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Law and Philosophy, Philosophy and Law

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LAW AND PHILOSOPHY, PHILOSOPHY AND LAW

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A roundtable discussion about the relevance of contemporary hermeneutical philosophy for legal theory raises a foundational question often neglected in interdisciplinary articles: What is the relationship between law and philosophy?[1] The burgeoning scholarship drawing connections between legal

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I dedicate this essay to Howard I. Kalodner, who recently returned to full-time teaching after serving as dean of the law school for 17 years. Although Howard has little use for contemporary interdisciplinary scholarship, I sincerely extend my thanks to him for supporting my efforts consistently and with (admittedly, a somewhat bemused) enthusiasm.

1. I do not mean to suggest that interdisciplinary legal scholarship primarily consists of the integration of philosophy and law. The past several decades have witnessed tremendous growth in the breadth of interdisciplinary legal scholarship. Legal realism's broad-based movement away from doctrinal formalism and toward the social sciences lies at the root of this modern interdisciplinary scholarship. This movement was blunted for some time, however, by the emergence of process jurisprudence, which regarded legal practice—ideally, at least—as an institutionally autonomous exercise of reason through principled action. *See* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 606 (1993). Of course, the process tradition was unable to deliver on its promise of developing a distinctly legal form of rationality, and within the last 30 years the concept of legal theory as an inquiry insulated from the humanities and empirical sciences has disintegrated. *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 767 (1987) (chronicling the emergence of the modern conclusion that "we cannot rely on legal knowledge alone to provide definitive solutions to legal problems").

The early phase of the modern interdisciplinary trend often was characterized as a battle between competing major "schools": the sociological/anthropological focus espoused by the law and society movement; the critical social theory espoused by critical legal studies scholars; the economic analysis espoused by adherents to the Chicago school of law and economics; and the humanistic values espoused by participants in the law and literature movement. It is now clear, though, that interdisciplinary efforts have few, if any, bounds. *See Symposium: Reweaving the Seamless Web: Interdisciplinary Perspective on the Law*, 27 LOY. L.A. L. REV. 9, 9-303 (1993). The breadth of the trend toward interdisciplinary legal scholarship was institutionally confirmed in 1992 when a new journal entitled simply "Law &:" commenced publication, eschewing a more particular focus such as "Law and Philosophy" or "Law and Sexuality." *See generally* Alexander Morgan Capron, *The Blind Men and the Elephant: An Introduction to Multidisciplinary Legal Analysis*, 1 S. CAL. INTERDISCIPLINARY L.J. 1 (1992). One commentator recently suggested that the need for interdisciplinary legal analysis "is so widely accepted today as to be second nature to law teachers.

theory and philosophy increasingly has come under attack for displaying a naive view about the potential legitimate exchanges between philosophers and legal academics. I have written elsewhere at length about the important insights that philosophical hermeneutics can lend to jurisprudential discussions of the rule of law.[2] In this essay, I develop my argument by stepping back and attending more generally to the connections between the work of contemporary philosophers and the work of legal theorists. In part I, I describe several recent critical rejoinders to efforts by legal scholars to utilize philosophy in legal theory. In part II, I respond to these critiques and argue that attempts to connect contemporary hermeneutical philosophy to legal theory are legitimate and important undertakings. In part III, I contend that contemporary philosophy can benefit from an interdisciplinary exchange with law.

I. LAW AND PHILOSOPHY: INTERDISCIPLINARY SCHOLARSHIP UNDER FIRE

A. A Question of Competence

Interdisciplinary research will yield no insight if the legal theorist (or philosopher) demonstrates an inadequate understanding of philosophy (or law). Mark Tushnet has cautioned against the "lawyer as astrophysicist" hubris that

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Indeed, we now wonder whether 'law' is anything other than a combination of economics, philosophy, political science, statistics, and other disciplines." Phillip Areeda, *Always a Borrower: Law and Other Disciplines*, 1988 DUKE L.J. 1029, 1031. *See* E. Donald Elliot, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 38 (1985) ("Law is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own.") Judge Harry Edwards drew a great deal of attention when he attacked this interdisciplinary trend and urged law professors to return to a more traditional, narrow focus on legal doctrine in their teaching and scholarship. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). *See Symposium: Legal Education*, 91 MICH. L. REV. 1921, 1921-2219 (1993) (presenting responses to Judge Edwards' article).

Notwithstanding the recent rapid proliferation of interdisciplinary legal scholarship, Charles Collier argues that the enterprise has never been justified or grounded by its practitioners. Collier notes that "beneath the institutional trappings of interdisciplinary legal scholarship I detect not a scholarly tradition that has finally resolved to general acclaim all its basic, foundational, methodological problems, but rather one that has never really confronted them." Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 DUKE L.J. 840, 842 (1993). *But see* Elliot, *supra*, at 38 (attempting to describe how "abstract ideas borrowed from other disciplines"—in particular, Charles Darwin's theory of biological evolution—"affect the law"); M.B.W. Sinclair, *Evolution in Law: Second Thoughts*, 71 U. DET. MERCY L. REV. 31 (1993) (challenging the assumption that evolutionary theory lends anything of value to legal theory); G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J. L. & HUMAN. 1 (1994) (analyzing the "republican revival" among historians, and the subsequent adoption of this paradigm by legal scholars, as shedding light on the character of interdisciplinary scholarship).

2. Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993) [hereinafter Mootz, *Postmodern World*]; Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration That the Obvious is Plausible*, 61 TENN. L. REV. 69 (1993) [hereinafter Mootz, *Rethinking*].

sometimes leads legal thinkers to believe that they can master any discipline with relatively little effort.[3] Tushnet's generalized concern recently has been voiced with greater specificity by several commentators holding terminal degrees in both philosophy and law. Brian Leiter has delivered a scathing indictment of "intellectual voyeurism," in which he criticizes Jerry Frug's enlistment of Nietzsche "to support a claim that is anathema to Nietzsche's philosophical position,"[4] arguing that Nietzsche is "misunderstood, misappropriated, and vulgarized" by Frug.[5] In a related vein, Charles Collier sharply criticized Sheldon Nahmod's uncritical invocation of a long list of continental philosophers (beginning with Nietzsche) as self-validating authorities for Nahmod's otherwise conventional legal analysis of a federal statute.[6] It is difficult to argue with the proposition that legal theorists who discuss philosophy should do so in a competent fashion and not simply for the sake of appearing fashionable or erudite. Therefore, it is perfectly appropriate that Professors Frug and Nahmod be called upon to defend their work on this level.

The critique of interdisciplinary scholarship cuts deeper, however, by suggesting that legal theorists may be incompetent in all cases to relate contemporary philosophical themes to law. Tushnet goes so far as to suggest that legal thinkers are best counselled to leave the larger questions about the nature and possibility of critique to the professional philosophers, thereby freeing legal theorists to concentrate instead on fashioning practical legal reforms.[7] Collier, on the other hand, is willing to leave the door to interdisciplinary studies slightly ajar,[8] but he emphasizes that there is a disjunction between the intellectual authority of philosophical ideas and the institutional authority of legal practice.[9]

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3. Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979). *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST 56-60 (1980):

> Now I know lawyers are a cocky lot: the fact that our profession brings us into contact with many disciplines often generates the delusion that we have mastered them all. But surely the claim here cannot be that lawyers and judges are the best imaginable people to tell good moral philosophy from bad: members of the clergy, novelists, maybe historians, to say nothing of professional moral philosophers, all seem more sensible candidates for this job.

Id. at 56.

4. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 90 (1992) (critiquing Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988)).

5. *Id.* at 80 (describing intellectual voyeurism as the "superficial and ill-informed treatment" of philosophical works, such that the "scholarly endeavor of interdisciplinary research becomes a forum for posturing and the misuse of knowledge").

6. Collier, *supra* note 1, at 848-53 (critiquing Sheldon Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719 (1989)); Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 204-05 (1991) (same).

7. Mark V. Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325, 2347 n.94 (1992).

8. Collier, *supra* note 1, at 852-53; Collier, *supra* note 6, at 224.

9. Collier, *supra* note 1, at 845-48; Collier, *supra* note 6, at 215-23. *See generally* Charles

Leiter provides the most optimistic assessment of the potential benefits of interdisciplinary scholarship, but he nevertheless cautions that legal scholars are competent only to bring the lessons of philosophy to bear in particular legal contexts, and not to advance the philosophical debate on its own terms.[10] He adds that law professors who pursue this "applied philosophy" agenda for interdisciplinary research must avoid the lawyer-as-astrophysicist syndrome by spending the time and exerting the effort necessary to enable "a real intellectual encounter between law and philosophy."[11]

I have endeavored in my scholarship to chart a legitimate interdisciplinary research program. Given the ubiquity of interpretation within legal practice, I have explored the implications of Hans-Georg Gadamer's philosophical hermeneutics for legal theory. My efforts reaffirm a long tradition of linking hermeneutical philosophy to legal theory.[12] However, it is not enough for me to assert that I have represented Gadamer's philosophy accurately—given the particular context in which I invoke his work—and that his work is central rather than peripheral to my project. Displaying a minimal level of competence in discussing Gadamer's philosophical hermeneutics from a jurisprudential perspective undeniably is necessary, but more than one critic has argued that competence is not sufficient to justify interdisciplinary projects. Competent interdisciplinary efforts remain subject to three different and competing rejoinders, which I term the "postmodern critique," the "two cultures critique" and the "expertise critique."

B. The Postmodern Critique

Some postmodern critics deny that contemporary continental philosophers can provide guidance to the participants in legal practice. Having rejected all systematic philosophical attempts to bring human existence within the purview of a single *logos*, the postmodern philosopher has little ground to travel to reach the conclusion that theory is distinct from and holds no power over various social practices. Stanley Fish has touted this perspective with dogged determination, arguing that theory-talk has consequences only to the extent that it constitutes a rhetorical move within a particular practice, despite its pretense of governing the practice from outside.[13] Fish concedes that Gadamer's jargon might be employed within legal practice if it meets the rhetorical needs of that practice, but he argues

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W. Collier, *Intellectual Authority and Institutional Authority*, 42 J. LEGAL EDUC. 151 (1992).

10. Leiter, *supra* note 4, at 102.

11. *Id.* at 104. Leiter emphasizes that "law professors who want to undertake such an interdisciplinary engagement have some serious homework to do in philosophy." *Id.* at 101.

12. *See* Francis J. Mootz III, *The New Legal Hermeneutics*, 47 VAND. L. REV. 115 (1994) (arguing that 19th-century hermeneutical philosophy had a large influence in America through the work of Francis Lieber, and that Gadamer's contemporary philosophy similarly has the potential to influence legal practice).

13. STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 316-467 (1989).

that it is ridiculous to assume that any philosophical perspective could *justify*, *determine* or *change* legal practice.[14]

The postmodern critique, however, cannibalizes its own presuppositions. Many contemporary legal theorists have rushed to embrace the postmodern rejection of grand narratives, apparently without appreciating the irony that by doing so they in fact are attempting to subordinate the interlocking language games comprising legal practice to a new grand (anti-) narrative. Fish openly embraces a world without foundations—a multicultural world with competing canons of value and truth—in which social practices are immune to the posturing of theorists. Nevertheless, he has no qualms about crossing the quadrangle to instruct law professors about their theoretical errors.[15] It is difficult to accept Fish's argument that the practices of interpretive communities are beyond the reach of philosophy, especially when he remains committed to his own theoretical constructs with a passion that betrays a commitment to something more than theoretical game-playing.

C. *The Two Cultures Critique*

A weaker version of the postmodern critique finds expression in the more common-sense assertion that professional philosophers are engaged in a specialized discourse that cannot be pressed into service in an instrumental way by legal scholars, and that philosophers and lawyers in fact belong to two distinct cultures of inquiry and practice.[16] Charles Collier advances this perspective by contrasting the intellectual authority of philosophical ideas with the institutional

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14. Stanley Fish, *Play of Surfaces: Theory and the Law*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 297, 309 (Gregory Leyh ed., 1992) [hereinafter LEGAL HERMENEUTICS]. *See* FISH, *supra* note 13, at 357 (arguing 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"). 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." *Id.* 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 rhetorical devices are enmeshed in a practice such as law, but theory never "stands in a relationship of precedence and mastery to other practices." *Id.* at 337.

15. For example, Fish considers the long-standing debate among legal theorists about whether legitimate constitutional interpretation necessarily must reanimate the original meaning intended by the framers as a pointless dispute. Fish asserts that "there is only one style of interpretation—the intentional style . . . interpretation always and necessarily involves the specification of intention," without so much as pausing to consider that it is rather foundational to assert that his theory of interpretation with regard to literature is applicable to legal interpretation. Fish, *supra* note 14, at 299-300. Fish maintains the consistency, although perhaps not the coherence, of his argument by immediately conceding that getting the theory right in this case has absolutely no influence on the practice of law. *Id.* at 298.

16. *Cf.* C.P. SNOW, THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION (1959) (describing the two cultures of knowing represented by the humanities and the empirical sciences).

authority that certain legal actors possess.[17] His "thesis is that because of the radically different structures of authority in law and the humanities, the hope that humanistic theory will be able to provide a source of intellectual authority for law is largely a vain one."[18] Collier asserts that "[interdisciplinary] legal scholars . . . want to take a page out of the book of the poets and philosophers and bring to the study of judicial opinions the transferred intellectual authority and humanistic methods that are appropriate only in those other disciplines."[19]

Unlike philosophers and poets, judges wield authority by virtue of their institutional roles and not by virtue of the strength of their intellect. Consequently, Collier stresses that the effort to justify judicial opinions according to the criteria of humanistic theory amounts to a category mistake.[20] Collier differs significantly from Fish by accepting that there is intellectual authority in philosophy, but he joins Fish to the extent that he believes no authority can be conferred on legal practice from this theoretical perch.[21]

Again, however, Collier's own work provides the resources for rejecting this thesis. Although Collier argues in his recent critique of interdisciplinary scholarship that judicial opinions carry institutional authority rather than the intellectual authority of a literary or philosophical masterpiece, he is more careful elsewhere to note that literary texts and legal texts each exert intellectual as well as institutional authority.[22] Collier acknowledges that the cautious practice of

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17. Collier describes intellectual authority as the "'force of persuasion,' unaided and unhindered by institutional context," in contrast to his definition of institutional authority as the "nonintellectual influence exerted by social, political, cultural, historical, legal, literary, educational, religious, and other institutions." Collier, *supra* note 9, at 151-52.

18. Collier, *supra* note 6, at 194.

19. *Id.* at 206. *Cf.* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

> Both the literary critic and the moral philosopher aspire to a kind of authority we might term intellectual, and authority that comes from being right in their intellectual endeavor. Judges also attempt to achieve intellectual authority, yet this is only to supplement a powerful base of authority that they otherwise possess.

Id. at 755.

20. *See* Collier, *supra* note 1, at 845-48; Collier, *supra* note 6, at 215-23.

21. Collier accurately describes Fish's postmodern position as one that rejects the very existence of intellectual authority. Collier, *supra* note 9, at 154-61. As described above, Fish contends that humanistic theory is as irrelevant to literary criticism as it is to legal practice, both of which comprise practices that are immune to the pretensions of theory. Fish's belief that all authority is institutional authority leads him to be a vocal critic in the "canon debate." *Id.* at 153. *See* Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. 977 (1994) (criticizing this aspect of Fish's position at length).

22. *See* Collier, *supra* note 9, at 154 (arguing that intellectual authority can be maximized by attempting "to eliminate the effects of institutional authority," and that both forms of authority subtend the force of both literary and legal texts). Collier explains that he regards institutional authority and intellectual authority as features of a continuum rather than mutually exclusive descriptions. Collier asserts that in the humanities intellectual authority is both necessary and sufficient, although insitutional authority is also present, whereas in legal practice institutional

overruling precedents suggests that law is not defined solely by institutional authority, just as the canon debate in literary criticism undermines the belief that literary texts embody solely intellectual authority.[23] Collier believes that "it is *justice* that demands the strict separation of institutional authority from intellectual authority, for the scholar *as well as the judge*," and he champions methodological attempts to effect this separation and to cultivate intellectual authority.[24] Ultimately, Collier agrees that philosophy might lend insight to legal theorists describing the practice of adjudication, notwithstanding that judges are not acting as academic philosophers when they decide cases and write opinions.[25]

D. The Expertise Critique

In contrast to the postmodern and two cultures critiques, some philosophers defend the relevance of philosophy to legal theory, and they agree that it is appropriate for legal theorists to employ the rigor of analytical philosophy in their discussions of legal concepts. However, these philosophers stress that ultimately they are responsible for charting the appropriate connections between law and philosophy. Under this model, legal theory remains a subset of philosophical analysis, and legal thinkers adopt the role of specialized subcontractors who philosophize within a particular context.[26] Of course, subcontractors must at all times defer to the prime contractor, who holds the full set of plans for the broader intellectual project.

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authority is both necessary and sufficient, although intellectual authority is also implicated. Telephone interview with Charles W. Collier (Apr. 11, 1994).

23. *Id.* at 153, 158-59. Collier contends that the judicial practice of overruling precedents should not be considered just as an assertion of intellectual authority in response to the dogmatism of the past, nor just as an exercise of raw power by contemporary judges, but rather should be characterized in terms of an "intermediate position" that conceives the practice as being a "critical reexamination and an intellectual check in the long run, if and as relevant conditions change." *Id.* at 159. *See* Collier, *supra* note 9, at 154-61. *See also* Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771 (suggesting that the theoretical debates about the proper weight to be accorded to precedent reflect a tension between humanistic and scientific methodologies deeply embedded in legal practice and scholarship). *Cf.* Fiss, *supra* note 19, at 758 (acknowledging that the authority of *Brown v. Board of Education* was secured only by President Eisenhower's deployment of federal troops in Little Rock—thus indicating the very real political constraints on judicial authority—but arguing that judges nevertheless enjoy "a protection that is not shared by the literary critic or moral philosopher" when interpreting legal texts).

24. Collier, *supra* note 9, at 183 (former emphasis added). Although Collier is using the term *judge* in its widest sense as a person who evaluates, his point seems no less applicable to law judges. Collier argues that the intellectual authority of legal scholarship can be augmented if law review editors institute blind review procedures for selecting articles for publication. *Id.* at 167-83.

25. Collier, *Use and Abuse*, *supra* note 6, at 224.

26. From this perspective, Oxford jurisprudes H.L.A. Hart, Joseph Raz and John Finnis would qualify as philosophers engaging in a particular specialty, whereas Karl Llewellyn, Lon Fuller and perhaps even Ronald Dworkin would be considered legal theorists who adopt the role of subcontractors on the larger philosophical project.

Martha Nussbaum describes the interdisciplinary encounter of law and philosophy along these lines, suggesting that philosophy can best be integrated into legal education by appointing resident professional philosophers to law faculties.[27] She argues that judges and law professors frequently deal with concepts such as "free will" and "emotion" in a crude and rudimentary way,[28] rarely demonstrating "even the most elementary awareness of the rigorous work that philosophers have been doing, work that would very likely contribute to the clarification of the judge's or lawyer's own process of reasoning about these matters."[29] Of course, resident philosophers would need to learn about the law and its institutional imperatives in order to speak intelligently to law students and lawyers, but Nussbaum believes that philosophers would be capable of assimilating to legal culture.[30] The interdisciplinary encounter between law and philosophy, then, amounts to philosophers applying their learning and lawyers patiently listening.

However, Nussbaum qualifies her optimism that philosophers would bring rigor and clarity to legal analysis in several important ways. First, Nussbaum acknowledges Collier's theme that judges do not act as poets or philosophers. Rather, they act within a practice that is defined in important respects by institutional authority.[31] Additionally, she emphasizes that only genuine philosophers are competent to fulfill the role that she envisions, as opposed to the "sophists" of continental literary theory who currently attract so much attention among contemporary legal theorists.[32] Given that philosophy is a deeply contested discipline rather than a univocal practice of rigorous reasoning, one is left with the impression that, at bottom, Nussbaum simply is advocating the colonization of legal theory by pragmatic-minded analytical philosophers.

To summarize, the postmodern, two cultures and expertise critiques question the value of interdisciplinary scholarship produced by legal scholars, although each critique is open to question on its own terms. In part II, I argue that legal

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27. Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627, 1644 (1993).

28. *Id.* at 1630-37.

29. *Id.* at 1630.

30. *Id.* at 1642. Nussbaum suggests that medical ethicists are role models in this regard. *Id.* at 1644-45. For a contrary assessment, see M. B. E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 L. & PHIL. 67 (1990) (arguing that practicing lawyers will gain little useful advice regarding legal ethics from professional philosophers, and that incorporating philosophical ethics into legal training might very well have pernicious effects).

31. *Id.* at 1642-43. Nussbaum writes:

> Judges are never free to go for the best. They are constrained by history, by precedent, by the nature of legal and political institutions. This means that any philosophy that is going to be of help to the law must be flexible and empirically attentive, rather than prissy and remote.

Id. at 1643.

32. *Id.* at 1641-42. It is plain from the context that Jacques Derrida is Nussbaum's unnamed villain.

scholars have much to learn from contemporary hermeneutical philosophy, notwithstanding the aforementioned critiques.

II. PUTTING THE "INTER" BACK INTO INTERDISCIPLINARY SCHOLARSHIP

The postmodern, two cultures and expertise critiques undermine each other more than they undermine legal scholarship that connects contemporary philosophy to legal theory. I contend that it is appropriate for legal theorists to draw from philosophy in their efforts to describe legal practice provided, of course, that the theorists competently present and relate the philosophical themes. Interdisciplinary legal scholarship is a productive endeavor whose description lies between the position that philosophy holds no relevance for legal practice and the position that philosophers hold special expertise to resolve problems relating to certain legal concepts. The phrase "interdisciplinary scholarship" implies a relation between the disciplines of philosophy and law, but it also implies that the relation truly is "between" the two and is not dictated by either discipline. The concerns raised by the three critiques discussed above are put to rest not by requiring legal theorists to abandon interdisciplinary work, but by acknowledging the "inter" of interdisciplinary scholarship.[33]

Of course, by seeking to reclaim the "inter" of interdisciplinary scholarship, I evidence my commitment to a complex of philosophical and legal understandings. Whether scholars criticize or laud the invocation of philosophy by legal theorists, they inevitably work from their own substantive account, articulated or not, of both law and philosophy, since neither constitutes a self-defining practice. My commitment to the account of human understanding advanced in Gadamer's philosophical hermeneutics, together with my commitment to an account of legal practice as a hermeneutically mediated political engagement, animate my defense of interdisciplinary legal scholarship. My defense, therefore, unavoidably is predicated on my philosophical-legal perspective, which represents interdisciplinary thinking already underway. A demonstration that Gadamer's hermeneutical insights explain why legal scholars should be encouraged to think about legal practice in terms of his philosophy employs a circular argument, but it is not circular in a "vicious" (disabling) sense. I certainly do not claim to validate all manners of interdisciplinary work by legal theorists, nor do I claim that legal theorists can adjudicate the conflicts between philosophical hermeneutics and other philosophical traditions. My claim is only that philosophical hermeneutics on its own terms demands an interdisciplinary encounter with legal theory and invites the contributions of legal theorists, and that an anti-foundationalist account of law on its own terms demands an interdisciplinary encounter with the broader post-Enlightenment intellectual trends of contemporary continental philosophy. Some interdisciplinary legal scholarship

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33. *Cf.* Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J. L. & HUMAN. 1, 3 (1988) (arguing that law and literature interdisciplinary scholarship is unsatisfactory to the extent that it leaves both disciplines comfortably in place, rather than inviting a "discomfiting" subversion of disciplinary boundaries).

may be subject to one or more of the critiques described above, but the project of developing contemporary legal hermeneutics by taking direction from Gadamer's philosophy is not subject to these critiques. I shall elaborate on this claim by responding to each critique.

A. Gadamer and the Postmodern Critique

Stanley Fish delivers a postmodern critique of subordinating legal practice to hermeneutical theory, but his criticism misses the mark if it is directed at Gadamer's conception of philosophy. As evidenced by the title of Gadamer's most important book, one of Gadamer's primary claims is that truth is not solely the product of methodological inquiry.[34] Gadamer criticizes the neo-Kantian conception that philosophy is the theoretical handmaiden for the empirical sciences. He emphasizes that his philosophy is not intended to dictate the proper exercise of reason, but rather is an explanation of the ontology of understanding—"not what we do or what we ought to do, but what happens to us over and above our wanting and doing."[35] Fish correctly discredits the effort to devise a methodological key to understanding social practices from outside, but Gadamer emphasizes that his hermeneutical philosophy is the labor of thinking about the activity of understanding from within various practices. Gadamer does not propose a method for understanding texts or practices. Instead, he describes the activity of understanding as it is exhibited within certain contexts—appreciating art, understanding history and even interpretation within legal practice.[36] Gadamer does not offer a *theory*. He engages in *philosophical thinking*.[37]

B. Gadamer and the Expertise Critique

For these same reasons, the expertise critique carries little weight against efforts by legal scholars to connect their work with Gadamer's philosophy. Gadamer does not claim to establish a method for obtaining knowledge, such that only those persons properly trained in the methodological principles that he elucidates would be equipped to understand legal phenomena. Rather, Gadamer demonstrates that all understanding, including legal understanding, is seated in historically unfolding practices rather than being delivered as the fruit of

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34. HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1992).

35. *Id.* at xxviii.

36. *See generally id.* (dividing the text into "The Question of Truth as it Emerges in the Experience of Art," "The Extension of the Question of Truth to Understanding in the Human Sciences" and "The Exemplary Significance of Legal Hermeneutics").

37. This same distinction is drawn by Joel Weinsheimer and Steven Mailloux. *See* JOEL WEINSHEIMER, PHILOSOPHICAL HERMENEUTICS AND LITERARY THEORY 24-40 (1991); Steven Mailloux, *Rhetorical Hermeneutics*, 11 CRITICAL INQUIRY 620, 621, 631 n.26 (1985) (arguing that a rhetorical hermeneutics derived from Gadamer's philosophy resists the "theoretical urge").

unprejudiced, methodological inquiries. Thus, the consequences of philosophical hermeneutics:

> do not need to be such that a theory is applied to practice so that the latter is performed differently—i.e., in a way that is technically correct. They could also consist in correcting (and refining) the way in which constantly exercised understanding understands itself—a process that would benefit the art of understanding at most only indirectly.
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> [This approach] limits the position of the philosopher in the modern world. However much he may be called to draw radical inferences from everything, the role of . . . know-it-all does not suit him.
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> What man needs is not just the persistent posing of ultimate questions, but the sense of what is feasible, what is possible, what is correct, here and now. The philosopher, of all people, must, I think, be aware of the tension between what he claims to achieve and the reality in which he finds himself.[38]

Gadamer's perception of the humble role of the philosopher does not provide a basis for rebuking legal theorists for overstepping their bounds. In fact, Gadamer would accept the idea that legal scholars inform the philosopher's more general work by reminding the philosopher of the activity of understanding from which the philosopher develops an understanding of understanding.[39]

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38. GADAMER, *supra* note 34, at 266, xxxviii. *Cf.* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 392 (1979):

> To drop the notion of the philosopher as knowing something about knowing which nobody else knows so well would be to drop the notion that his voice always has an overriding claim on the attention of the other participants in the conversation. It would also be to drop the notion that there is something called "philosophical method" or "philosophical technique" or "the philosophical point of view" which enables the professional philosopher, *ex officio*, to have interesting views about, say, the respectability of psychoanalysis, the legitimacy of certain dubious laws, the resolution of moral dilemmas, the soundness of schools of historiography or literary criticism, and the like.

Id. Rorty radicalizes the critique of philosophy to such an extent that he becomes an advocate of the postmodern critique that I describe *supra*.

Gadamer's persistent claim that the philosopher is unable to extricate herself from the hermeneutical circle (i.e., a historically defined and meaning-laden situation that includes a socio-political-economical culture) is challenged most forcefully in continental philosophy by Jürgen Habermas, who argues for the "quasi-transcendental" status of philosophical critique. *See* Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U. L. REV. 523, 584-96 (1988). But Habermas' claims have become more muted in recent years, and now are securely grounded in the need for interdisciplinary inquiry. JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 1-20 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990) ("Philosophy as Stand-In and Interpreter").

39. Gadamer's provocative claim that the legal historian and judge understand legal texts fundamentally in the same way is a centerpiece in his effort to develop an ontology of

C. *Gadamer and the Two Worlds Critique*

By eschewing a method or theory of interpretation, Gadamer responds both to the postmodern and expertise critiques. Nevertheless, given the nature of Gadamer's approach, interdisciplinary efforts drawing on his work seemingly remain subject to the two cultures critique. Philosophical hermeneutics does not claim authority over various interpretive practices. Rather, it represents an effort to understand understanding. On its own terms, then, philosophical hermeneutics suggests that legal practice will remain unaffected by Gadamer's thinking, and that legal theorists are mistaken to seek "answers" from his philosophy. However, Gadamer's philosophical project is not wholly disengaged from the real world of political and social struggle, as evidenced particularly in his recent writings.[40] It would be surprising if an inquiry into the conditions of understanding had no impact on legal theory, especially with regard to studying the activity of interpreting legal texts in the course of making judgments. Gadamer agrees that this impact may be indirect, but he acknowledges the impact nevertheless.[41]

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understanding grounded in the universality of the hermeneutical situation. Gadamer argues that the interpretive activity of judges "serves to remind us what the real procedure of the human sciences is. Here we have the model for the relationship between past and present that we are seeking." GADAMER, *supra* note 34, at 327-28.

40. *See* HANS-GEORG GADAMER ON EDUCATION, POETRY, AND HISTORY: APPLIED HERMENEUTICS (Dieter Misgeld & Graeme Nicholson eds., Lawrence Schmidt & Monica Reuss trans., 1992); Fred Dallmayr, *Self and Other: Gadamer and the Hermeneutics of Difference*, 5 YALE J.L. & HUMAN. 507, 508 (1993) (arguing that Gadamer's recent work "is not just a parochial ingredient of continental thought, but an important building stone in the emerging global city and in a dialogically construed cultural ecumenicism") (citation omitted).

41. *See* GADAMER, *supra* note 34, at xxxviii. By conceding only an insignificant role for intellectual authority in legal practice, Professor Collier fails to take account of the fact that institutional authority is a by-product of legitimacy, which in turn is founded in publicly redeemed conceptions of legal practice as something other than simply the exercise of institutional authority. *See, e.g.*, Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 710, 798 (1994) (arguing that the legitimacy of the Supreme Court's abortion decisions is founded on the public's perception that its decisions do not merely reflect shifts in Court personnel, but instead are constrained by rule-of-law values). Institutional authority constantly is renewed by the exercise of intellectual authority, even though intellectual authority in the American political system often degenerates into a contest between competing crude ideologies. If a majority of the populace viewed Antonin Scalia as an opportunistic hack attempting to implement a conservative agenda at any cost, the Supreme Court's institutional authority would be seriously undermined. Justice Scalia is required by legal convention to fight his battle on the plane of ideas, both in order to persuade other members of the Court to join with him and to sustain the legitimacy of the Court if they do join him. Is Justice Scalia a great legal philosopher? Hardly. Is Justice Scalia's authority derived in substantial part from his efforts to lay claim to a superior vision of law and politics that animates his decision-making? Undeniably. Which brings me back to my thesis: The use of contemporary hermeneutical philosophy to combat the naive, if not pernicious, descriptions of legal practice as "originalist" or "textualist" in nature is not a mistaken effort to collapse two distinct worlds of practice and inquiry so much as an effort to demonstrate that there is but one world.

The two cultures critique is blunted by regarding Gadamer's efforts as a model for legal hermeneutics rather than as a source of information about legal practice. It is useful to explain my idea of a model by invoking the familiar legal distinction between procedure and substance. On the procedural level, Gadamer's careful re-examination and rehabilitation of the humanist philosophical tradition exemplifies his thesis that understanding results from a fusion of horizons. His work stands as a model of dialogical understanding, regarded as working within a tradition, and displays a scholarly attitude that certainly can be employed fruitfully by legal scholars.[42] Moreover, Gadamer's philosophy provides a substantive model for legal scholarship. His conclusion that understanding entails a fusion of horizons undeniably shades any effort to discuss legal practice because it speaks to the conditions for engaging in legal practice. Philosophical hermeneutics is not a methodology of legal decision-making, nor is it a master science that answers the particular questions arising in legal theory. However, philosophical hermeneutics does provide a model of inquiry that shapes the work of legal theorists.[43]

Considered from the perspective of philosophical hermeneutics, the three critiques of interdisciplinary legal scholarship are not persuasive. Gadamer acknowledges the primacy of the activity of understanding as opposed to the conceptualization of understanding, and so his philosophy necessarily establishes connections with legal theory and the practice of law. Legal theory is not supplanted by Gadamer's efforts any more than literary theory, although both disciplines are influenced by Gadamer's ontological description of how understanding occurs in legal practice and reading literature. For example, equating the meaning of legal texts with the meaning intended to be conveyed by the drafters—originalism, in legal theory jargon—is a meaningless gesture if one accepts Gadamer's account of understanding.[44] As Gadamer forcefully contends, if the "real meaning of a text, as it speaks to the interpreter, does not depend on the contingencies of the author and his original audience [because] it is always co-determined also by the historical situation of the interpreter,"[45] then certainly the belief "that the legal practice of the present simply follows the original meaning" of a law amounts to a "legally untenable fiction."[46] However, it is important to keep in mind that Gadamer does not purport to describe what judges ought to do, nor does he attempt to describe in contextual detail how they go about their practice. Rather, he suggests only that the conditions for understanding, once acknowledged, may lead legal theorists and legal practitioners alike to see legal practice in a new light.[47]

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42. The hermeneutical ethic of inquiry "insists that there is no higher principle than holding oneself open in a conversation" with others and with the tradition. HANS-GEORG GADAMER, PHILOSOPHICAL APPRENTICESHIPS 189 (Robert R. Sullivan trans., 1985).

43. Mootz, *supra* note 38, 565-67.

44. Mootz, *supra* note 12, at 130-38; Mootz, *supra* note 38, at 542-56.

45. GADAMER, *supra* note 34, at 296.

46. *Id.* at 326.

47. In this short essay, I do not address a fourth critique of interdisciplinary legal scholarship, which I shall term the "quiescent critique." According to the quiescent critique, the flash and

III. PHILOSOPHY AND LAW: ADJUDICATION AND OBLIGATION

In part II, I supported the claim that legal theorists can benefit from investigating the lessons of philosophical hermeneutics in the course of working through a description and critique of legal practice. In this part, I claim that the reverse holds true as well—post-Enlightenment philosophers benefit from investigating the lessons of legal theory in the course of developing their thinking. Gadamer acknowledges as much in his philosophical masterwork *Truth and Method* when he contends that legal hermeneutics has exemplary significance for exploring the fundamental hermeneutical problem of describing how understanding occurs.[48] Gadamer claims to "verify" his description of the historicity of understanding by exploring "how this structural element of understanding obtains in the case of legal and theological hermeneutics."[49] Gadamer describes the activities of lawyering and judging as paradigmatic cases of interpretive understanding, but he also finds it significant (after qualifying his opinion as that of a lay person) that "jurisprudence is retreating from legal positivism."[50] It seems plain that Gadamer remains attentive not only to legal practice, inasmuch as the activity of understanding must always be the source of any philosophical inquiry into understanding, but also to its representation by legal theorists.

In his recent deconstructive attack on ethics conceived as a philosophical project, John Caputo similarly invokes a picture of legal practice and theory at a crucial juncture of his presentation, and it is with reference to this work that I discuss the relevance of legal thought to philosophy.[51] Caputo indicts ethics as an intellectual and emotional safety net erected in the face of the "tenuous and delicate situation" of "undecidability" in all matters of judgment.[52] Ethics holds out the false promise of providing "principles and criteria" to adjudicate "hard

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excitement of interdisciplinary scholarship overshadows—and eventually undermines—progressive legal critique. *See, e.g.*, ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 265, 265-98 (1993) (arguing that the move to interdisciplinary scholarship has failed to avert the disabling legacy of postmodernism: "political stagnation, moral complacency, and muting of the critical voice such as we may never have previously encountered . . ."). Gadamer's work in particular is challenged by many commentators for its purported conservative bias, but elsewhere I have argued at length that Gadamer's philosophy does not underwrite in any manner a quiescent acceptance of status quo ideologies. *See* Mootz, *Postmodern World, supra* note 2, at 160-61; Mootz, *supra* note 38, at 601-05. Thus, I accept Michael Clark's emphasis on the need for a critical approach to tradition, but I argue that Gadamer's philosophy openly accepts such a critical engagement. *See generally* Michael J. Clark, *Foucault, Gadamer and the Law: Hermeneutics in Postmodern Legal Thought*, 26 U. TOL. L. REV. 111 (1994).

48. GADAMER, *supra* note 34, at 307-41.

49. *Id.* at 329. Gadamer describes his task as "*redefining the hermeneutics of the human sciences in terms of legal and theological hermeneutics.*" *Id.* at 310-11.

50. Hans-Georg Gadamer, *Hermeneutics and Historicism, in* GADAMER, *supra* note 34, at 505, 510.

51. JOHN D. CAPUTO, AGAINST ETHICS: CONTRIBUTIONS TO A POETICS OF OBLIGATION WITH CONSTANT REFERENCE TO DECONSTRUCTION 93-122 (1993).

52. *Id.* at 3-4.

cases."[53] Ethical philosophy has been undermined irredeemably by Nietzsche's unrelenting perspectivism, but Caputo argues that we nevertheless remain under obligation.[54] He regards obligation as a fact of our existence, a fact of the flesh, that never can be made safe or certain by ethical philosophizing.[55] In the course of developing his thesis, Caputo follows Derrida by contrasting law with justice. Law is a principled abstraction that elides undecidability, whereas justice is the never fully realized response to the obligations owed to actual persons, that is, to persons with proper names.[56]

> The law inevitably, structurally, falls short of individuals, because it cannot see what it is aimed at, about which it systematically, structurally, keeps itself in the dark.
>
> Deconstruction, which "is justice," on the other hand, keeps its eye peeled for the little bits and loose fragments easily lost sight of by the law.[57]
>
> . . .
>
> Laws are always oversized or undersized, too sweeping or too narrow, more or less bad fits. A perfect set of laws would have to be cut to fit; it would have to mention everybody by name . . . .
>
> . . .
>
> We pass our days in a double bind, tossing back and forth between two impossibilities, two equally tall tales: good laws and justice in itself . . . the space between these two mythic spaces, is the real space of factical life. . . .[58]

Caputo's characterization of law is central to his attempt to dissemble ethics without denying obligation. This characterization unavoidably invites legal scholars, those who have practiced law and now profess the law, to contribute to his understanding of law in action the law of factical life.

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53. *Id.* at 4.

54. Caputo summarizes his Nietzschean impiety toward ethics in simple terms: "You and I stand on the surface of the little star and shout, 'racism is unjust.' The cosmos yawns and takes another spin." *Id.* at 17. *See id.* at 134-39, 186-92 (writing under the pseudonym "Felix Sineculpa").

55. Obligation persists after the demise of ethics because obligation is a matter of the flesh that attaches prior to reflection. A child born with AIDS, Caputo argues,

> "lays claim" to us, "seizes" us, without needing (and without having) a prior theory of the [g]ood in virtue of which we can adjudicate this to be (an) evil. . . . The being-obliged does not depend on the principle. The principle is a distillation, after the fact, of the being obliged.

Id. at 36-7. "Obligations constitute a 'language game' of their own, a language game that is not, however, a game that we play but rather, as Gadamer shows, a game that plays us, that picks us up and carries us along by its momentum." *Id.* at 25.

56. *Id.* at 69-92 ("Chapter Four: In the Names of Justice").

57. *Id.* at 87 (quoting Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 945 (1990)).

58. *Id.* at 89.

Caputo is quite willing to acknowledge the reverse—that Derridian deconstruction provides an orientation or direction to legal and political theorists.[59] But it is equally the case that the rich jurisprudential tradition of regarding legal judgments as a mediation of universal law and particularized justice would enhance Caputo's discussion and help to shape his thinking. In matters of obligation, whether ethical or legal, judgment remains problematic.[60] Judgment is an activity that cannot be avoided or postponed, so traditional philosophy attempts to keep judgment from slipping into the presumed abyss that lies between the idealized concepts of law and justice.

> We must judge even if we do not know how to judge. That is where we are. Life does not ask if we are prepared and it does not have the decency to wait until we are ready. Even though we lack a criteriology, a law of laws, we are still not dispensed from judging. We are from the start before the law, forced to act and choose, to judge and respond.[61]

Judgment is never the mere subsumption of an actual case under the dictates of law, but neither is it ever a complete response to the full particularity of the situation. Having accepted the connection between legal judgments and ethical judgments,[62] Caputo is under obligation, one might say, to understand legal

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59. Caputo makes the same point that I have made above about the legitimate connections between philosophical hermeneutics and legal theory.

> Deconstruction is a quasi theory about what political theory ought to look like, one which problematizes the idea of theory in the strong sense, and which gives an orientation or direction to a political or legal theorist working from a Derridian point of departure—such as Drucilla Cornell. . . . Deconstruction is related to political, legal, or literary theories rather the way Gadamer's "philosophical" hermeneutics is related to specific hermeneutic methods: it is a (quasi-) philosophical reflection *on* them, not an example *of* them.

Id. at 269, n.54.

60. *Id.* at 93-122 ("Chapter Five: The Epoch of Judgment"). Caputo states the central problematic of his thesis as a question: "How am I to judge, I who have come out against ethics?" *Id.* at 93.

61. *Id.* at 99.

62. *Id.* at 103. I don't believe that there is a *fundamental* difference between a judge rendering a judgment about legal matters and a person making a moral judgment in the course of everyday life, although, of course, the institutional commitments by the judge to the rule of law result in a more circumscribed and reflective exercise of judgment than often is the case in everyday life. An individual faced with a moral judgment certainly is capable of making this judgment in a judge-like fashion, just as a judge might be prone to "intuit" the correct result in a case without reasoning through the alternatives. Judges well understand that the legitimacy of their office is founded on avoiding mere intuition, and their practice (for the most part) consequently embodies practical reasoning within institutional bounds of the legal system. To the extent that judges strive to reach their judgments in a rational and principled fashion, adjudicative practice appears to be a worthy focus for ethical theorists. MARK JOHNSON, MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS 78-107, 103 (1993) (concluding that the "types of indeterminacy [that come] into play wherever we apply laws to actual historical cases exist also for our moral reasoning," and thus moral reasoning—like legal reasoning—is "often metaphorical and imaginative through and through"). Alan H. Goldman, *Legal Reasoning as a Model for Moral Reasoning*, 8 L. & PHIL. 131,

judging by doing more than relying on the word of Jacques Derrida.[63] I am not offering the law professor's version of the two cultures or expertise critiques—I welcome Caputo describing the practice of judging and drawing conclusions about the status of ethical philosophy—but I am insisting that it would be productive for him to study work by legal theorists. Lawyers who teach and write about legal judgments are particularly well-situated to describe the activity of judging and to serve as a resource for those philosophers who reject the conception of judgment as a function of the faculty of applying principles within the singularity of an event.[64] After all, a lawyer would quickly note, the common law is premised on the practice of judges deciding only the particular dispute brought before the court by persons having proper names, rather than on the practice of establishing abstract principles of law. Correspondingly, the case name is simply the names of the litigants, rather than a description of the abstract legal principle involved.

Caputo believes that invoking Aristotelian *phronesis* to describe judging is insufficiently radical, that obligation sometimes requires us to suspend the law as a "universal, uniform, sweeping, blind, relentless"[65] force and to countenance the

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139, 144 (1989) ("Moral reasoning, despite a difference in the data base [owing to the doctrine of *stare decisis* in law], shares the structure of legal reasoning . . . . In ethics, as in law, an important goal is itself the rational settlement of disputes."); Chaim Perelman, *Law and Morality, in* JUSTICE, LAW AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 114-19 (William Kluback trans., 1980).

> Practical reasoning, applicable in morality, must not be inspired by the mathematical model which is not applicable in changing circumstances, but by a knowledge characterized by reasonableness and by the taking into consideration diverse aspirations and multiple interests, defined by Aristotle as *phronesis* or prudence, and which is so brilliantly manifested in law, in Roman *jurisprudentia*.

Id. at 119. *Cf.* Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 WM. & MARY L. REV. 333 (1992) (defending the possibility of bankruptcy decision-making that is both a creative and rationally constrained adjudication of competing values presented in situations of financial distress by comparing such adjudication to individual value judgments).

63. This is true especially since Derrida's essay on the force of law is part of a large multidisciplinary symposium on the topic. *See Symposium: Deconstruction and the Possibility of Justice*, 11 CARDOZO L. REV. 919, 919-1726 (1990).

64. Caputo cannot retreat from this invitation by claiming that the factical experience of practicing lawyers is removed from the philosophical problems raised by the concept of law, for—with Gadamer—he begins by rejecting such grand designs for philosophy. Dennis Schmidt's contribution to this roundtable succinctly describes the postmodern challenge to received notions of an easy alliance between law and justice. His references to Greek tragedy, literature and Martin Luther King, Jr.'s writings seemingly confirm that the problem cannot be framed solely as a development in the philosophical tradition. Dennis J. Schmidt, *Can Law Survive?: On Incommensurability and the Idea of Law*, 26 U. TOL. L. REV. 147 (1994).

65. CAPUTO, *supra* note 51, at 115. Aristotle regards *phronesis* as "a capacity to judge and to do the right thing in the right place at the right time in the right way. The exercise of such a judgment is not a routinizable application of rules." ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 150 (2d ed. 1984). This is not simply a formal capacity for decision-making, but rather constitutes part of the "intelligence" of the person. *Id.* at 154-55.

violation of law in the name of justice.[66] This approach reinforces an unhelpful theoretical opposition that I believe mischaracterizes the activity of judging within legal practice. Caputo construes *phronesis* as "the ability to bring to bear a general schema upon the particularities of the situation," a "nimbleness and dexterity of a mind capable of coming to grips with the complexity of factical life itself" by letting one's "*logos* hang loose."[67] Understanding judging to be the exercise of this kind of *phronesis* is widespread among many judges, lawyers and even legal theorists, and usually is phrased as an acknowledgement that lawyering and judging are "crafts." However, this narrow conception has not gone unchallenged by contemporary legal theorists.[68] Alternative characterizations of legal practice suggest that judging embodies an even looser *phronesis* that does not dissolve into the suspension of law when it confronts a hard case. Legal practice suggests that judgment rests on *phronesis*, but that *phronesis* is not the craft of bringing principles to bear on a particular dispute. Instead, it represents the ability to develop and articulate principles in the course of judging the case at hand.[69] Caputo may well reject this representation of legal practice, but both

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66. CAPUTO, *supra* note 51, at 117-21. *Cf.* Anthony D'Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527, 581 (1993) (arguing from a deconstructive point of view that justice considerations unavoidably are "built into the very enterprise of affecting human behavior through law").

67. CAPUTO, *supra* note 51, at 99, 101.

68. The critical legal studies effort to demonstrate the thorough indeterminacy of legal doctrine was in large part an effort to disrupt the comforting view of judges as constrained craftspersons who shaped the law in a skillful, though not arbitrary, manner. *See, e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 (1983).

69. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345-54 (1990); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 635-37 (1990); Mootz, *Postmodern World*, *supra* note 2, at 299-301; Mootz, *Rethinking*, *supra* note 2, at 145-48.

Gadamer prefaces his discussion of the possibility of truth in the human sciences with an extended critique of IMMANUEL KANT, CRITIQUE OF JUDGMENT (J.H. Bernard trans., 1951) (1790). GADAMER, *supra* note 34, at 42-81. Gadamer argues that Kant cabined judgment as a minor, subjective supplement to the pure reason and practical reason of the first two critiques. *But see* RUDOLPH A. MAKKREEL, IMAGINATION AND INTERPRETATION IN KANT: THE HERMENEUTICAL IMPORT OF THE *CRITIQUE OF JUDGMENT* 154-71 (1990) (arguing that Gadamer, along with most commentators, gives too narrow a reading of *Critique of Judgment*, and concluding that Kant well recognized the "orientational" significance to reflective judgment). Makkreel suggests that Kant accepted Gadamer's principle point, and that the commonly presumed hierarchy of Kant's critiques—mirroring their chronology—is in fact inverted. *Id.* at 170. *See also* JOHNSON, *supra* note 62, at 65-76 (arguing that Kant's moral philosophy is metaphoric and imaginative despite his professed project of outlining a theory of pure practical reason); Schmidt, *supra* note 64, at 154-55. Gadamer rehabilitates Aristotelian *phronesis* as a central feature of his hermeneutical philosophy by drawing substantially from his recharacterization of aesthetic understanding as a de-centering "playing," GADAMER, *supra* note 34, at 101-69, 312-24, 399, and therefore he provides a more radical accounting of *phronesis* than simply equating it with a capacity for employing universal laws in a given situation.

he and legal theorists will benefit from a dialogue about questions of mutual concern.

Gadamer's account may profitably be compared with Caputo's critique of *phronesis* and ethics by considering the historical novel *Schindler's List.* THOMAS KENEALLY, SCHINDLER'S LIST (1982) (describing the efforts of a German industrialist to safeguard Jewish prisoners from the Nazi death camps during World War II). Caputo rejects ethics in favor of acknowledging the obligations owed to persons having proper names, which seemingly is the situation in which the improbable hero, Oskar Schindler, found himself. Early in the book, Schindler dramatically rescues his office manager, Abraham Bankier, and several other workers from his factory who had been rounded up and herded onto a train headed for the Belzec death camp.

> Beginning from the engine, Schindler moved along the line of more than twenty cattle cars, calling Bankier's name to the faces peering down at him from the open grillwork high above the slats of the cars. It was fortunate for Abraham that Oskar did not ask himself why it was Bankier's name he called, that he did not pause and consider that Bankier's had only equal value to all the other names loaded aboard the *Ostbahn* rolling stock. An existentialist might have been defeated by the numbers at [the depot], stunned by the equal appeal of all the names and voices. But Schindler was a philosophic innocent. He knew the people he knew. He knew the name of Bankier. "*Bankier! Bankier!*" he continued to call.

Id. at 123-24. *See id.* at 319 (telling how Schindler extricated certain women prisoners—his workers—from certain death in Auschwitz and refused the offer by the S.S. to supply him with an equal number of healthier Jewish prisoners "out of the endless herd" entering Auschwitz). Schindler's overpowering sense of obligation seemingly served as a constant check on the urge to postulate wider ethical principles, thereby permitting heroic local action rather than a surrender to abject despair and impotence. As the horror of the incipient holocaust begins to become clear to Schindler, he makes a pledge to the accountant, Itzhak Stern:

> "I'm going to get you out," Oskar grunted all at once. He put a balled fist on the desk. "I'm going to get you *all* out."
>
> "All?" asked Stern. He couldn't help himself. Such massive Biblical rescues didn't suit the era.
>
> "You, anyhow," said Oskar. "*You.*"

Id. at 256. Schindler appears to acknowledge Caputo's theme: Obligation is real and matters, whereas ethical dictates are ephemeral and impotent.

But it seems doubtful that ethics can be so thoroughly dismantled, if by ethics we mean just the ability to reason about one's obligations. Schindler did not only save his workers, people whose names and stories he had learned, he also pulled anonymous Jews from the horrific pipeline of death. *Id.* at 353-58. Schindler may not have been able to construct a pristine and uncontroversial ethical philosophy precisely justifying his actions, but neither did he fail to conceive of his obligations in terms wider than "I will save *you.*" Gadamer's reformulation of Kantian aesthetics attempts to elevate the reflective judgment of *phronesis* to a constitutive feature of understanding, without reducing *phronesis* to a technical aptitude for rule application. Accepting that rules are known only in their application does not lead to the conclusion that rules, always inchoate and open to challenge, are irrelevant. The deplorable inability to make defensible judgments on wider grounds than obligation lies at the heart of Keneally's pointed question about the S.S. officer who assisted Poldek Pfefferberg by arranging for his family's names to be placed on Schindler's list of protected workers. "It is a human puzzle why men like Schreiber didn't in such moments ask themselves, *If this man and his wife were worth saving, why weren't the rest?*" *Id.* at 298.

IV. SUMMATION

Legal theory is no less divided in its conception of judging than philosophy is in its conception of ethics. Interdisciplinary exchanges between law professors and professors of philosophy are valuable, but not because they will lead to answers that otherwise would elude thinkers within their respective disciplines. In fact, these exchanges promise only to foster more vigorous questioning and sharper debates within the two disciplines. Nevertheless, such exchanges are productive. The project of philosophical hermeneutics and the project of developing an anti-foundationalist account of legal practice inevitably fold into one another, as mutually destabilizing and edifying supplements that lead to increased understanding.

As I have suggested above, it would be a mistake to believe that an encounter between philosophical hermeneutics and jurisprudence will lead to increased understanding only at a theoretical level. Interdisciplinary legal scholarship should not have the effect of severing the legal theorist from legal practice. Instead, it should represent an effort by legal scholars to join philosophical themes to legal practice. Gregory Leyh recently has argued that philosophical hermeneutics might help to transform legal practice by providing broad guidelines for reforming law school curricula in order to impart "an understanding of law's past and of the constitutive connections between law and wider culture."[70] Such an approach to legal education, deeply informed by Gadamer's philosophy, would reject a characterization of lawyers as hired-gun technicians. Rather, this approach would promote the older model of lawyers as important participants in the social and political communities within which they practice,[71] and simultaneously would challenge the model of philosophers and legal theorists inhabiting the proverbial ivory tower.[72] I can think of no better reasons to relate contemporary hermeneutical philosophy to legal theory.

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70. Gregory Leyh, *Legal Education and the Public Life*, *in* LEGAL HERMENEUTICS, *supra* note 14, at 269, 281.

71. *Id.* at 283.

72. Hans-Georg Gadamer, *The Diversity of Europe: Inheritance and Future*, *in* GADAMER, *supra* note 40, at 221 ("The myth of the ivory tower where theoretical people live is an unreal fantasy. We all stand in the middle of the social system.").