ancient *theoria*. The call to *let* the work be a work by tarrying in its presence, granting it time by responding to the possibility of its time, entering our own time as that of the work, as the presencing of an extraordinary being—this call, as a call to preservation, is the call to essential knowing, to *Wissen*.<sup>19</sup>

Heidegger concludes that the manipulative seeing of modern technological consciousness, with its attendant divisions between theoretical seeing and productivity, is parasitical on the originary comportment of caring that is most dramatically revealed in our response to the work of art.

McNeill emphasizes that Heidegger does not simply reverse the priority by subsuming theory under unreflective practice,<sup>20</sup> nor does he erase the distinction between the two comportments.<sup>21</sup> Theory, practice and making are all caring dispositions in the world, and they mutually reinforce each other as dispersions of an originary *Augenblick*. Consequently, although Heidegger cites Aristotle's analysis of *phronēsis* as an important concession that points toward the originary *praxis*

<sup>19</sup> *Id.* at 295.

<sup>20</sup> McNeill insists that Heidegger does not seek a reversal in priority:

What seems clear from these considerations is that Heidegger, while emphasizing the way in which theoretical contemplation emerges within the context of a worldly involvement with things, and specifically with producing or making, is not indicating any ontological order of founding with respect to these two modes. The initial goal is to make both forms of comportment visible as modes of worldly concern.

MCNEILL, *supra* note 15, at 61.

<sup>21</sup> Heidegger acknowledges the differences between theory, practice and making by regarding them as dispersions that conceal the unitary ground from which they emanate. In short, he acknowledges that the differences are derivative, but not illusory. McNeill explains:

Contemplation, as noncircumspective, remains a kind of concern. Heidegger therefore seeks to emphasize that one should not view "theoretical" and "practical" comportment as mutually exclusive ways of being that reciprocally supplement one another. Theoretical comportment is itself a form of acting, of comportment, just as practical comportment (or "action" in a broad sense) is also a seeing, indeed one that does not first need "theory" to inform it. . . .

Heidegger's point, then, is not that there is no difference between theoretical and circumspective comportment, between "theory" and "practice." Quite to the contrary. His point is simply that this difference must be understood in terms of its unitary ground, as a distinction between different modes of (concernful) being-in-the-world, different ways of uncovering beings within the world. . . .

Circumspection and theoretical contemplation are dispersed, already differentiated ways of concern. This dispersion is not only factual, but also historical, that is, it occurs as the concrete enactment of certain interpretations of the being of beings. From the point of view of the analytic, however, the difficulty remains of how to access Dasein's being prior to such dispersion. In terms of what can we recognize such dispersion as *dispersion*?

*Id.* at 67-68.

before its occlusions in modernity,<sup>22</sup> he argues that regarding *phronēsis* as the originary ground would represent an inauthentic collapse into one of the dispersions of originary being.<sup>23</sup> Heidegger's point is not just that the subtleties of *phronēsis* resist the simplification of Aristotle's work by later philosophers, but that Aristotle's conceptions of *technē* and *theoria* are equally ambivalent and conflicted.

### B. *Gadamer's Praise of Theory*

It might be surprising that Hans-Georg Gadamer—Heidegger's student and a leading proponent of post-Enlightenment hermeneutical philosophy—recently published a collection of essays entitled *Praise of Theory*.<sup>24</sup> It is easy to misconstrue Gadamer's careful rehabilitation of Aristotelian practical philosophy in response to modern scientific ideology as an abandonment of theory and a return to practice as the source of human understanding. But in a speech delivered when he was eighty years old, Gadamer acknowledges the importance of theory not only to his life's work, but to social life generally.<sup>25</sup> Gadamer revives Aristotle's practical philosophy not to supplant theory, but rather to restore the essential equilibrium of theory and practice that has been disturbed in modernity. Gadamer's sustained attention to these themes during his long career provides important elaborations and extensions of Heidegger's earlier work.

Modern technological consciousness warps social life because it reduces theory to nothing more than applied research and it reduces practice to nothing more than the implementation of efficient technologies. This leads Gadamer, following Heidegger, to ask: "Is there perhaps more to theory than what the modern institution of science represents to us? And, is practice, too, perhaps more than the mere application of

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<sup>22</sup> Heidegger argues that Aristotle's concession that *theoria* is a form of *praxis*, and therefore that it cannot be sharply distinguished from *phronēsis* or *technē*, provides an opening for a *destruktion* of the metaphysical tradition and its later emphasis on the separation of theory and practice. *Id.* at 17-54 (Chapter 2: "Vision in Theory and Praxis: Heidegger's Reading of Aristotle (1924)").

<sup>23</sup> *Id.* at 100-07.

<sup>24</sup> HANS-GEORG GADAMER, *PRAISE OF THEORY: SPEECHES AND ESSAYS* (Chris Dawson trans., 1998). All of the speeches and essays came after the original publication of *Warheit und Methode* in 1960, and most of them are from the late 1970s and early 1980s, reflecting Gadamer's mature thinking.

<sup>25</sup> See HANS-GEORG GADAMER, *Praise of Theory*, in *PRAISE OF THEORY*, *supra* note 24, at 16-36 (reprinting a speech originally given in Bonn on June 3, 1980).

science? Are theory and practice correctly distinguished at all when they are seen only in opposition to each other?"<sup>26</sup> He concludes that the opposition of practice and theory is mistaken, and that "theory is just as primordial an anthropological datum as is practical and political power. So everything depends on constantly renewing the balance between these two human forces. And I am convinced that human society exists only because and as long as there is a balance of this kind."<sup>27</sup>

Gadamer credits Aristotle for recognizing that theory is a relinquishment of immediate and pressing questions within a practice. Theory can never be completely segregated from practical engagement with others because it is a comportment within practice. Nevertheless, theory is an openness to different understandings that can reveal the unproductive nature of one's prevailing prejudices precisely because it is intersubjective. Gadamer draws this lesson by closely reading Book Six of Aristotle's *Nicomachean Ethics*, in which Aristotle moves beyond the opposition of *epistēmē* and *technē* by introducing *phronēsis* as moral-practical knowledge that is more in the nature of a cultivated disposition to apply general considerations non-deductively to the practical demands for ethical action in a given context.<sup>28</sup> In contrast to Heidegger's attention to the originary ground of experience that subtends Aristotle's taxonomy, Gadamer emphasizes the special role that *phronēsis* plays in Aristotle's analysis.<sup>29</sup>

Although a *technē* can be learned and forgotten, *phronēsis* cannot be learned in advance and then later applied; instead, moral knowledge is revealed only in the thoughtful actions of a moral individual.<sup>30</sup> Gadamer explains this point by

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<sup>26</sup> *Id.* at 24.

<sup>27</sup> See HANS-GEORG GADAMER, *Science and the Public Sphere, in PRAISE OF THEORY*, *supra* note 24, at 62-70, 68 (reprinting a lecture originally given in Marburg in 1977).

<sup>28</sup> See HANS-GEORG GADAMER, *TRUTH AND METHOD* 312-24 (Joel Weinsheimer & Donald G. Marshall, rev. trans., 2d rev. ed. 1992) (1960; 5th German ed. 1986).

<sup>29</sup> Gadamer's relationship with Heidegger's thought exemplifies his hermeneutical philosophy: he is a careful and charitable reader who challenges himself to learn from Heidegger while at the same time he moves in new directions on important issues. See Robert J. Dostal, *Gadamer's Relation to Heidegger and Phenomenology*, in *THE CAMBRIDGE COMPANION TO GADAMER* 247, 247 (Robert J. Dostal ed., 2002) (describing Gadamer's characterization of the "complex relationship" as "one of constant challenge and provocation"); ROD COLTMAN, *THE LANGUAGE OF HERMENEUTICS: GADAMER AND HEIDEGGER IN DIALOGUE* (1998).

<sup>30</sup> GADAMER, *supra* note 28, at 317-20.

distinguishing judicial decisionmaking—which requires a just weighing of both equities and rule of law values in the context of a particular case—from the activity of a craftsman—which involves the skillful achievement of a design that is known in advance.<sup>31</sup> “That is why,” Gadamer explains, “it is pointless to distinguish . . . between knowledge and experience [in the case of moral judgment], as can be done in the case of a *technē*. For moral knowledge contains a kind of experience in itself . . . .”<sup>32</sup> In other words, because *phronēsis* simultaneously is knowledge, experience and action, it can be distinguished from the “ends-means” calculus of *technē*, according to which the craftsman first learns the *eidos* of a table, then gains experience in making tables, and finally produces a table.

In one respect, Gadamer’s distinction between these dispositions is just a nuanced development of Heidegger’s pathbreaking distinction between deliberative activities (*phronēsis* and *technē*) and scientific knowing (*epistēmē* and *sophia*) in building his fundamental ontology.<sup>33</sup> But Gadamer also believes that this distinction is a defining feature of his philosophical hermeneutics. Gadamer regards *phronēsis* as a fundamental form of experience because it is uniquely experiential, in which the ends and means are simultaneously determined within practical situations.

That is, *phronēsis* becomes what he calls “genuine” or “real” experience, insofar as its application both participates in and reflects upon the immediate human situation. By “real experience” Gadamer means “that in which humanity becomes conscious of its finitude. In it the ability to make (*das Machenkönnen*) and the self-consciousness of its planning reason find their limits.” *Phronēsis*, in other words, not only distinguishes itself from *technē* but also acts as a critique of

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<sup>31</sup> *Id.* at 318.

<sup>32</sup> *Id.* at 322. Gadamer draws from one of Aristotle’s most important distinctions between *technē* and *phronēsis*: while there is such a thing as excellence in *technē* (i.e., the carpenter can do an excellent job in crafting a piece of furniture), there can be no excellence in *phronēsis* (i.e., one cannot be an excellent good person who acts appropriately). In other words, it might be the case that a carpenter would choose to do a poor job in a particular instance, as when she is helping her daughter to construct a science fair exhibit, but still have technical expertise in the form of knowledge. It makes no sense to say, however, that the wise person could choose to act poorly but still have wisdom and ethical knowledge. *Phronēsis* is a product of cumulative experience that literally becomes part of the person, and is not knowledge that the person may put aside or forget in a given instance. See ARISTOTLE, *supra* note 1, at 180 (1140b).

<sup>33</sup> See COLTMAN, *supra* note 29, at 17-24.

all purely cognitive reasoning by partaking in what Gadamer refers to as "the experience of human finitude."<sup>34</sup>

By recuperating the distinctive features of Aristotle's *phronēsis*, Gadamer argues, it is possible to recover the hermeneutic dimension of life in a manner that reorients our thinking about theory and practice.

Gadamer reaffirms the value of science and scientific theory, despite his challenge to the methodological self-understanding of science. He explains that theory is "not so much the individual momentary act as a way of comporting oneself, a position and condition"<sup>35</sup> of openness. Underneath the facade of disinterested method, Gadamer believes that the real activity of the natural sciences exemplifies a spirit of attentiveness that seeks to press beyond current prejudices by means of reconstituting the hermeneutic relationship between theory and fact.<sup>36</sup> Consequently, although he argues that "the only productive or appropriate way for the human sciences to think of themselves is on the model of Aristotle's practical philosophy rather than the modern concept of scientific method,"<sup>37</sup> he certainly does not reject science or scientific theory. By acknowledging that theory is inseparable from practice he rejects claims on behalf of a special form of scientific theory in favor of identifying the theoretical disposition that subtends all forms of inquiry and is woven into the very fabric of social life.

It would not be hard to show that modern science always presupposed this concept of theory as a condition of its own existence. But where does that get us? In returning to the basic constitution of mankind, are we actually still dealing with theory, or with practice and interactions between people and things that we

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<sup>34</sup> *Id.* at 22 (quoting GADAMER, *supra* note 28, at 357).

<sup>35</sup> GADAMER, *Praise of Theory*, *supra* note 25, at 31.

<sup>36</sup> See HANS-GEORG GADAMER, *The Ideal of Practical Philosophy*, in PRAISE OF THEORY, *supra* note 24, at 50-61, 53 (reprinting lecture originally given in Marburg in 1977) (arguing that the pretense of a distinctive epistemology in the natural sciences is precluded because the "mere accumulation of facts constitutes no experience at all, let alone the foundation of empirical science. It is the 'hermeneutic' relationship between fact and theory that is decisive in this field too."); GADAMER, *Science and the Public Sphere*, *supra* note 27, at 68 ("Whoever is able to achieve distance from himself, who gains insight into the limitedness of his sphere of life, and so openness to others, experiences constant correction by reality. Science has made this its most noble duty. Its freedom from ends serves to liberate us from those overly narrow ends that our wishes and illusions constantly create in us. This is the famous education to objectivity that makes a researcher.").

<sup>37</sup> GADAMER, *The Ideal of Practical Philosophy*, *supra* note 36, at 50.

certainly could not call theoretical? Can this be right? Is theory ultimately a practice, as Aristotle already stressed, or is practice, if it is truly human practice, always at the same time theory? Is it not, if it is human, a looking away from oneself and looking out toward the other, disregarding oneself and listening for the other? Life, then, is a unity of theory and practice that is the possibility and the duty of everyone. Disregarding oneself, regarding what is: that is the behavior of a cultivated, I might almost say a divine, consciousness. It does not need to be a consciousness cultivated by and for science; it only needs to be a humanly cultivated consciousness that has learned to think along with the viewpoint of the other and try to come to an understanding about what is meant and what is held in common.<sup>38</sup>

Reconceived in light of Aristotle's distinctive accounting of *phronēsis*, theory is not the dominion only of scientists or academic specialists; it is intimately connected with social practices.

Gadamer elaborates Heidegger's etymology of *theoria* as participating in a festival. McNeill notes that Gadamer's contribution is to insist that the "being-there" of the festival "is not to be understood as a compartment of subjectivity. Participation here has the sense of being delivered over to whatever is unfolding, to events in their disclosure, of an attentiveness that is *held* by beings themselves as they appear and conceal themselves."<sup>39</sup> This underscores why Gadamer chooses to place primary significance on *phronēsis*: it is social reason that is rooted in dialogic traditions, rather than cognitive mastery of data or technical mastery of materials. *Phronēsis* is exemplary, for Gadamer, because it exhibits the sociality of reason and the practical dimensions of theory in ways that too often are obscured.

Gadamer investigates *phronēsis* not only to continue Heidegger's attack on the technical conception of theory and knowledge, but also to highlight how his path of thinking diverges from Heidegger's. Although Heidegger's early lectures introduced the notion of theory as a "tarrying," his later work too often represented the *Augenblick* as an instantaneous flash of insight, a lightning bolt direct from the gods as it were.<sup>40</sup>

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<sup>38</sup> GADAMER, *Praise of Theory*, *supra* note 25, at 35.

<sup>39</sup> MCNEILL, *supra* note 15, at 272 (discussing GADAMER, *Praise of Theory*, *supra* note 25).

<sup>40</sup> Dostal, *supra* note 29, at 255. Dostal notes that Heidegger's early conception of the event of truth as tarrying in response to a disclosure becomes a sudden and abrupt *Augenblick* in *Being and Time*, and then in later writings is represented by the metaphor of "lightning." Conversation plays an important role in



Gadamer carries forward Heidegger's original impulse by emphasizing the sociality and historical character of *phronēsis* as experiences that cumulate in the disposition of practical-moral wisdom within a given setting.<sup>41</sup> Gadamer pursues the notion of truth as a "tarrying." Truth is revealed in an *Augenblick* in the sense that truth comes to being only in the moment, and not as the product of a methodological application of pre-existing principles, or in the sense of being a flash of insight delivered from above. Robert Dostal explains Gadamer's development of Heidegger's concept:

Tarrying, as the way of attending to art or to the world, is to be understood as a mode of comportment (to speak anglicized Heideggerian) or as a habit (to speak anglicized Aristotelian). "Tarrying" takes time, and in tarrying we lose ourselves in the thing and, thereby, lose track of time. Where Heidegger would have us await the sudden flash of insight, Gadamer would have us develop the habit of tarrying with things.

This tarrying is also a conversation—a conversation with oneself, with the thing at hand, and with others about whatever is at stake. . . . Although Heidegger, both in *Being in Time* with its concept of Being-with (*Mitsein*) and in his later work, provides a framework for the social and the dialogical, he never makes good on this aspect of the conversation that he says we are. The later Heidegger is not so much conversing as he is waiting and listening for the voice of the gods. . . . the truth-event for Heidegger is best characterized as the voice of the gods, [it] comes like lightning—unmediated and "without a bridge." Gadamer, however, explicitly

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Heidegger's conception of truth, Dostal continues, but it is a conversation between us and the gods that is not captured in ordinary language.

<sup>41</sup> GADAMER, *supra* note 28, at 346-62. In this section of his book, Gadamer characterizes historically-effected consciousness as the product of experience, but he argues for a normative understanding of experience. Experience is not just a string of events, but rather implies a continuing openness to the revision of unproductive prejudices in a manner that settles into dispositions. The cultivated and experienced person embraces this historical and social process of coming to understanding, which seemingly occurs without effort within the moment. Recalling Aristotle's image of the fleeing army that "suddenly" stands fast and responds to orders, Gadamer writes that this "image captures the curious openness in which experience is acquired, suddenly, through this or that feature, unpredictably, and yet not without preparation, and it is valid from then on until there is a new experience—i.e., it holds not only for this or that instance but everything of the kind." *Id.* at 352. Gadamer concludes this discussion by distinguishing the monological inquiry of science from the dialogic inquiry that marks hermeneutical understanding, recalling his distinction between *epistēmē* and *phronēsis*: "The hermeneutical consciousness culminates not in the methodological sureness of itself, but in the same readiness for experience that distinguishes the experienced man from the man captivated by dogma." *Id.* at 362.

characterizes the conversation with the other as providing a "bridge."<sup>42</sup>

Gadamer's emphasis on dialogue as the cornerstone of his philosophy emerges from this complex conception of theory, practice, understanding and truth that is drawn from Aristotle's discussion of *phronēsis*.

Gadamer draws more from Aristotle than his differentiation of *phronēsis* from *epistēmē* and *technē*, insisting that Aristotle provides substantial guidance on the interactions of practice and theory by his very activity of writing the *Nicomachean Ethics*. In this work, Aristotle quite obviously is not engaged in making ethical decisions; he is theorizing about ethical decisionmaking. Gadamer's praise of theory should come as no surprise, because his philosophical hermeneutics is a theoretical treatment of the practical activity of interpretation in much the same fashion as Aristotle's practical philosophy is a theoretical treatment of ethical decisionmaking. Gadamer justifies his theoretical bent by insisting that his philosophical hermeneutics "must arise from practice itself and, with all the typical generalizations that it brings to explicit consciousness, be related back to practice."<sup>43</sup> In this respect, the theoretical activity of philosophical hermeneutics represents a genuine theoretic comportment in the manner modeled by Aristotle's practical philosophy.<sup>44</sup>

Theory is a distinctive part of dealing with the paradoxical social demands for action that are placed on individuals, but it remains intimately related to practice and cannot be separated entirely. As Gadamer insists, the "myth of the ivory tower where theoretical people live is an unreal fantasy. We all stand in the middle of the social system."<sup>45</sup>

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<sup>42</sup> Dostal, *supra* note 29, at 257.

<sup>43</sup> HANS-GEORG GADAMER, *Hermeneutics as Practical Philosophy*, in REASON IN THE AGE OF SCIENCE at 88, 92 (Frederick G. Lawrence trans., 1981). See also HANS-GEORG GADAMER, *Hermeneutics as a Theoretical and Practical Task*, in REASON IN THE AGE OF SCIENCE, *supra*, at 113.

<sup>44</sup> Gadamer summarizes his discussion of Aristotle:

[I]f we relate Aristotle's description of the ethical phenomenon, and especially the virtue of moral knowledge to our own investigation, we find that his analysis in fact offers a kind of *model of the problems of hermeneutics*. We too determined that application is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning.

GADAMER, *supra* note 28, at 324.

<sup>45</sup> HANS-GEORG GADAMER, *The Diversity of Europe: Inheritance and Future*, in HANS-GEORG GADAMER ON EDUCATION, POETRY, AND HISTORY: APPLIED

Gadamer has been duly credited for advancing Heidegger's analysis by more carefully distinguishing *phronēsis* from *technē*, and for emphasizing the especial significance of *phronēsis* for the project of philosophical hermeneutics,<sup>46</sup> which signals Gadamer's focus on the social dimensions of reason. But Heidegger's reading of the complexities of Aristotle's use of *technē* is important to the task of uncovering the relationship between theory and practice in law.

To complete my recovery of an Aristotelian account of postmodern theory, I turn to Joseph Dunne's reading of Aristotle's *technē*. Dunne works from a Gadamerian perspective that is committed to the social reason most clearly demonstrated in *phronēsis*, but he is attentive to the broader themes advanced by Heidegger in that he does not simply elevate the model of *phronēsis* as the only genuine comportment.

### C. *Dunne's Refinement of Aristotle's Treatment of Technē*

In *Back to the Rough Ground*, Joseph Dunne reviews efforts by several contemporary philosophers to rework Aristotle's assessment of the connections between theory and practice, placing special emphasis on Gadamer's investigations.<sup>47</sup> Dunne credits Gadamer with demonstrating that Aristotle's *phronēsis* overcomes a narrow conception of rationality by linking reasoning and the ethical being of the person,<sup>48</sup> and with revealing how Aristotle's ethics provide a model of how one can theoretically interrogate a practice after the demise of metaphysical theory.<sup>49</sup> But Dunne criticizes

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HERMENEUTICS 221 (Dieter Misgeld & Graeme Nicholson eds., Lawrence Schmidt & Monica Reuss trans., 1992).

<sup>46</sup> See COLTMAN, *supra* note 29, at 19-23.

<sup>47</sup> See JOSEPH DUNNE, *BACK TO THE ROUGH GROUND: PRACTICAL JUDGMENT AND THE LURE OF TECHNIQUE* (1997) (discussing the retrieval of *phronēsis* and *technē* by John Henry Newman, R.G. Collingwood, Hannah Arendt, Hans-Georg Gadamer and Jürgen Habermas).

<sup>48</sup> *Id.* at 125-27.

<sup>49</sup> *Id.* at 160. Dunne summarizes this important dimension of Gadamer's recovery of Aristotle:

[I]f the claims of all self-inflated sciences and philosophies are to be rejected, hermeneutics, as the philosophy which both does this rejecting and at the same time brings our finitude into the clearest relief, itself comes to embody the highest aspirations of reason—a reason which now recognizes itself as irredeemably *practical*. . . . Indeed, in Gadamer's deconstruction, hermeneutics must carry an even greater weight than Aristotle's practical philosophy did. For the latter was always to some degree overshadowed by the transcendent status of *theoria* or *sophia*. . . . For us now, on the other

Gadamer's sharp opposition between *phronēsis* and *technē* in advancing these claims, arguing that Aristotle's *technē* is a fluid concept that exhibits the tension between theory and practice within itself.<sup>50</sup> The effect of Dunne's study is to expand Gadamer's inquiry along the lines of Heidegger's original thinking, but without lapsing into Heidegger's later mysticism.<sup>51</sup>

Dunne argues that there are affinities between certain *technai* and *phronēsis*, especially in the case of medicine.<sup>52</sup> A physician does not act solely by learning universal theoretical truths, and then applying them with skill to particular cases.<sup>53</sup> The ends-means calculus traditionally associated with *technē* misses the deliberative character of the physician-patient relationship.<sup>54</sup> In a recently published collection of essays,<sup>55</sup> Gadamer makes this same point about the hermeneutical dimension of practicing medicine, although he does not take this opportunity to recast his narrow reading of Aristotle's use of *technē*.<sup>56</sup> Gadamer's theme is that modern

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hand, with "the getting over of metaphysics," no such *theoria* is any longer possible. And so hermeneutics must assume the role not only of practical philosophy but of a practical philosophy which itself has to "take the place of a *theoria* whose ontological legitimation may be found only in an *intellectus infinitus* that is unknown to an existential experience unsupported by revelation."

*Id.* at 164 (quoting the later Heidegger without specific attribution, and then quoting HANS-GEORG GADAMER, *On the Origins of Philosophical Hermeneutics*, in *PHILOSOPHICAL APPRENTICESHIPS* 183 (R.R. Sullivan trans., 1985) (1977)).

<sup>50</sup> DUNNE, *supra* note 47, at 229.

<sup>51</sup> See, e.g., P. CHRISTOPHER SMITH, *THE HERMENEUTICS OF ORIGINAL ARGUMENT: DEMONSTRATION, DIALECTIC, RHETORIC* (1998). Smith argues that Heidegger failed to fulfill the project of developing a "hermeneutics of facticity." Smith repeatedly invokes Gadamer's focus on the social realm of everyday speech as an antidote to Heidegger's elitist, monological quest to experience truth through poetry. See, e.g., *id.* at 312 n.5.

<sup>52</sup> DUNNE, *supra* note 47, at 253-61.

<sup>53</sup> Dunne emphasizes Aristotle's ambivalence. On the one hand, in the *Metaphysics* Aristotle appears to assume that medicine is a "making" that can proceed analytically from a *noesis*, but later Aristotle appears to recognize that a physician must deliberate with his patient about the ends of treatment. *Id.* at 350.

<sup>54</sup> *Id.* at 350-53.

<sup>55</sup> See HANS-GEORG GADAMER, *THE ENIGMA OF HEALTH: THE ART OF HEALING IN A SCIENTIFIC AGE* (Jason Gaiger & Nicholas Walker trans., 1996) (1993).

<sup>56</sup> In his essay, *Apologia for the Art of Healing*, Gadamer suggests that it is the imposition of the concept of *technē* on medicine that has led to the scientific approach to healing. He draws a sharp contrast between the Greek concept of *technē* as the skillful production of something that imitates a model (usually found in nature) and the practice of medicine as a restoration of equilibrium rather than a productive art. "The necessary integration of a differentiated body of knowledge and skills into the practical unity of treatment and healing cannot emerge from that powerful force of knowing and acting that modern science cultivates in a

scientific consciousness has reduced the self-understanding of medicine to mere *technē*, although it has not eliminated altogether the dialogic character of the healing arts.<sup>57</sup> Dunne's study shows that Aristotle's treatment of *technē* already imports within it the subtleties that Gadamer attempts to re-introduce. He argues that the assumed polarity between a theoretical-universal approach operative in *technē* and an experiential-practical approach operative in *phronēsis* can also be viewed as a polarity "implicit in Aristotle's treatment of *technē* itself."<sup>58</sup>

The rise of modern technocratic consciousness was fueled, Dunne believes, by Aristotle's failure to recognize explicitly that *technē* has an experiential base no less than *phronēsis*.<sup>59</sup> Aristotle generally speaks of *technē* as bringing to bear self-sufficient theoretical knowledge in a productive manner, but intermittently he suggests that *technē* is gained through experience.<sup>60</sup> There are several prominent and revealing examples of Aristotle's more expansive (that is, less theoretical) understanding of *technē*. Perhaps the most important instance occurs in the context of Aristotle's famous claim that equity is a necessary counterbalance to the universality of law in achieving excellence in the virtue of

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methodologically precise manner." *Id.* at 35. He concludes that the attempt to regard medicine as a *technē* has not been entirely successful.

Among all the sciences concerned with nature the science of medicine is the one which can never be understood entirely as a technology, precisely because it invariably experiences its own abilities and skills simply as a restoration of what belongs to nature. And that is why medicine represents a peculiar unity of theoretical knowledge and practical know-how within the domain of the modern sciences, a unity moreover which as such cannot be understood as the application of science to the field of praxis. Medicine itself represents a peculiar kind of practical science for which modern thought no longer possesses an adequate concept.

*Id.* at 39. As explained below, Dunne's point is that medicine was regarded as a *technē* by Aristotle, notwithstanding the connections between theoretical knowing and practical activity that Gadamer identifies. In other words, the very concept of *technē* is more complex than the traditional readings of Aristotle recognize.

<sup>57</sup> Gadamer claims that medicine exemplifies the tensions between practice and theory in the modern world. "The example of the doctor thus shows with special clarity how the relationship between theory and practice comes to a critical point under the conditions of modern science." *Id.* at 20. He explains that the "enigma of health is just one small example from the range of problems which confront us. Everywhere it is a question of finding the right balance between our technical capacities and the need for responsible actions and choices." *Id.* at viii-ix.

<sup>58</sup> DUNNE, *supra* note 47, at 314.

<sup>59</sup> See generally *id.* at 315-56 (Chapter 10: "Beyond the 'Official' Notion of Technē: Recovering the Experiential Background").

<sup>60</sup> *Id.* at 319-20.

justice. This leads Aristotle to contend that moral action is premised on a steady disposition built on life experience rather than being a simple matter of applying universal moral norms to a situation.

And to show this Aristotle reaches quite unproblematically for a medical, i.e., technical, analogy: one might as well say that “to know [*eidenai*] what honey, wine and hellebore, cautery and surgery are” is easy. Indeed, such knowing is easy, but for the “task of being a doctor (*ergon . . . iatron einai*) it is not sufficient; one is not a doctor unless one knows “how, to whom, and when to administer [these things—honey, etc.] with a view to producing health.” . . . What is involved here, quite clearly, is a kind of discriminating resourcefulness that will be available only to one who has been informed by a wealth of experience, and the point I am making is that Aristotle in this passage attributes this both to the virtuous person *and* to the *technitēs*.<sup>61</sup>

The *technē* of the physician is no less a matter of experience than the *phronēsis* of the politician, and they both represent a spiraling synergy of theory and practice in experience.

Dunne agrees that the *technē* of medicine cannot be captured by a purely technical account because physicians work with other humans rather than on inert materials; consequently, physicians, rhetoricians, artists and other *technitēs* who exhibit excellence in their interactions with others are particularly likely to exhibit knowledge similar to the *phronēsis* of the statesman.<sup>62</sup> But even the work of a master carpenter who confronts new and unexpected challenges deviates from the simplistic model of mechanically reproducing

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<sup>61</sup> *Id.* at 334 (quoting *Nicomachean Ethics*, Book V, 1137a). In concluding his discussion of the internal morality of law, Lon Fuller cites to Aristotle’s analogy to medicine as capturing the experiential basis of excellence in law and as a rejection of the idea that simple, universal rules can be applied to particular circumstances without difficulty. In other words, Fuller’s desiderata of the morality of law are not offered as determinate guides for decision so much as points of reference for judicious weighing, just as medical learning informs the physician’s task of healing.

The application of a simple rule [or morality] ought itself to be simple. But this is not so, Aristotle says, invoking at this point a favorite analogy, that of medicine. “It is an easy matter to know the effects of honey, wine, hellebore, cautery and cutting. But to know how, for whom, and when we should apply these as remedies is no less an undertaking than being a physician.”

So we may in turn say: It is easy to see that laws should be clearly expressed in general rules that are prospective in effect and made known to the citizen. But to know how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver.

LON L. FULLER, *THE MORALITY OF LAW* 94 (rev. ed. 1969) (1964) (quoting *Nicomachean Ethics*, Book V, 1137a).

<sup>62</sup> DUNNE, *supra* note 47, at 359.

an *eidos* that one grasps theoretically.<sup>63</sup> Dunne suggests that this feature of technical excellence proves that Aristotle's distinction between *technē* and *phronēsis* discounts too heavily the creativity borne of experience and experimentation.

Finally, Dunne emphasizes that Aristotle does not discriminate carefully between *technē* as an excellence of knowledge that has an explanatory power and *technē* as an excellence of knowledge in bringing about an effect. In this respect, *The Rhetoric* is the corollary to the *Nicomachean Ethics*, in that by writing the text, Aristotle reveals his understanding of the theoretical dimensions of rhetorical practice without necessarily demonstrating his oratorical skills.<sup>64</sup> Dunne concludes that *technē*, no less than *phronēsis*, involves a theoretical "seeing" that is bound up with a practical engagement, and that in neither case can the theoretical "seeing" methodologically direct the practical engagement.<sup>65</sup>

In the end, then, Dunne arrives at the same point as Gadamer, but he does so by working within the concept of *technē*. Dunne's inquiries are motivated by his concerns about the increasingly technical approach to teaching, under which teaching is viewed as the production of knowledge in the minds of pupils. His theoretical inquiries yield the paradoxical lesson that his own theoretical conclusions cannot purport to direct the practice of teaching from "outside" this primary practical engagement. Nevertheless, a chastened theoretical disposition remains important because it prevents practical engagements from being warped by a technicist self-understanding.

Although the reflection we pursued here is, of course, theoretical, it is nonetheless paradoxical in its effect. For it is a form of theory whose whole import is to vindicate practical knowledge—and thereby to severely curtail the claims of theoretical knowledge on practice. It not only exposes the limitations of the kind of theory that informs the technical approach but it also recognizes the modesty of its own contribution to practice. Its role is not to instruct or dictate to practitioners. It does not offer any countermodel to the technical model. Nor is its argument merely moralistic—preaching how things *ought* to be to a world that is no better disposed to philosophical than it is to religious homiletics. It draws attention not to what ought to

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<sup>63</sup> *Id.* at 283-84.

<sup>64</sup> *Id.* at 315-19.

<sup>65</sup> Eugene Garver's treatment of Aristotle's account of rhetoric fits well here: Aristotle regarded rhetoric as an art of character, and did not regard rhetoric as the mechanical assembly of arguments that have only logical force. See EUGENE GARVER, *ARISTOTLE'S RHETORIC: AN ART OF CHARACTER* (1994).

be, so much as to what *is* the case anyhow—even though the technician project does not recognize it and even tries to suppress it.<sup>66</sup>

Dunne's Gadamerian understanding of the power of his theoretical inquiries is important, however, because it broadens Gadamer's conclusions from the scope of *phronēsis* to the scope of *technē* as well.

What, then, are Dunne's conclusions about the role of theory, both in the *technē* of teaching and in *technē* and *phronēsis* generally? First, his account provides an example of a theoretical tarrying with the practical activity of teaching in order to make sense of its current technician self-understanding. Thus, theory is a comportment within and toward a practice that overcomes the natural tendency to forego reflection and to objectify the dynamics of the practice, as might happen when a teacher becomes so wrapped up in day-to-day tasks that she begins to embody the prevailing technician conception of teaching.<sup>67</sup> Second, he emphasizes the degree to which theory and practice are intertwined features of practices such as teaching, even if it is helpful and important to distinguish them from each other. A good teacher reflects on her practices, and can learn through guided reflection by those who already are skilled in the practice.<sup>68</sup> Theory is an

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<sup>66</sup> DUNNE, *supra* note 47, at 365.

<sup>67</sup> Dunne summarizes the role of his theory of teaching—and also Gadamer's theory of interpretation and Aristotle's theories of rhetoric and ethics—as a drawing back from the natural urge to lose oneself in one's own projections.

The task of philosophy—or, at any rate, of the type of philosophy explored here—has been to avoid being absorbed into this [objectified] frame [of mastering one's environment] that we impose and, by maintaining a space for reflection outside it, to articulate its limits and to draw attention to aspects and dimensions of existence which do not appear within the frame but which, nonetheless, continue to give human life its density and even make the frame itself possible. . . . They are the "necessary conditions" of human experience, which all our projects at mastery actually build on but which, despite our ambitions, we cannot supplant or co-opt: there will be no project to make them cease to operate or operate only on its terms.

*Id.* at 366.

<sup>68</sup> *Id.* at 369-70. Dunne does not counsel a surrender to practice in response to the inability of theory to direct practices, for that would be skewing what the *technē* of teaching involves.

In being initiated into the practice of teaching, student-teachers need not only experience in the classroom but also the right conditions for reflecting on this experience—so that reflectiveness (which we have all the time been clarifying under the name of "phronesis") can become more and more an abiding attitude or disposition. . . . He needs a teacher who will help him to reflect on what he is doing. Such a teacher, though not a theoretician in our modern sense—or in the sense which, as we just saw, Aristotle scorns—will



inextricable feature of practice, although the theoretical disposition can be manifested within the ongoing dynamic of the practice or from a relatively (although not actually) removed perch of one commenting on the practice.

### III. TAKING STOCK: A NEO-ARISTOTELIAN ACCOUNT OF THE RELATIONSHIP OF THEORY AND PRACTICE UNDER POSTMODERN CONDITIONS

Aristotle theorizes about ethical behavior, and also about productive arts such as rhetoric. He characterizes ethical knowledge as a cumulation of experiences that are molded through reflection into a disposition that becomes part of the being of the person, rather than a set of universal dictates that can be learned and then applied. His relatively brief discussion of *phronēsis* serves as an important starting point for Gadamer's destruction of the methodological conception of knowledge that has triumphed in the age of modern science. But Aristotle also advances a concept of *technē* that is ambivalent and, under Dunne's careful (against the grain) reading, similar to *phronēsis*. The productive knowledge of the physician, artist or public speaker also evidences a subtle relationship between theory and practice, despite Aristotle's general claims that *technē* involves the application in a particular setting of universal principles that have previously been learned. These modern readings of Aristotle by Gadamer and Dunne express Heidegger's earlier theme that the dispersions of the originary *Augenblick* are properly distinguished but not rigidly demarcated.

The role and possibilities of theory under postmodern conditions are best explored with a neo-Aristotelian 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 and 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

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nonetheless be able to evince the *logos* of good practice (i.e., the kind of *context-bound logos* [discussed earlier in the book]).

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.”

Gadamer effectively diagnoses the problem of theory in the postmodern age. He argues that Western civilization has now entered a third stage of progressive Enlightenment: moving from the original dissolution of the Homeric epics and the embrace of the discovery of pure truths on a mathematical model in Ancient Greece; to the classical stage, inaugurated by Copernicus, in which experience was organized inductively under universal laws; and culminating in the modern stage marked by the dominance of experts, global industrialization and the surpassing of Christianity.<sup>69</sup> This development is marked by the ascendancy of the technical conception of knowledge. In Aristotle’s terms, this ascendancy means the reduction of *technē* to mere technique and the eclipse of *phronēsis*. Gadamer cautions against fueling this worldview by pursuing theoretical interventions that, by their nature, participate in the concealment of the genuine experience of theory.

If we view the ever-widening movement of Enlightenment in the second half of our century against this backdrop, what seems to be new is that technical thinking is beginning to expand into a universal view of the world. As the moral and religious basis of Kant’s idea of freedom has vanished by degrees from present-day consciousness, man’s self-consciousness has come to rest ever more exclusively on his ability to do and to make things. . . . I think it is our prepossession with the technological dream and our obsession with emancipatory utopia that represent the prejudices of our time and from which reflection, as the courage to think, needs to free us.<sup>70</sup>

Critical legal theory, as the “courage to think” beyond the urge toward mastery of one’s world that gives rise to the scientific worldview, must be a form of “historical reflection” that “can lay bare the presuppositions that lie behind these prejudices” of modernity; it must reject the project of *constructing* an “emancipatory utopia” in favor of *stimulating* “our social reason”—largely obscured but not eliminated—“to awake from its technological dream.”<sup>71</sup>

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<sup>69</sup> See HANS-GEORG GADAMER, *Science as an Instrument of Enlightenment*, in PRAISE OF THEORY, *supra* note 24, at 71-75.

<sup>70</sup> *Id.* at 79.

<sup>71</sup> *Id.* at 80, 83.

Gadamer insists that theory cannot be a corrective from outside—a demarcation of the appropriate way to see the world—without embodying the delimiting prejudices of modernity. Critics might argue that this assumes the point in question: that modernity is “prejudiced” rather than the triumph of historical enlightenment into a transparent and universal reason. It is at this juncture that the neo-Aristotelian conception of theory gains its critical bite. The idea of a closed rationality, of the triumph (or end) of history, is precisely the narrow conception of theory that Gadamer targets. Theory can’t rise above practice and grasp clearly the way things must be and ever will be, except in the most narrow and artificial realms of mathematics and basic natural science. Theory is a component of dynamic practices, a form of participation in the ancient sense of *theoria* as an envoy’s participation in a festival.

As Aristotle’s *Nicomachean Ethics* shows, theory remains intimately connected with practice even when it seeks to reflect on a practice without engaging in the practice. The humble role of the philosopher in the hubristic age of science is to call to mind the most important lesson that science teaches: human finitude and the corresponding limitations on knowledge. Working from this recognition, the philosopher’s task can only be to reinvigorate a “common reason” that lies buried under technical necessity and universal prescriptions. Gadamer, in classically Gadamerian terminology, makes this case for theory most eloquently:

Don’t worry that I’m going to conclude by recommending philosophers as the experts of reason, so that the power of reason can finally be raised beyond all doubt by filling our panel of experts. We should be careful not to make fools of ourselves, especially by claiming that our specialty is the universal that is reason: let alone that reason should come to power through us. But perhaps it is, all in all, a contradiction in terms that reason should have power and exercise governance, and perhaps it is quite in order that the strange guild of philosophers should remain almost invisible in the real power struggles between peoples, states, classes, religions, world-views, and economic systems. We do not speak in the name of reason. Anyone who speaks in the name of reason contradicts himself. For it is reasonable to acknowledge that one’s own insight is limited and for just that reason to be capable of better insights, wherever they may come from.

To be sure, this definition is so universal that it applies equally to scientific reason insofar as every researcher always knows that he can himself be surpassed. But for just this reason science persists in its ways. It is nevertheless reasonable, as we say, to be aware that

science is limited by its inability to reflect on its own presuppositions and consequences. This too is an insight that overcomes a prejudice, just like when an individual corrects old prejudices with a new insight. Reason always consists in not blindly insisting on what one holds true, but engaging critically with it. This is still what enlightenment does, but not in the dogmatic form of a new absolute rationality (Rationalität) that always knows better—reason also needs to be grasped with respect to itself and its own contingency in a process of constant self-enlightenment.<sup>72</sup>

Superficially construed, Gadamer's plea that philosophers not adopt the experts' mantle of rationality appears to surrender theory to practice, to eliminate the special role of theory. But it is Dunne's reflections on the role of theory within teaching and Gadamer's theoretical reflections on human understanding, both drawing from Aristotle, that seek to maintain the delicate equilibrium of theory and practice.

#### IV. IN PRAISE OF POSTMODERN LEGAL THEORY: THE MODEL OF POSTMODERN PSYCHOTHERAPY

Perhaps surprisingly, Heidegger, Gadamer and Dunne find in Aristotle's philosophy an account of theory that not only can survive the challenges of postmodernity, but that inspires praise. My discussion to this point, admittedly, has been overly theoretical, and so I turn now to an exploration of a concrete instance of the interconnections of theory and practice. Postmodern approaches to psychotherapy provide a model of the relationship between theory and practice for critical legal theorists because these approaches exemplify a theoretically informed hermeneutical activity. The therapist adopts a theoretical posture to assist her client, but she does not pretend to escape her hermeneutical engagement with the client in dialogue. My use of postmodern psychotherapy as a model, of course, recalls Aristotle's invocation of the physician in the course of his theoretical investigation into ethics.<sup>73</sup>

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<sup>72</sup> HANS-GEORG GADAMER, *The Power of Reason*, in PRAISE OF THEORY, *supra* note 24, at 37-49, 48. Gadamer's speech was given in Vienna at the height of the student uprisings in 1968. Understood in this context, his pointed challenge to both bureaucratic technicism and the ideology of emancipatory critique leading to utopia is quite remarkable, as Gadamer resisted the sharp polarization of the time and embodied the quest for a common social reason.

<sup>73</sup> I have explained using postmodern psychotherapy as a model for critical legal theory in detail in a recent article. See Francis J. Mootz III, *Psychotherapeutic Practice As a Model for Postmodern Legal Theory*, 12 YALE J.L. & HUMAN. 299 (2000). My brief overview of this model in the text that follows should be read in conjunction with this earlier article, to which I refer the reader who seeks elaboration and citations

Postmodern psychotherapists disavow the traditional conception of psychoanalysis as a comprehensive theory that permits the “expert” analyst to “see through” the patient’s neuroses. Instead, they adopt a philosophical position of “not-knowing.”<sup>74</sup> Postmodern psychotherapists locate the critical dimension of therapy in a collaborative dialogue with the client that is oriented toward restoring the client’s equilibrium, rather than claiming the authority to artfully direct the client’s review of life options from the therapist’s presumed position of theoretically-secured superiority. Under this account, the therapist is an expert only in facilitating the patient’s attempts to fashion a satisfactory life narrative, rather than an expert in diagnosing what is wrong with the patient according to a theoretically derived template.

Regarding psychotherapeutic dialogue as a site of theoretical intervention provides an excellent example of my neo-Aristotelian account of the relationship between theory and practice. The “talking cure” is theoretically-informed, if we regard theory as “tarrying” with the presencing of the world rather than as mastering the world through a disciplining act of subjectivity. In psychotherapeutic dialogue, the therapist is not directing the client to divulge information according to methodological rules; rather, she is opening herself to the client and attending to what the client says. Postmodern psychotherapists characterize their expertise in just these terms: a therapist is an expert in “suspending” her urge to diagnose quickly according to a template; she is an expert in *not* “establishing understandings, explanations, and interpretations based on prior experiences, formed truths, and

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to the literature.

<sup>74</sup> I draw from Harlene Anderson’s theoretical defense of “not-knowing.” Anderson insists that change occurs in therapy through the emergence of new meanings in dialogic conversation rather than as a result of technical interventions designed to “fix” a “problem.” HARLENE ANDERSON, CONVERSATION, LANGUAGE, AND POSSIBILITIES: A POSTMODERN APPROACH TO THERAPY 108-31 (1997). She writes:

The more attention I paid to what clients were saying, the more I understood that they knew more than I did or ever would about their lives, and the more I realized how my *knowing* interfered with the telling of their stories and the accessing of their resources. As a consequence, I have elevated the client’s voice to center stage; again—much like flipping the usual roles of therapists (knowers) and clients (not-knowers)—therapists learn and clients teach.

A cornerstone of the conversation and the relationship is the concept of *not-knowing*. . . . Not-knowing is the key feature that distinguishes my collaborative approach from other therapies and that makes a pivotal difference in a therapist’s intent, direction and style.

*Id.* at 133.

knowledge,” but rather in facilitating a genuine dialogue which is a collaborative discovery.<sup>76</sup> This is a theoretically informed practice, because it depends upon general insights into the nature of conversational exchange, but it is theoretical in the neo-Aristotelian sense that I have developed in this Article. Gadamer and Dunne both stress Aristotle’s lesson that theory participates in practice, and this same insight is central to the “not-knowing” stance adopted by postmodern psychotherapists. As described by Harlene Anderson:

The [not-knowing] stance is not a technique or theory. It is not manipulative, strategic, nor contrived, as thinking about it cognitively might suggest. It is not deliberate in the sense of being acted; however, it is intentional. I purposely want to be open, genuine, appreciative, respectful, inviting, and curious—all important characteristics of being in a therapy relationship that is mutual, collaborative, cooperative, and egalitarian.<sup>76</sup>

Theory works within practice as a disposition that overcomes habit and prejudice, and as a reflection on that practice that eschews efforts to formalize practice as the technical accomplishment of pre-given theoretical insight.

Theory is important beyond its role in psychotherapeutic dialogue, just as theory is important beyond its role in rhetorical exchanges or ethical decision-making. In the same way that Aristotle theorized about the interplay of theory and practice in ethics (and suggested the same with regard to rhetorical exchanges), postmodern psychotherapists have theorized about psychotherapeutic dialogue. Anderson insists that she uses theoretical knowledge not only in therapeutic dialogue, but also to gain perspective from which she can teach student-psychotherapists. Significantly, she educates new therapists in a collaborative and dialogic manner that is patterned on the therapy relationship, with the result that educating students about general principles is embodied in practical engagements.<sup>77</sup> Postmodern psychotherapists insist that their theoretical presupposition that human interaction is a narratively structured hermeneutical-rhetorical event is inseparable from their description of clinical practice. But, theoretical elaboration of the intersubjective character of human understanding can do little more than commend the

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<sup>76</sup> *Id.* at 137.

<sup>76</sup> *Id.* at 107.

<sup>77</sup> *Id.* at 248.

pragmatic experience of therapeutic dialogue and seek to facilitate this dialogue by reflecting on the practice. In other words, theory can only seek to free the theoretical disposition *that already resides within a practice*, since it would simply be absurd to attempt to develop a theory that could methodologically "produce" a genuine conversation.

While the "not-knowing" approach does not preclude a theoretical assessment of the techniques and methods that foster successful psychotherapeutic dialogue, postmodern psychotherapists reject the idea that there can ever be a methodological rulebook that literally can be picked up and employed or lost and forgotten. Because postmodern psychotherapists utilize practical knowledge within complex and fluid situations, they generally embrace pluralistic and interdisciplinary approaches. This does not mean that techniques are irrelevant, but only that no particular model or technique is uniquely necessary to any particular outcome. In other words, there is a mixture of *technē* and *phronēsis* at work; more importantly, it is *technē* in the sense of Dunne's reworking of Aristotle's concept rather than in the sense of a technique guided by the theoretical perception of universal laws. Postmodern psychotherapists theorize in their psychotherapeutic practice, and also when they reflect on their practice for the purpose of teaching others to become psychotherapists. This theorizing is dramatically different than the theorizing of social scientists working within the modern scientific model; it is theorizing that is deserving of cultivation and praise under postmodern conditions.

With the example of postmodern psychotherapy in mind, the connections between theory and legal practice are understood more easily. Postmodern psychotherapists provide a model for breaking free from the "theoretical urge"<sup>78</sup> in a manner that suggests that reliance on modernist conceptions of theory runs counter to basic structures of human understanding. Although postmodern psychotherapy and legal practice are very different practices, the basic structures of human understanding are equally operative in each case. Construed at a sufficiently general level, the model of psychotherapy suggests that legal theory is both a disposition

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<sup>78</sup> See STEVEN MAILLOUX, RHETORICAL POWER 3-18 (1989) (characterizing the "theoretical urge" as the desire to stand outside the flux of a rhetorical-pragmatic practice and devise a methodological key for correctly seeing that practice).

within legal practice and also a reflection on this disposition. The key lesson is that reflection on the disposition can never be a narrow *technē* that *produces* the disposition; reflection is a facilitation that does not gain a privileged perspective on the practice from the perch of universal principles in the form of an *eidōs*.

In this short Article, I can only adumbrate the contours of legal theory under the neo-Aristotelian conception of theory. In an important respect, critical legal theory is found in the creative hermeneutical discernment and rhetorical elaboration that marks the practice of lawyers and judges. Tarrying with the presencing of social meaning in legal settings rather than proceeding in a mechanical or rote manner is a theoretical disposition that is particularly stimulated in legal practice. Gadamer celebrates legal reasoning as a challenge to the methodological conception of human understanding, noting that the practice of law exemplifies his thesis that understanding always involves application because the lawyer is enmeshed in the practical demands of the case at hand and cannot pretend to pronounce the meaning of the law for all cases and for all time. He challenges the modern conception of theory as a narrow *technē*, arguing that “the idea of a perfect legal dogmatics, which would make every judgment a mere act of subsumption, is untenable,”<sup>79</sup> and therefore, legal practice “does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. It is the very understanding of the universal—the text—itsself.”<sup>80</sup> Academic theorists should take as their primary goal the facilitation of this theoretical disposition within practice. This can be accomplished through scholarship that offers creative readings of legal doctrine, even to the point that the creative reading challenges the legitimacy of the doctrine under discussion.

Reflections on legal practice by academics reflect the theoretical disposition in a different posture. Legal theorists in the academy often write about the practice of law, seeking to gain perspective on the creative readings of legal doctrine. In this vein, legal theory is an effort to facilitate the theoretical elements of practice, to unfreeze the habitual and prejudiced self-understandings that mute the theoretical disposition within practice. Theory in this sense is a reflection designed to

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<sup>79</sup> GADAMER, *supra* note 28, at 330.

<sup>80</sup> *Id.* at 341.



free the expression of the theoretical disposition within practice. The legal scholar cannot mistake this project as a special authority to lecture practitioners from the supposed heights of theoretical insight. Rather, the role of theoretical reflection is to regain a sense of the underlying practice and to inspire the “courage to think” *within* that practice. Legal academics are particularly well-suited to this conception of theory because most are former practitioners. While historians, philosophers, economists and sociologists may have relevant theoretical insights about law, they will find it more difficult to avoid a theoretical posture that seeks to objectify legal practice, master legal practice, and then prescribe methodological cures for the perceived failings of legal practice.

Modeling critical legal theory on the work of postmodern psychotherapists, I contend that legal theorists should reject the idea that “law” is a concept awaiting explication in favor of the view that law is a narratively structured social process. The participants in legal practice present their anxieties in a manner similar to the individual entering psychotherapy. The neo-Aristotelian model of theory exemplified in postmodern psychotherapy counsels the critical legal theorist to attend to the client rather than imposing a theoretically-derived template onto the legal tradition. The critical legal theorist must take seriously lawyers and judges struggling with practical problems, rather than regard them as self-deluding simpletons who must be diagnosed rather than dialogically engaged.

Critical legal theorists work to disrupt unproductive abstractions and the false sense of necessity within legal discourse by means of a hermeneutical-rhetorical engagement that seeks to recover the full breadth and depth of a practice that has calcified into dogma. The legal theorist has no recourse to, or any need for, an external standard of critique against which practices can be assessed, because the critical project identifies and then stimulates the theoretical disposition within legal practice. The goal of critical legal theory is not to develop an ideal legal narrative and then import it into practice; rather, its goal is to reveal the activity of theory within the creative narrative of law as overcoming unhelpful, static conventions, thus opening the possibility for more satisfactory participation in the ongoing process of creating and transforming legal meaning.

The theoretical posture of “not-knowing” does not preclude the use of techniques to facilitate critical inquiry,

although there can be no science of critical legal theory in which the critic methodologically transforms legal practice in accordance with a strong guiding theory. Empirical quantification, sociological description, ethnographic study and economic assessment all can play a role in the critic's project. As postmodern psychotherapists emphasize, however, techniques and methods are only helpful to the extent that they broaden discourse. Insistence on the superiority of a particular methodology betrays a rigidity and narrowness of theoretical understanding that runs counter to the pluralism of postmodern critical engagement and the goal of freeing the originary theoretical disposition.

Bill Eskridge's theoretical work on statutory interpretation provides an excellent example of theoretical intervention in the neo-Aristotelian sense that I have developed in this Article. Eskridge advances a theory of "dynamic statutory interpretation" in response to the various theories of interpretation (intentionalist, purposivist and textualist) that have been formulated to constrain judicial interpretation of statutes.<sup>81</sup> Eskridge's theory does not seek to direct the practice of interpreting statutes; his purpose is to reveal the nature of the practice and to clear away conceptual confusions that inhibit the practice. Eskridge conducts a genealogical inquiry,<sup>82</sup> as well as normative and empirical investigations into the practice of interpreting statutes. But Eskridge emphasizes that he draws only pragmatic injunctions from his theoretical reflections, rather than methodological rules.

How do judges interpret statutes? How should they? Many commentators argue that judicial interpretation is, or at least ought to be, inspired by grand theory. We think these commentators are wrong, both descriptively and normatively: Judge's approaches to

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<sup>81</sup> The theory was developed in several important law review articles, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987), William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) [hereinafter *Practical Reasoning*], and William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990) [hereinafter *Gadamer/Statutory Interpretation*], consolidated in a book, see WILLIAM N. ESKRIDGE JR., *DYNAMIC STATUTORY INTERPRETATION* (1994), and elaborated in subsequent publications, see William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994) and WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001).

<sup>82</sup> See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 101 COLUM. L. REV. 990 (2001).

statutory interpretation are generally eclectic, not inspired by any grand theory, and this is good methodology.<sup>83</sup>

Reading Gadamer critically . . . does not provide many *conventional* legal insights. Gadamer does not tell us what steps to follow when we interpret statutes, what evidence to exclude, what dictionary to use. Hermeneutics is not methodological and directive (as Gadamer sees it anyway). It is, instead, illuminating and therapeutic. Hermeneutics helps us see what we are already doing, to see behind some of the myths that we have intellectually constructed, and (I hope) to throw ourselves into the process in a less alienated way.<sup>84</sup>

Theory is important to practice, but not superordinate to practice. Consequently, Eskridge champions a pluralistic and rhetorical approach to legal reasoning about the meaning of statutes.<sup>85</sup>

Eskridge's theory of dynamic statutory interpretation also clarifies the role of theory in legal practice. Eskridge characterizes critical theory as one variation of dynamic statutory interpretation, albeit an approach that only rarely is acknowledged in judicial opinions, and his theorizing reflects on the potential for this kind of critical intervention within practice. The development of the "reasonable woman" standard of hostile work environment sexual harassment claims under Title VII of the Civil Rights Act of 1964 provides one example of theoretical tarrying within practice. As Title VII doctrine matured, a number of feminist scholars argued that sexual harassment law was unconsciously constrained by the adoption of a gendered perspective about permissible workplace behavior. For example, Kathryn Abrams persuasively argued that the development of the law of hostile work environment sexual discrimination was hampered by a formal notion of equal treatment that obscured and preserved gendered workplace norms that inhibited the full participation of women.<sup>86</sup> Citing her article, the Ninth Circuit Court of Appeals endorsed a "reasonable woman" test in hostile work environment cases, finding that conduct "that many men

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<sup>83</sup> Eskridge & Frickey, *Practical Reasoning*, *supra* note 81, at 321-22.

<sup>84</sup> Eskridge, *Gadamer/Statutory Interpretation*, *supra* note 81, at 679.

<sup>85</sup> Eskridge's "funnel of abstraction" model of statutory interpretation, which was introduced in Eskridge & Frickey, *Practical Reasoning*, *supra* note 81, at 353 and continues to play an important role in his theorizing, evidences this pluralistic and rhetorical approach.

<sup>86</sup> See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989).

consider unobjectionable may offend many women," and that "Congress did not enact Title VII to codify prevailing sexist prejudices" under the guise of a seemingly neutral "reasonable person" test.<sup>87</sup> Subsequently, Abrams has written about the difficulties facing courts seeking to interpret Title VII in a manner that will effectively combat sexism in the American workplace and she has reflected at greater length on the advantages and disadvantages of the "reasonable woman" standard.<sup>88</sup>

If Eskridge theorizes *about* statutory interpretation, Abrams (and the lawyers and appellate judges who read her work) theorize *within* statutory interpretation. These different theoretical compartments are rooted in the practice under question, even if they can be distinguished. The hallmark of Eskridge's theory and Abrams's proposal for a "reasonable woman" standard of hostile work environment sexual harassment is that they both tarry with legal practice. This theorizing evidences both the practical wisdom of *phronēsis* and the productive art of *technē*, because excellent lawyering is both normatively guided and skillfully executed. Legal theory, if it is to deserve our praise, must remain attentive to the practice at hand, regardless of the degree to which it suspends the press of everyday lawyering in an effort to attend to the problem at hand.

## CONCLUSION

Theory has fallen on hard times, and the predicament facing legal theorists is exacerbated by postmodernity. Our complex attitudes toward theory appear to be inconsistent, if not incoherent. On one hand, theory is powerful and liberating because it is the experience of rising above our animalistic impulses and reactions. On the other hand, theory is impotent and misleading because it is the fruitless quest to rise above human finitude. Aristotle, when read through the lens of modern interpreters who resolve his equivocations against the excesses of modernity, illuminates a new understanding of theory that can survive the challenges of postmodernity

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<sup>87</sup> *Ellison v. Brady*, 924 F.2d 872, 878-79, 881 (9th Cir. 1991).

<sup>88</sup> See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994).

revealed in this paradox. Theory can be restored to its proper place, deserving of praise: not all-powerful, not impotent.

Surely there is irony in trying to conclude these reflections. How are legal theorists supposed to react to my assessment; what are they to do in response to my claims? My thesis has been that theory cannot deliver definitive answers to these questions. But there is a purpose in theoretical inquiry, even at the level of abstraction at which I have been working. As Eskridge suggests, the purpose is therapeutic, by which he means it is designed to rid us of misunderstandings and unfruitful ways of thinking. My goal is to awaken in legal theorists a recollection of their finitude and historicity, and to persuade them that they should abandon "theoretical" efforts to step outside their hermeneutical situation. Critical legal theory is a disposition within legal practice, supplemented by second order accounts of legal practice capable only of awakening this disposition, and supplemented by more general accounts (such as this Article) capable only of motivating better second order accounts. If we ignore or suppress theory only at our peril, it is equally true that we court danger by asking too much of theory by elevating it above our practices.

The neo-Aristotelian theory advanced in this Article is reflexive. But, as Gadamer explained in his reflections on his own theoretical inquiry into philosophical hermeneutics, this reflexivity is not disabling. Gadamer writes that the theoretic stance of his philosophical hermeneutics

only makes us aware reflectively of what is performatively at play in the practical experience of understanding. And so it appears to me that the answer given by Aristotle to the question about the possibility of a moral philosophy holds true as well for our interest in hermeneutics. His answer was that ethics is only a theoretical enterprise and that anything said by way of a theoretic description of the forms of right living can be at best of little help when it comes to the concrete application to human experience of life. And yet the universal desire to know does not break off at the point where concrete practical discernment is the decisive issue. The connection between the universal desire to know and concrete practical discernment is a reciprocal one. So it appears to me, heightened theoretic awareness about the experience of understanding and the practice of understanding, like philosophical hermeneutics and one's own self-understanding, are inseparable.<sup>89</sup>

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<sup>89</sup> Gadamer, *Hermeneutics as a Theoretical and Practical Task*, *supra* note 43, at 112.

Although this conception of theory might sound modest and uneventful, it poses a substantial challenge to modern academic consciousness. By reining in the grasping deformations of theory as a narrow *technē*, Heidegger, Gadamer and Dunne advocate a neo-Aristotelian approach that can inspire wonder and stimulate praise of our theoretical lives in the law.