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Psychotherapeutic Practice as a Model for Postmodern Legal Theory

Francis J. Mootz III*

Whatever philosophy is, it must be seen as a natural propensity within us all rather than as some sort of professional skill or ability. I ask of you, then, that my contribution today be understood not as that of a specialist who has answers to all the questions, but rather as that of one who is simply putting forward his own reflections alongside everyone else's.

—Hans-Georg Gadamer¹

A note for physicians: if you listen carefully to what patients say, they will often tell you not only what is wrong with them but also what is wrong with you.

—Walker Percy²

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INTRODUCTION

A. Critical Legal Theory in Crisis

Critical legal theory is in need of reconstruction and rehabilitation. By most accounts, the goal of critical legal theory is to reveal the deep structure of the legal system that remains unrecognized in, and even obscured by, the self-understanding of legal actors. Scholars traditionally moved beyond the superficial level of legal doctrine either by adopting a rationalistic orientation and analyzing legal concepts or by adopting an empiricist orientation and analyzing the economic and sociological features of legal institutions. However, during the past thirty years there has been a tremendous diversification in these critical approaches. For example, the critical legal studies movement has generated a variety of neo-Marxist critiques of legal ideology, law and economics scholars have argued that legal legitimacy is grounded in the maximization of economic efficiency, and advocates of “voice” scholarship have worked to expose the gendered, racist, and homophobic elements of law. In the new scholarly environment everyone seems to be doing critical theory, but as a result of this diverse expansion the very enterprise of critical theory now appears chaotic and disjointed.

Some postmodern theorists contend that critical legal theory has been rendered impotent even as it has become ubiquitous for the simple reason that its goal cannot be achieved. They argue that the growing cacophony of critical voices is a symptom of the false hope of modernity that the power of reason can elevate us above the flux of existence to perceive a stable realm of (hidden) reality. Stanley Fish is a particularly vigorous advocate for this view that much of critical legal theory is a relic of the receding modern era. He eviscerates theoretical reflection to the point that it is competent only to describe the impotence of theory. In particular, he contends


that critical theory cannot gain a privileged perspective on legal practice either because it is a separate (academic) practice that holds only tangential relevance to legal practice, or because it is simply a rhetorical move within legal practice that can make no defensible claim to serve as the arbiter of the validity of legal practice. Despite critical theorists’ claims to be radically progressive, Fish insists that they continue to build on the unstable cornerstone of Enlightenment ideology: the belief that the universalizing powers of reason can overcome the bias and parochialism of localized social practices.

Notwithstanding the flamboyant attacks by Fish and others, a number of prominent scholars continue to defend the project of critical theory. In response to postmodern challenges, Jürgen Habermas recently has developed a reconstruction of critical legal theory that incorporates both rationalist and empiricist traditions. Habermas attempts to rein in critical theory without subsuming its many diverse voices. Although he concedes substantial ground to the postmodern critics of Enlightenment ideology, Habermas struggles to provide the last, best defense of legal theory in the gathering postmodern darkness. But even Habermas's impressive synthesis is unlikely to beat back the growing postmodern ennui. Grounded in Kantian aspirations, Habermas's critical legal theory appears unlikely to unite contemporary critical legal theorists, many of whom have abandoned all modernist aspirations in the face of the postmodern critique.

And so it is not being overly dramatic to pose some very basic questions. What is the function of critical legal theory? What authority underwrites such critique? What is the relationship between critical legal theory and legal practice? The purpose of this Article is to take these fundamental questions seriously by demonstrating that critical legal theory is something other than an

5. For example, Fish argues that Ronald Dworkin’s jurisprudential defense of principled normative decision making, “however persuasive or unpersuasive it might be,” is irrelevant to legal practice because no theoretical account can deliver a “program according to which a judge might generate his practice.” FISH, DOING WHAT COMES NATURALLY, supra note 4, at 357.


entirely distinct (academic) practice or simply part of the flow of legal practice itself. Elsewhere I have argued that Hans-Georg Gadamer's philosophical hermeneutics—especially when informed by contemporary rhetorical theory—delivers the most accurate and sophisticated description of the activity of legal practice.\(^9\) In this Article I will press beyond my earlier accounts by reflecting on the activity of theorists who simultaneously participate in and critique the reality that Gadamer describes. My objective is to provide a plausible theoretical account of the practice of critical theory that will motivate critical theorists to revise their self-understanding in a manner that might indirectly facilitate their practice.

What does a theorist do when she purports to criticize law from a theoretical perspective, and what can she hope to accomplish? My thesis is that critical legal theory is a distinct form of reflection that never secures inviolable and universal truths, but that does gain perspective on social practices in a distinctive manner. I rehabilitate and justify the activity of critical legal theory, but in doing so I defend only a circumscribed (postmodern) conception of theory. Restated in traditional jurisprudential terminology, critical legal theory does not collapse into the wholly conventional "internal perspective" of unreflective legal actors, but neither does it enable the theorist to achieve the "external perspective" of a neutral observer capable of studying law as an object.\(^10\)

My defense of critical theory remains attentive to the fact that critique can be a practical experience as well as a theoretical project. A lawyer might one day experience a critical shift in her understanding of the legal system, as would be the case if in mid-career she suddenly views law as a system that has its own imperatives and that is only loosely controlled by individual actors. This experience is critical in nature, but, standing alone, it is not a critical theory about law. Even Stanley Fish readily acknowledges


\(^10\) See Richard L. Schwartz, Internal and External Method in the Study of Law, 11 LAW & PHIL. 179 (1992). Doug Litowitz recently has argued that legal theorists must adopt both an internal and an external perspective if they are to achieve a sophisticated understanding of law. See Douglas E. Litowitz, Internal Versus External Perspectives on Law: Toward Mediation, 26 FLA. ST. U. L. REV. 127 (1998). I wish to make a more radical argument. The external perspective (critique) is inextricably bound up with the internal perspective (practice), and must be viewed not as a different perspective to be adopted by a theorist as much as a different comportment (e.g., working as a practicing lawyer trying to win a case but then later working as a law professor writing an article on critical race theory) within the finite perspective that is our lived existence.
the practical experience of critique, but he regards it as a quasi-
magical event that is utterly incapable of being planned or 
consciously generated. Critical encounters with the legal system 
might occur everyday, Fish agrees, but there is not much more one 
can do or say about it.11 I confront this misguided abandonment of 
reason and theory by connecting the practical experience of critique 
with theoretical elaboration. Critical legal theory undoubtedly is 
rooted in the critical experiences of legal practice, but it is not 
equivalent to them. At the same time, critical legal theory does not 
occupy a privileged cognitive realm that is wholly distinct from legal 
practice.

My reconstruction of critical legal theory unavoidably is reflexive, 
since my theoretical inquiry is an example of the kind of critical 
theory that I am attempting to describe. The critical theorist, no less 
than the legal actor, is enmeshed in a historically emerging social 
situation that is secured and shaped by ongoing interpretive 
practices. Although this reflexivity renders even Habermas’s 
minimalist Kantian aspirations problematic, it need not condemn the 
critical theorist to Fish’s diagnosis of impotence. Reflexivity poses a 
problem only to the extent that one is working from a modernist 
conception of theory. Reflexivity is not an impediment to critical 
legal theory under my account but rather is the mainspring of the 
critical project. In this Article I embrace the reflexivity of my project 
by arguing that psychotherapeutic practice provides an excellent 
model of critical theory, precisely because psychotherapists explicitly 
acknowledge that reflexivity plays a central role in their practice.

B. Psychotherapeutic Practice as a Model of Critical Theory

If the term “critical legal theory” is to have any significance, it 
must be grounded in the practical experience of critical insight and 
yet still be distinguished from practice. My thesis is that the practice 
of psychotherapy provides the best model of a postmodern 
conception of theorizing because psychotherapy is a practical activity 
in which the therapist adopts a distinct theoretical posture while she 
is working with a client. For example, a psychotherapeutic model is

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11. Fish argues that theory cannot justify, regulate, or change practice, but that this fact is 
not troubling because there is no “need for anything outside the system to impel it forward.” 
Fish, Play of Surfaces, supra note 4, at 312. Pierre Schlag has offered one of the most insightful 
criticisms of Fish’s position, see Pierre Schlag, Fish v. Zapp: The Case of the Relatively 
Autonomous Self, 76 GEO. L.J. 37 (1987), but he is unpersuasive when he attempts to distance 
his radical critique from Fish’s signature observation that theory holds no consequences for 
practice. See Pierre Schlag, “Le Hors de Texte, C’est Moi”: The Politics of Form and the 
Domestication of Deconstruction, 11 CARDozo L. REV. 1631, 1646 n.41 (1990). This 
congruence in the thinking of two philosophical adversaries about the efficacy of critical legal 
theory reveals the depth of the crisis of self-confidence that I am confronting in this Article.
superior to a literary theory model. The law and literature movement has been criticized from the beginning because the study of literature in the academy is fundamentally different than the practice of law. After all, legal interpretation occurs within a political structure empowered to imprison and execute, whereas literary criticism is carried out within a bureaucratic institution authorized only to set travel budgets and schedule class meetings. Psychotherapeutic practice provides a much better model for legal theory because it involves a theoretically informed activity that has direct and substantial (at times even life-or-death) real world effects. By exploring the ways in which critique and critical theory are manifested in psychotherapeutic practice, we can better address fundamental questions about the function, authority, and efficacy of critical legal theory.

My use of psychotherapeutic practice as a model of critical theory is not without important precedent. In the 1960s Jürgen Habermas and Hans-Georg Gadamer debated the significance of Freudian psychoanalysis for critical theory. Because it has substantially informed contemporary understandings of critical theory, in Part I of this Article I review this much-reported debate in detail. The Gadamer-Habermas debate provides an important, and perhaps inevitable, touchstone for a focused assessment of critical legal theory. After describing the two views, I demonstrate that the debate was unproductive because both philosophers were unduly shaped by Freud's psychoanalytic theories, which subsequently have been discredited.

In Part II, I revisit the debate by assessing more recent writings by Gadamer and Habermas. In their debate, Gadamer was the relentless critic of Habermas's attempt to "psychoanalyze" society, whereas Habermas resolutely defended the epistemological legitimacy of critically assessing social self-understanding. However, subsequent work by both philosophers has clarified their original positions, which unfortunately have been frozen in time and reduced to caricatures in the secondary literature. I demonstrate that

13. In earlier articles I have argued in detail that Gadamer's philosophical hermeneutics can be "applied" to the legal setting quite directly and with great profit, working from Gadamer's claim at a critical juncture of Truth and Method that legal practice has "exemplary significance" for his philosophical argument. See sources cited supra note 9; HANS-GEORG GADAMER, TRUTH AND METHOD 324-41 (Joel Weinsheimer & Donald G. Marshall trans., Crossroad, 2d rev. ed. 1989) (1960). Although Habermas couches Between Facts and Norms as a particular application of his theory of communicative rationality and discourse ethics, he clearly sees direct and important connections between his broader work and the more specific concerns of legal theorists. For these reasons, I have elected to begin this Article with an extended discussion of the Gadamer-Habermas debate over critical theory.
Gadamer's position has evolved into a sophisticated understanding of psychotherapeutic practice that suggests productive applications for defining critical theory, whereas Habermas has continued to follow an unsatisfactory approach.

I am not suggesting that legal theorists can or should seek to "psychoanalyze" the legal system and its participants from a privileged perch of analytic remove. Such a modernist conception of the role of critical theory has no place in my postmodern account because it rests on a gross misrepresentation of psychotherapeutic practice. In Part III, I describe the broad contours of an emerging postmodern account of psychotherapeutic practice that will serve as my model. I then connect this emerging model to Gadamer's present understanding of the philosophical significance of the experience of psychotherapy. Under this model, critical theory is connected with the critical experiences of practice, rather than elevated above practice as an acontextual and atemporal standard of judgment.

Properly oriented by the foregoing investigations into critical theory in general, in Part IV, I bring the psychotherapeutic model to bear on the more specific venue of critical legal theory. When psychotherapeutic practice is conceived in postmodern terms—as a hermeneutical-rhetorical event without fixed foundations—this application is rather straightforward. I present my findings dialogically, by engaging and assessing the work of the prominent critical legal theorist Peter Goodrich. I argue that his psychoanalytically-informed critical legal theory falls victim to the deficiencies of the psychoanalytic model when he expressly invokes it as a guide for his critical project. Nevertheless, the primary thrust of Goodrich's work is productive precisely because he exemplifies the psychotherapeutic model when he abandons overt psychoanalytic language. My objective is not to clarify the nature of Goodrich's critical endeavors by importing authority from a privileged foreign discipline, but instead to confirm the similarities that extend across different practices and disciplines and to identify important conceptual resources legal theorists can use to develop more productive paths of inquiry. I wish to instill confidence in the project of critical legal theory by developing a new understanding of what critical legal theory entails, thereby shaping the activities of critical theorists.

In summary, my goal in this Article is to provide a comprehensive response to foundational questions about the function, authority, and efficacy of critical legal theory by adopting a psychotherapeutic model of critique, by deriving this model from the recently articulated postmodern conception of psychotherapy, and then by illustrating how this model clarifies the project of critical legal
theory. What emerges from my discussion is not a blueprint for carrying out a critique of law, but rather an acknowledgment of the ways in which critical engagements occur and the role of theory in facilitating these engagements. A postmodern defense of critical legal theory necessarily abandons strong theoretical claims, but it is possible to do so without surrendering the critical project to postmodernist anxiety and its attendant quiescence.

I. THE GADAMER-HABERMAS DEBATE: ORIGINS OF THE MODEL

My claim that psychotherapeutic practice provides an illuminating model of the task of critical legal theory revives a line of inquiry with an impressive heritage. Thirty years ago, Gadamer and Habermas debated the significance of Freudian psychoanalytic theory for the project of critical social theory. Habermas argued that social critique was predicated on a “depth hermeneutic” that looked behind socially constructed meanings and revealed the ways in which such social meanings were systematically distorted. Habermas insisted that the critical theorist, like the Freudian psychoanalyst, does not draw solely from her native linguistic competence as a member of society to eradicate mistaken understandings. Rather, she assumes the status of an expert who is capable of decoding surface meanings to reveal a deeper, unacknowledged reality, which is inaccessible to the members of society who lack the benefit of her theoretical grounding. Gadamer responded by insisting that Habermas was seriously misguided in making this analogy because the physician’s role of reintegrating an individual patient into a shared lifeworld is fundamentally different than the role of the social critic. Gadamer emphasized that the asymmetrical roles of physician and patient in the analytic context are a limit situation; in general, no person can gain sufficient purchase on the lifeworld in which she is immersed to enable her to serve as an expert of social dysfunction in the same manner as a psychoanalyst.

I begin my defense of a psychotherapeutic model of critical legal theory by reviewing this debate in some detail. The current crisis in critical legal theory can be traced to the apparent stalemate in the famous Gadamer-Habermas exchange. Only by moving beyond the positions staked out in this debate is it possible to reconstruct critical legal theory in the face of the postmodern challenge.

A. Habermas’s Psychoanalytic Model of Depth Hermeneutics

Habermas’s prolific and wide-ranging scholarship centers around his earnest attempt to justify the Enlightenment faith that reason is sufficiently powerful to outline the path of social progress,
notwithstanding his post-metaphysical acknowledgment that the Enlightenment conception of reason was mistakenly limited to empirical and logical modes of thinking. In his pathbreaking book *Knowledge and Human Interests*, Habermas pursues this theme in the form of philosophical anthropology. Habermas argues that reason is embodied in different human interests, which he defines as "the basic orientations rooted in specific fundamental conditions of the possible reproduction and self-constitution of the human species, namely *work* and *interaction*." He characterizes the former as a technical cognitive interest embodied in the empirical-analytical sciences and the latter as a practical cognitive interest embodied in the historical-hermeneutical sciences. Thus, his defense of Enlightenment values begins by rejecting the Enlightenment project of gaining interest-free knowledge: "Although the sciences must preserve their objectivity in the fact of particular interests, the conditions of possibility of the very objectivity that they seek to preserve include fundamental cognitive interests."

Epistemology is inevitably bound up with social theory, according to Habermas, since reason takes shape only with the historical trajectory of a society's attempt to respond to these fundamental human interests.

Habermas recognizes that his approach threatens to dissolve reason into separate spheres of objectivism and psychologism, neither of which can provide an epistemological basis for critical theory. In response, he emphasizes that the very recognition that human interests subtend empirical and hermeneutical knowledge reveals that reason is subject to a third human interest—the interest in reason itself. "We can say that [reason] obeys an emancipatory cognitive interest, which aims at the pursuit of reflection," since "we can methodologically ascertain the knowledge-constitutive interests of the natural and cultural sciences only once we have entered the dimension of self-reflection. It is in accomplishing self-reflection that reason grasps itself as interested." Distinguished from the technical manipulation of the natural world and the effort to reach a shared understanding with others, self-reflection arises from an independent yet co-primordial human interest in emancipatory reflection. Characterizing Nietzsche's perspectivism as a dispirited and misguided response to his revolutionary insight that knowledge is

15. *Id.* at 196.
17. HABERMAS, supra note 14, at 198.
18. *Id.* at 212.
tied to human interest, Habermas reconstructs epistemology as a social theory in order to ground the critical power of self-reflection.\textsuperscript{19} Freud's psychoanalytic theory represents a decisive moment in our intellectual tradition, according to Habermas, precisely because it directly takes into account this "new dimension" of knowledge.\textsuperscript{20}

Habermas's first task in employing a Freudian model of critical theory is to distance himself from Freud's theoretical self-understanding. Misled by the overpowering ideology of positivism, Freud legitimated his psychoanalytic practice with biological/empirical terms that concealed the distinct cognitive interest served by radical self-reflection. Freud "viewed his theory precisely not as systematically generalized self-reflection, but as strict empirical science. Freud did not take methodological cognizance of the characteristic that distinguishes psychoanalysis from both the empirical-analytic and exclusively hermeneutic sciences."\textsuperscript{21} Notwithstanding this \textit{theoretical} mistake, Freud's psychoanalytic \textit{practice} involved a broader critical inquiry that Habermas finds to be a compelling model for social critique.\textsuperscript{22} In Freud's practice, the psychoanalyst is not attempting to interpret ambiguous statements or actions, nor is she seeking a technical mastery of human physiology.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{19} Habermas writes:
Nietzsche shares the blindness of a positivist age in respect of the experience of reflection. He denies the status of \textit{knowledge} to the critical recollection of self-generated illusory that has become independent and opposed to the subject—that is, to the self-reflection of false consciousness..... Nietzsche is so rooted in basic positivist beliefs that he cannot systematically take cognizance of the cognitive function of self-reflection from which he lives as a philosophical writer.

The history of the dissolution of the theory of knowledge into methodology is the prehistory of modern positivism. Nietzsche wrote its last chapter. As a virtuoso of reflection that denies itself, he simultaneously developed and misinterpreted in an empiricist manner the connection of knowledge and interest.

\textit{Id.} at 298-300.
\item \textsuperscript{20} \textit{Id.} at 215.
\item \textsuperscript{21} \textit{Id.} at 189.
\item \textsuperscript{22} Habermas argued that Freud's clumsy theoretical explanations add nothing to Freud's explication of the techniques utilized in psychoanalytic dialogue. In fact, Freud's reductionist epistemological framework led to a curious situation:
The language of the theory is narrower than the language in which the technique was described..... [W]hat does not appear among ego functions on the metapsychological level is the movement of reflection, which transforms one state into another—which transforms the pathological state of compulsion and self-deception into the state of superseded conflict and reconciliation with excommunicated language. Strangely enough, the structural model denies the origins of its own categories in a process of enlightenment.

\textit{Id.} at 244.
\item \textsuperscript{23} Habermas emphasizes that the psychiatrist does not enable a patient to reach understanding with other persons by refining the patient's hermeneutical capacities, but rather looks behind the patient's apparently competent hermeneutical understandings to reveal the systematically distorted communication that results in a "communication disturbance within himself." \textit{Id.} at 227. At the same time, Habermas emphasizes that psychoanalysis "does not
Instead, the analyst guides the patient through a process of self-reflection that has an emancipatory effect by correcting internal disturbances that lie below the ordinary level of hermeneutical understanding, disturbances that amount to a “faulty organization of speech itself” and that result in “systematically distorted communication.”24

Habermas contends that the critical social theorist adopts the same posture toward society that the psychiatrist adopts toward a patient. “The role of the social theorist is to render those to whom he speaks autonomous by enabling them to understand their own situation in the social world. What in the individual is self-reflection is in a society self-education.”25 Habermas characterizes “the form of argumentation that serves to clarify systematic self-deception as therapeutic critique,”26 and he regards this critical intervention as a necessary prerequisite for unconstrained discourse in society. Because the purpose of the analysis is to establish the appropriate conditions under which normal dialogue can take place, psychoanalytic practice requires that the participants temporarily abandon the effort to approximate the ideal speech situation, effectively elevating the psychiatrist to more than a mere conversation partner.27 The social critic, no less than the analyst, employs a different kind of persuasion and reasoning in therapeutic critique, since she is not seeking mutual understanding as she would in ordinary dialogue but rather is helping the “patient” to reconstruct and explain his mistaken self-understanding in an

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27. Habermas explains:

A therapist’s critique of his patient’s self-deceptions can, of course, also be understood as an attempt to influence attitudes by means of arguments, that is to convince the other. . . . Nevertheless, there is not the relation here between a problematic validity claim and discourse proper. . . . In a therapeutic dialogue directed to self-reflection, some important presuppositions for discourse in the strict sense are not fulfilled: the validity claim is not regarded as problematic from the start; the patient does not take up a hypothetical attitude toward what is said; on his side, it is by no means the case that all motives except that of cooperatively seeking the truth are out of play; the relations between the partners in dialogue are not symmetrical, and so on. Nonetheless, in the psychoanalytic view, the healing power of analytic dialogue owes something to the convincing force of the arguments employed in it.

Id. at 41-42.
emancipatory manner.

Oriented by this model of critical theory, Habermas sharply criticizes the complacency that Gadamer’s philosophical hermeneutics demonstrates regarding the deep background agreements that subtext ordinary social discourse oriented toward reaching agreement. Habermas distinguishes critical theory from hermeneutical understanding by placing the two in a vertical hierarchy of inquiry. Hermeneutics is concerned with the process of coming to mutual understanding, whereas critical social theory is a “depth hermeneutic” that provides a theoretically-backed assessment of the necessary conditions for such mutual understandings to be deemed rational.28 Habermas’s challenge is to provide a sufficient theoretical backing for his project in the wake of his pointed criticism of Freud’s theoretical failings and self-misunderstandings. Habermas explicitly refuses to abandon psychoanalytic theory despite Freud’s errors, arguing instead that Freud’s practice anticipates a theoretical understanding of how systemic distortions within an individual result in neuroses, regardless of Freud’s unsatisfactory adoption of a biological model.29

At the end of his career, Freud attempted to extend his theory from the task of removing systemic distortions within the individual to the very different task of identifying neurotic distortions embedded within the society itself.30 Freud recognized that social critique poses a special problem: When the theorist moves beyond the bounded activity of enabling an individual to resume “normal” discourse within a given social context, there appears to be no baseline from which the analyst can work.31 Habermas responds to this challenge by returning to the heart of Freud’s “talking cure.” “Both the pathology of social institutions and that of individual consciousness reside in the medium of language and of

28. Habermas contends that “hermeneutical consciousness is incomplete so long as it has not incorporated into itself reflection on the limit of hermeneutical understanding.” Habermas, supra note 24, at 302. He later explains the distinction between the two levels of understanding: “Consequently, depth-hermeneutical understanding requires a systematic preconception which has to do with language as a whole, whereas hermeneutical understanding begins, in each case, from a preconception defined by the tradition which is formed and altered within linguistic communication.” Id. at 311.

29. Habermas writes, “Psychoanalysis does not grant us a power of technical control over the sick psyche comparable to that of biochemistry over a sick organism. And yet it achieves more than a mere treatment of symptoms, because it certainly does grasp causal connections, although not at the level of physical events.” HABERMAS, supra note 14, at 271.


31. Habermas writes, “For the individual, the institutional framework of the established society is an immovable reality. . . . But for the species as a whole, the boundaries of reality are in fact movable.” Id. at 280.
communicative action and assume the form of a structural deformation of communication."32 By taking the "linguistic turn," Habermas overcomes Freud's positivism: Language is not just the medium of psychoanalytic dialogue; language is the source of critical standards that guide emancipatory self-reflection.

It is no accident that the standards of self-reflection are exempted from the singular state of suspension in which those of all other cognitive processes require critical evaluation. They possess theoretical certainty. The human interest in autonomy and responsibility is not mere fancy, for it can be apprehended a priori. What raises us out of nature is the only thing whose nature we can know: language. Through its structure, autonomy and responsibility are posited for us. Our first sentence expresses unequivocally the intention of universal and unconstrained consensus. Taken together, autonomy and responsibility constitute the only Idea that we possess a priori in the sense of the philosophical tradition.33

Thus, Habermas's psychoanalytic model of critical social theory anticipates his recent sustained efforts to develop a communicative account of reason.34

Habermas offers an extremely sophisticated account of Freudian psychoanalysis to serve as a model of critical social theory. By looking only to Freud's practice of engaging in a reintegrative dialogue with patients rather than to Freud's questionable metapsychology and theoretical defense of his practice, Habermas

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32. Id. at 288. See also Habermas, supra note 24, at 314-15.
33. HABERMAS, supra note 14, at 314.
34. This anticipation is revealed clearly in the following passage from Habermas's response to Gadamer:

Explanatory understanding, as a depth-hermeneutical deciphering of specifically inaccessible expressions, presupposes not only, as simple hermeneutical understanding does, the trained application of naturally acquired communicative competence, but a theory of communicative competence as well. Such a theory concerns itself with the forms of the intersubjectivity of language and the causes of their deformation. I do not maintain that, at present, a theory of communicative competence has been satisfactorily undertaken, much less explicitly developed. Freud's metapsychology would have to be freed of its scientific misconception of itself before it could serve fruitfully as part of a metahermeneutics.

Habermas, supra note 24, at 312. Habermas originally supposed that this explanatory theory would follow a Freudian orientation that looked to a pre-linguistic symbolic structuring as the source of disturbances that were only revealed in language, tracking a Chomskyian effort to uncover the cognitive presuppositions of language. See id. at 309. Subsequently, Habermas has discerned a universal structure and developmental logic within the use of language. See JÜRGEN HABERMAS, Moral Consciousness and Communicative Action, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 116 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990) (1983) [hereinafter HABERMAS, Moral Consciousness]; JÜRGEN HABERMAS, What is Universal Pragmatics?, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 1 (Thomas McCarthy trans., Beacon Press 1979) [hereinafter HABERMAS, EVOLUTION OF SOCIETY].
reaffirms that he has abandoned grand metaphysical theorizing. Habermas does not adopt a simplistic account of psychoanalysis as a technology and then attempt to "psychoanalyze" society. Nevertheless, Habermas’s general insight that language is the ground of critical theory no less than it is the ground of psychoanalytic practice reveals that he too is at risk of falling victim to Freud’s desire to develop an unassailable theoretical foundation for his practice. This risk is the entry point for Gadamer’s critique.

B. Gadamer’s Hermeneutical Critique of Habermas’s Model

Hans-Georg Gadamer has steadfastly criticized Habermas’s attempt to identify an independent epistemological ground for emancipatory critique. Yet Gadamer’s fundamental criticism should not obscure his broad and substantial agreement with Habermas. Both share the goal of moving beyond the philosophy of subjectivity in order to reveal the intersubjective experience of human understanding. Gadamer shares Habermas’s emphasis on the radically social dimension of knowledge by regarding language as an intersubjective site for hermeneutical experience rather than simply a tool used by an individual to convey information. It is in their elaboration of this social dimension of knowledge that the two part ways. Gadamer argues that understanding and knowledge emerge from hermeneutical experience and never become the products of a methodological attitude that can transcend an individual’s situated perspective.

Gadamer begins with the claim that language is hermeneutical all the way down, and that Habermas errs in trying to establish a ground for critique that transcends the interpreter's horizontal existence within a tradition. Gadamer’s argument against the transcending power of critique is aptly summarized by Thomas McCarthy as a claim that reflection "is no less historically situated, context-dependent, than other modes of thought. In challenging a cultural heritage one presupposes and continues it." For Gadamer, every critical challenge to the tradition is always a hermeneutical development of the tradition; the critic remains enmeshed in the intersubjective dimension of understanding that she appraises. This is the import of the enigmatic title of Gadamer’s masterwork, *Truth and Method*. Truth is constitutive of the situation in which a critic

35. Fred Dallmayr writes that the complexity of the debate between Gadamer and Habermas “derives from the lack of bipolarity, from the intricate mixture of conflict and consensus between the two contestants.” FRED R. DALLMAYR, TWILIGHT OF SUBJECTIVITY: CONTRIBUTIONS TO A POST-INDIVIDUALIST THEORY OF POLITICS 284 (1981).
36. MCCARTHY, supra note 16, at 188.
lives, rather than the product of a methodological process of abstraction.

This theme emerges most clearly in Gadamer’s discussion of the principle of “effective-history” (Wirkungsgeschichte), by which he means that “in all understanding, whether we are expressly aware of it or not, the efficacy of history is at work.” In a negative sense, Gadamer means that it is impossible for a critic to step outside her historical situation. However, Gadamer makes clear that the principle of effective-history not only designates a limit, but also affirms the positive character of human understanding. Although unable to remove herself methodologically from the flux of existence to grasp the past as a completed story, a critic does experience the past as a presently-lived reservoir of potentiality. Efforts to describe the “historical development” of a society as a closed topic that can be surveyed critically from a distance in fact embody a peculiarly anti-historical posture. “As soon as history is in play, what matters is not what is merely given, but, decisively, what is new. Insofar as nothing new, no innovation, and nothing unforseen is present, there is also no history to relate. Destiny also means constant unpredictability.” The Marxist theory of historical materialism,

37. GADAMER, supra note 13, at 301.
38. In a recently translated book on the history of the Western philosophical tradition, Gadamer explains that the finite character of human existence that renders all understanding thoroughly historical is paradoxically the condition that enables understanding to rise above solipsism and subjectivism. He writes:

This means, above all, that it is not correct to assert that the study of a text or a tradition is completely dependent upon our own decision making. Such a freedom, such a standing at a distance from the examined object simply does not exist. We all stand in the life-stream of tradition and do not have the sovereign distance that the natural sciences maintain in order to conduct experiments and to construct theories.

....

We are not observers who look at history from a distance; rather, insofar as we are historical creatures, we are always on the inside of the history that we are striving to comprehend.

39. Id. at 16. Gadamer describes the increasing consciousness of the effect of history in the wake of Hegel’s bold effort to demonstrate that “all things are bound together in the progressive development of knowledge.” Id. at 22. Dilthey’s romantic hermeneutics rejected a naturalistic account of history in favor of a view that cultural history represents an organic symbiotic structure, see id. at 23, but even this gave way to the school of Problemgeschichte, which abandoned the effort to identify a uniform theme (or even uniform structures) in history and concentrated instead on the resolution of common problems by different cultures, see id. at 25. Gadamer regards this principle of effective-history as a radicalization of historical consciousness and a refusal to fall back on comforting notions that present investigators can discern the meaning of history as a past event by adopting the methodological posture of the natural sciences:

We never find ourselves in the situation of being pure observers of or listeners to an artwork because in a certain sense we are always involved in our tradition. Comprehending the objectives, the inner structure and the context of a work is not in itself sufficient to clear away all our prejudices that arise from the fact that we ourselves

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carried forward in modified form by Habermas's critical social
theory, is the antithesis of Gadamer's principle of effective-history.

Habermas's psychoanalytic model of social criticism brings into
sharp focus his misguided hopes for a critical inquiry that can
transcend the critic's historically shaped hermeneutical situation.
Because the social critic is embedded in a traditionary horizon of
understanding no less than any other person, Gadamer insists that
the task of unmasking a prejudice always takes place against the
background of an entire network of "prejudices." Consequently, in
"the realm of practical reason there is simply no analogy to the
knowing analyst who guides the productive reflective processes of
the analysand." Gadamer does not accept the goal of social critique
and then reluctantly conclude that the social critic is unable to tap
into the deeper, specialized mode of understanding that
characterizes psychoanalytic practice. On the contrary, he rejects the
implicit goals of psychoanalytically-informed social criticism by
insisting that psychoanalysis always operates within, and is parasitic
upon, the primordial and inescapable "hermeneutical situation" of
human understanding. The critique of ideology, he explains,

belongs itself, then, to the social process that it criticizes. That is
the ineluctable pretension. This is ultimately no less true for
psychoanalysis. However often technical-scientific skill may
intervene in psychoanalytic therapy, there is always a moment
of authentic practice present as well. Nothing is "made" here or
produced by construction, not even the life story of the patient.
The constructive hypotheses of the therapist have to be
accepted by the personal reflection of the patient. This goes far
beyond any technical procedure inasmuch as it puts the patient
in his entire social and mental constitution to free, spontaneous
work on his own healing.

Psychoanalytic theory does not provide a technique that creates
sound mental health but instead guides an analyst within a
communicative event that in turn shapes the patient's hermeneutical

Id. at 24.

40. Gadamer uses the term "prejudice" in the sense of a prejudgment or orientation to the
world. To experience the world from a prejudiced standpoint is not pathological but rather the
very nature of finite human existence. Gadamer characterizes the ideology of Enlightenment
as the prejudice against the prejudiced character of human understanding. Nevertheless, he
insists that within hermeneutical discourse it is not only possible but unavoidable that
participants will seek to reveal the "unproductive" quality of certain prejudices. For a general
discussion of Gadamer's notion of prejudice, see Mootz, Rule of Law, supra note 9, at 144-45.


42. HANS-GEORG GADAMER, What Is Practice? The Conditions of Social Reason, in
capacity.

In an exchange with Paul Ricoeur on the problem of developing critical standards for interpretation, Gadamer makes clear that the critical attitude of "going behind, unmasking, showing forth hidden desires that are longing for their fulfillment as revealed by the inner tension in our souls" moves beyond intersubjective dialogue, and therefore he insists that a conflict of interpretations is best resolved not by traditional philosophical critique, but in a dialogue that is oriented toward finding a common language. Gadamer echoes Habermas in concluding that critical theory and psychoanalysis occur when there is a collapse, or suspension, of ordinary communication, but he emphasizes that this does not amount to a distinct epistemological achievement. The "critique of ideologies, psychoanalysis, and every radical form of critique should be and needs to be reintegrated into this basic process of social life—a way which I call (in a manner I find satisfactory) hermeneutical," Ricoeur essentially conceded this point to Gadamer, characterizing his own pathbreaking analysis of psychoanalysis as being too oriented toward Freud's theory rather than attending to the hermeneutical nature of psychoanalytic practice.

Despite this strong challenge to Habermas's psychoanalytic model of critical theory, Gadamer does not fall victim to crude conventionalism and political quietism. He insists that hermeneutical encounters between one's own horizonal existence and an "other"—whether another person or a text—contain both the motivation and resources for developing critical insight. Gadamer makes this point forcefully by using conversation as a metaphor of hermeneutical understanding:

Conversation is a process of coming to an understanding. Thus it

44. *Id.* at 304.
45. *See id.* at 311. Ricoeur rejects what he terms the "short route" to hermeneutic understanding, exemplified by Heidegger and Gadamer, in which philosophers begin with an ontological inquiry into understanding. Instead, he commences his effort to delineate a critical hermeneutics by first working through the interpretive practices of psychoanalysis in order to uncover the ontological lessons that are implicit in the methodologies of exegesis employed by Freud on the one hand and by linguists on the other. *See Paul Ricoeur, Existence and Hermeneutics* (Kathleen McLaughlin trans.), in *THE CONFLICT OF INTERPRETATIONS: ESSAYS IN HERMENEUTICS* 3, 6-10 (Don Ihde ed., 1974). Ricoeur's approach has done much to promote the possibility of a critical hermeneutics, but he clearly accepted too much Freudian dogma in working through the exegetical experience of psychotherapeutic discourse, despite having properly rejected the claim that Freud uncovered the foundation for an all-encompassing critique of culture. *See Paul Ricoeur, Psychoanalysis and the Movement of Contemporary Culture* (Willis Domingo trans.), in *THE CONFLICT OF INTERPRETATIONS*, supra, at 121.
belongs to every true conversation that each person opens himself to the other, truly accepts his point of view as valid and transposes himself into the other to such an extent that he understands not the particular individual but what he says.

\[\ldots\]

[When seeking to understand a text,] the interpreter's own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says. \ldots We can now see that this is what takes place in conversation, in which something is expressed that is not only mine or my author's, but common.\textsuperscript{46}

Experiencing the world from within a tradition, like engaging in conversation with another person who similarly embodies certain prejudices, presents a persistent challenge to one's necessarily limited perspective. Gadamer argues that Habermas is wrong "to suppose that I thought there were no such things as loss of authority and emancipatory critique,"\textsuperscript{47} since "reflection on a prevailing preconception brings something before me which otherwise happens behind my back."\textsuperscript{48} Gadamer insists only that critique is never thoroughgoing, since it must occur only against the situated backdrop of existence. Reflection is capable only of bringing forward "something" and "not everything," since "effective historical consciousness is inescapably more existence than it is consciousness."\textsuperscript{49}

Gadamer's reply to Habermas's review of Truth and Method contains his most pointed elaboration of these themes. Although the hermeneutical development of a tradition includes emancipatory urges and critical insight, Gadamer rejects Habermas's search for an extra-traditionary measure of validity: "Tradition itself is no proof of validity, at any rate not in instances where reflection demands proof. But that is the point: Where does reflection demand proof? Everywhere? The finiteness of human existence and the intrinsic particularity of reflection seem to me to make that impossible."\textsuperscript{50} Although he acknowledges that the model of psychoanalysis clarifies Habermas's distinction between a mere social technician and a

\begin{itemize}
  \item 46. GADAMER, supra note 13, at 385, 388.
  \item 47. Hans-Georg Gadamer, Rhetoric, Hermeneutics and the Critique of Ideology (Jerry Dibble trans.), in THE HERMENEUTICS READER, supra note 24, at 274, 285.
  \item 48. Id. at 288.
  \item 49. Id.
  \item 50. Id. at 286.
\end{itemize}

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sociologist engaged in emancipatory reflection, Gadamer contends that the quasi-scientific attitude of Habermas’s critical theorist nevertheless represents a specialized methodological attitude that necessarily rests on a wider hermeneutical capacity for understanding. Gadamer asks:

What, it must be asked, is the relationship between the knowledge of the psychoanalyst and his professional position within the social reality, of which he is, after all, a member? That he inquires behind superficial explanation, breaks through obstacles to self-understanding, sees through the repressive effect of social taboos—all these things are part and parcel of the emancipatory reflection in which he engages with his patients. But if he exercises the same kind of reflection in situations and in fields where his role as doctor is not legitimately involved, where he is himself a participant in the social game, then he steps out of his social role. The person who “sees through” his playing partners to something beyond the understandings involved in their relationship—that is, does not take the game they are playing seriously—is a spoilsport whom one avoids. The emancipatory power of reflection to which the psychoanalyst lays claim thus has its limit—a limit which is defined by the larger social consciousness in terms of which analyst and patient alike understand themselves, along with everyone else. For hermeneutical reflection teaches us that social community, with all its tensions and disruptions, leads us back time and again to a social understanding, by virtue of which it continues to exist.  

Gadamer concludes by arguing that Habermas has endorsed a conception of critical rationality with no discernible limits, one which therefore threatens to dissolve itself. He writes:

In light of such considerations, however, Habermas’s analogy between psychoanalytical and sociological theory becomes problematic. For where is the latter to find its limit? Where in Habermas’s scheme of things does the patient stop and the social partnership step in in its unprofessional right? Behind and beyond which self-interpretation of the social consciousness—and every custom is such a self-interpretation—[is it] appropriate for one to inquire and go (perhaps out of desire for revolutionary change), and which not? Such questions are apparently unanswerable [for Habermas]. The inevitable consequence seems to be that the emancipatory consciousness cannot stop short of the dissolution of every obligation to restraint—and thus that its guiding light must be the vision of an

51. Id. at 290-91.
anarchistic utopia. This, of course, seems to me a hermeneutically false consciousness.\textsuperscript{52}

Gadamer is not arguing against the claimed accomplishments of modern psychoanalysis, just as he has never denied the powerful accomplishments of modern natural science. He insists only that Habermas makes a profound mistake by not recognizing that these two methodological attitudes are equally limited in scope and subordinated to the hermeneutical character of human understanding.

\textit{C. Undermining the Debate: The Collapse of Freudian Psychoanalysis as Science}

The Gadamer-Habermas debate about the usefulness of a psychoanalytic model of critical theory is properly regarded as a benchmark in the tradition of social criticism, but the debate was distorted from the beginning because it was conducted in Freud’s canonical shadow. Gadamer and Habermas both criticized Freud’s assumption that psychoanalysis is a technique governed by an overarching scientific theory, but their assessments of psychotherapeutic dialogue proved inadequate because they remained responsive in character. Habermas attempted to correct Freud’s errors and to reconstruct an appropriate epistemological account for purposes of critical social theory, whereas Gadamer rejected the significance of the theory for social critique altogether. In the past twenty years, however, traditional theory-laden psychoanalysis has been replaced by more practice-driven conceptions of psychotherapy. A growing number of psychotherapists have completely abandoned Freud’s dream of drawing “on all the relevant sciences to construct a complete theory of mental life, including its primeval origins, organic foundation, and proximate psychical causes.”\textsuperscript{53} In particular, postmodern conceptions of psychotherapeutic dialogue have emerged as rivals to traditional Freudian psychoanalytic theory, resulting in an important shift in our understanding of psychotherapy. Under a variety of banners—including postmodern, hermeneutic, existential, common factors, and eclectic approaches—psychotherapists have developed new understandings of their practice that offer the possibility of developing a more fruitful psychotherapeutic model of critical theory.

\textsuperscript{52} Id. at 291.

\textsuperscript{53} PATRICIA KITCHER, FREUD’S DREAM: A COMPLETE INTERDISCIPLINARY SCIENCE OF MIND 41 (1992).
Freudian psychoanalysis increasingly is the target of blistering criticism from a wide variety of commentators. In a recent review, Frederick Crews reports that independent studies have begun to converge toward a verdict... that there is literally nothing to be said, scientifically or therapeutically, to the advantage of the entire Freudian system or any of its component dogmas.

....

.... [A]nalysis as a whole remains powerless... and understandably so, because a thoroughgoing epistemological critique, based on commonly acknowledged standards of evidence and logic decertifies every distinctively psychoanalytic proposition. The most telling criticism of Freud's psychoanalytic theory is that it has proven no more effective in producing therapeutic benefits than have other forms of psychotherapy. Critics draw the obvious conclusion that the benefits (if any) of psychotherapy are neither explained nor facilitated by psychoanalytic theories. Although Freudian psychoanalytic theory purports to provide a truthful account of the operations of the psyche and the causes for mental disturbances, critics argue that psychoanalytic theory may prove in the end to be nothing more than fancy verbiage that tends to obscure whatever healing effects psychotherapeutic dialogue may have.

Freudian psychoanalysis failed because it could not make good on its claim to be a rigorous and empirical science. Although Freud's mystique is premised on a widespread belief that psychoanalysis was a profound innovation made possible by his genius, Freud claimed only that he was extending the scientific research of his day within the organizing context of a biological model of the human mind.

57. See Macmillan, supra note 54, at 607-10.
58. See Frank J. Sulloway, Freud, Biologist of the Mind: Beyond the
Freud's adherents created the embarrassing cult of personality and the myth of a self-validating psychoanalytic method only after Freud's empirical claims could not withstand critical scrutiny in accordance with the scientific methodology demanded by his metapsychology. The record is clear that Freud believed that psychoanalysis would take its place among the sciences and that his clinical work provided empirical confirmation of his theories. This belief now appears to be completely unfounded and indefensible.

Freud's quest for a scientifically grounded psychotherapy was not amateurish or naive. Although Freud viewed his "metapsychology as a set of directives for constructing a scientific psychology," Patricia Kitcher makes a persuasive case that he was not a blind dogmatist who refused to adjust his metapsychology in the face of contradictory evidence. Freud's commitment to the scientific method, coupled with his creative vision, led him to construct a comprehensive and integrative metapsychology that drew from a number of scientific disciplines in an impressive and persuasive manner. However, the natural and social sciences upon which he built his derivative and interdisciplinary approach developed too rapidly and unpredictably for him to respond. As developments in biology quickly undermined Freud's theory, he "began to look to linguistics and especially to anthropology as more hopeful sources of support," but this strategy later in his career proved equally

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PSYCHOANALYTIC LEGEND (1979). Calvin Hall succinctly reflects this traditional understanding of Freud's project: "Freud did not feel that psychoanalysis was called upon to develop a new Weltanschauung. It was only necessary to extend the scientific worldview to the study of man." CALVIN S. HALL, A PRIMER OF FREUDIAN PSYCHOLOGY 20 (1954). It is important not to confuse Freud's use of a biological model, in the sense of a heuristic or analogy, with his quickly abandoned effort early in his career to develop a reductionist biological account of human behavior. See GRÜNBAUM, FOUNDATIONS, supra note 54, at 3; SULLOWAY, supra, at 121-23.

59. See SULLOWAY, supra note 58, at 419-44.
60. KITCHER, supra note 53, at 45.
61. See id.; cf. CIOFFI, supra note 54, at 19 (comparing Freud to a suborned witness who keeps changing his story to satisfy his disbelieving questioners).
62. Kitcher argues that the "core doctrines of psychoanalysis... depended on work in other disciplines" and that "each was a more or less reasonable working hypothesis in the context of nineteenth-century scientific advances, views about the goals of scientific explanation and standards of evidence," KITCHER, supra note 53, at 109, and that given "so great a consilience and so many directions to extend and corroborate psychoanalytic research, it might have been hard to foresee how his program could fail utterly." Id. at 112.
63. Kitcher's fascinating book is not really about Freudian metapsychology but about the perils of interdisciplinary theorizing that contemporary cognitive scientists must overcome. See id. at 5. She uses Freud as a case study of the problems for a grand theory that rests on several fields and anticipates their continued development along certain lines. Freud became so convinced of the truth of his theory that he forgot the scientific foundations he had established, leading him to react with scorn when the biological and social sciences that he drew from began to contradict his theories. See id. at 219.
64. Id. at 185-86.
unsuccessful. The scientific justification claimed by Freud literally eroded when the knowledge base underlying his theory collapsed, leaving his disciples with the impossible task of defending a theory whose presuppositions no longer were plausible according to their own criteria of validation.

Given the collapse of Freudian psychoanalysis as a science, it is productive to revisit the Gadamer-Habermas debate and to excise the unhelpful influence of Freud from their respective approaches. Although Gadamer and Habermas criticized Freud for many of the deficiencies that now are acknowledged by psychotherapists, they both remained in the powerful grip of an image of Freud as the master theorist who had uncovered a deeper realm of reality. Habermas was gripped by the promise of such an achievement; his criticism of Freud echoes with his desire to achieve the radical theoretical insight that Freud mistakenly claimed for himself. On the other hand, Gadamer was gripped by the patent implausibility of the Enlightenment hubris that animated Freud's project; his criticism of Freud blunted his appreciation of the significance of the "talking cure." I will demonstrate that "updating" the Gadamer-Habermas debate with reference to a plausible account of psychotherapeutic practice yields a far greater understanding of the nature of critical theory.

II. REVISITING THE GADAMER-HABERMAS DEBATE: DEFENDING THE MODEL

The Gadamer-Habermas debate remains relevant today, for it raises issues central to a contemporary assessment of critical theory. However, the terms of the debate have shifted in light of the collapse of Freudian psychoanalysis as a science. Both participants have refined their thinking in the intervening years by moving away from the Freudian model. In this part, I trace this development in their philosophies in order to gain greater insight into the questions surrounding the project of critical theory. I conclude that, although the Freudian model skewed the original debate, the emerging postmodern conception of psychotherapy promises to provide a different and more useful model of critical social theory that

65. See id.
66. Vincent Calapietro reminded me that Freud can be read even more radically than Habermas reads him to support the postmodern approach to psychotherapy. When I use the term "Freudian psychoanalysis" I mean to refer to the institutionalization of his theory by followers as well as his intended approach. Whether Freud can be invoked in support of my argument does not affect my argument, but I do acknowledge that some would argue strongly that Freud should not be saddled with the reductions and mistakes of his followers. Just as Plato was not a Platonist in some respects, so too Freud was not a Freudian.
connects with Gadamer's hermeneutical philosophy.

A. Habermas's Theory of Communicative Rationality as an Elaboration of His Psychoanalytic Model of Critical Theory

Over the past few decades, Habermas has developed an account of communicative rationality in an effort to revive and defend the Kantian argument that moral theory is rationally based.\textsuperscript{67} Moral theory has a quasi-transcendental foundation, Habermas insists, because idealizations of universality and impartiality are presupposed in the very activity of communication. "Reaching understanding is the inherent telos of human speech," he argues, whereas strategic communication is merely "parasitic."\textsuperscript{68} With this foundation established, he characterizes rationality in procedural terms: Rationality obtains in the reciprocal relationship presumed in communicative action in which a speaker raises and is prepared to defend validity claims.\textsuperscript{69} Although this presumption is not often satisfied in actual communicative situations, as a universal and regulative ideal it provides the standard against which we may criticize current practices. The critical theorist identifies systematic distortions in communication patterns that infect various social activities designed to coordinate behavior, primarily by exposing them as distortions that only masquerade as rational communication oriented to achieving mutual understanding.

Habermas does not pretend that his theoretical reconstruction of the idealizations subtending communicative reason can spell out in advance what the content of rational communication will be. Nevertheless, he does make the strong claim that rationality is defined by universal stages of development, closely tracking Lawrence Kohlberg's claim that there is an invariant pattern in the development of the capacity for moral judgment.\textsuperscript{70} Kohlberg underwrites Habermas's insistence that we must distinguish the claim that there is a universal capacity for rational moral judgment from the admission that moral philosophy "does not have privileged

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{67} See Habermas, supra note 26; Jürgen Habermas, 2 The Theory of Communicative Action (Thomas McCarthy trans., Beacon Press 1987) (1984).
\item \textsuperscript{68} HABERMAS, supra note 26, at 287-88.
\item \textsuperscript{69} See id. at 302.
\item \textsuperscript{70} Habermas describes his reasons for following Kohlberg in succinct terms: Kohlberg's theory of moral development offers the possibility of (a) reducing the empirical diversity of existing moral views to variation in the contents, in contrast to the universal forms, of moral judgment and (b) explaining the remaining structural differences between moralities as differences in the stage of development of the capacity for moral judgment.
HABERMAS, Moral Consciousness, supra note 34; see also HABERMAS, Evolution of Society, supra note 34, at 69-94.
\end{enumerate}
\end{footnotesize}
access to particular moral truths.” In light of this distinction, critical theory cannot dictate the elements of the “good life” that pertain within a particular social setting but can only describe the conditions under which the social actors may together agree on these elements in a rational manner. In this respect, Habermas follows Freud’s insight that a theoretical reconstruction points the way not to resolutions of particular problems facing the patient, but rather to an understanding of the conditions under which an individual obtains the autonomy to handle life’s demands in a rational manner. The theoretically-guided role of the analyst (critical theorist) is not to tell the patient (society) how to live her life (organize itself), but instead to work from universal idealizations to identify and eradicate distortions that prevent the patient (society) from exercising her autonomy to make rational, rather than pathological, life choices.

Although Habermas does not expressly invoke his psychoanalytic model of critical theory in support of his philosophy of communicative reason, he returns to the model to explain the crucial difference between the simple manipulation of dialogue by one communication partner and the unconscious, mutual deception that occurs in systematically distorted communication. Similarly, Habermas reiterates his critique of Gadamer’s philosophical hermeneutics for its inability to underwrite a critical perspective on received traditions, arguing that a hermeneutical exegesis cannot be rational under conditions of systematically distorted communication. It seems clear that the theory of communicative

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71. HABERMAS, Moral Consciousness, supra note 34, at 211.
72. Habermas writes:
The question of the context-specific application of universal norms should not be confused with the question of their justification. Since moral norms do not contain their own rules of application, acting on the basis of moral insight requires the additional competence of hermeneutic prudence, or in Kantian terminology, reflective judgment. But this in no way puts into question the prior decision in favor of a universalistic position. Id. at 179-80. Habermas makes this point in the course of explaining why Carol Gilligan’s feminist challenges to Kohlberg’s thesis miss the mark. Habermas contends that the feminist critique is not a critique of the existence of universal moral norms, but only the application of these justified norms in the context of contemporary society. This is Habermas’s consistent line of attack against neo-Aristotelian and pragmatist positions: There is inevitably a wide sphere of contextualized application, but this occurs only against a background of a universal structure of communicative reason. He writes:

Communicative reason, too [like the approaches by Hilary Putnam and Hans-Georg Gadamer] treats almost everything as contingent, even the conditions for the emergence of its own linguistic medium. But for everything that claims validity within linguistically structured forms of life, the structures of possible mutual understanding in language constitute something that cannot be gotten around.

HABERMAS, supra note 7, at 139-40.
73. See HABERMAS, supra note 26, at 332.
74. See id. at 134-35; Habermas, supra note 24, at 313-17. Habermas acknowledges the force of Gadamer’s criticism of the universalizing presumption of critical theory that
rationality plays the role in Habermas's critical theory that Freud's theories of ego development and neuroses played in his psychoanalytic practice. The theory of communicative rationality invests the seemingly artful and individual practice of social critique with the authority of theoretical knowledge, even if Habermas's proceduralist approach remains quite subdued when compared with Freud's claims.

Admittedly, Habermas's revised approach implicitly concedes much to the force of Gadamer's critique. Even after his sharp criticism of Freud's theoretical overreaching, Habermas's psychoanalytic model accorded a unique role to critical theory in unmasking the distorting effects of social organization. In contrast, Habermas's theory of communicative action looks within the practical experience of dialogue to locate the quasi-transcendental, regulative ideal that grounds the critical enterprise. The critical impulse becomes one of clarification and extension in Habermas's recent writings, since the critical standards upon which he draws are always already instantiated in intersubjective practices and, in fact, have served as the foundation of the modernist expansion of rationality. Critical theory works from within rationality, one might say, to identify social deformations against the internal standards of rationality itself.

Despite Habermas's reversion to the priority of practice, Paul Fairfield has correctly argued that Habermas remains enmeshed in precisely the problems that he diagnosed in Freud's metapsychology. By adopting Kohlberg's developmental stages of moral reasoning, Habermas participates in the "myth of the expert, the social critic 'in the know' whose standpoint within the 'conversation that we are' is to be awarded a position of privilege." Fairfield persuasively degenerates into monological self-certainty and obscures the hermeneutically-secured self-reflection of social participants, but he insists that Gadamer's claim for the universality of the hermeneutical situation commits the same error. See Habermas, supra note 24, at 317. Habermas argues for the independent epistemic validity of both critique and understanding, neither of which can claim universal priority.

75. Habermas insists that critical theory is not charged with providing a philosophical grounding as much as working with the social sciences in a fallible manner to trace the emergence and over-emphasis on functionalist reason within larger patterns of rationalizing activities. See HABERMAS, supra note 67, at 396-403.

76. Joseph Dunne writes:

[In Habermas's early work it] was as if practice in itself was deficient but was nonetheless remediable insofar as it was susceptible to therapeutic interventions from the side of theory. In Habermas's later work, however, practice is shown not so much to be instructed or "enlightened" by theory as to contain within itself a rational structure which drives it immanently (though not inevitably) toward self-transparency.

JOSEPH DUNNE, BACK TO THE ROUGH GROUND: 'PHRONESIS' AND 'TECHNE' IN MODERN PHILOSOPHY AND IN ARISTOTLE 194 (1993).

demonstrates that Habermas's initial attention to the dialogic encounter of psychoanalytic practice remains overshadowed by his desire to establish a properly theoretical role for the social analyst, "whose self-appointed task is not to persuade but to 'diagnose,' not to submit interpretations to one's interlocutors but to 'enlighten' and 'explain,' not to listen to the claims of others but to 'score' their judgments" on a developmental scale. The critic does not seek mutual understanding, but instead first discovers universal criteria in the very use of language. The critic lays claim to expert knowledge about the existence of systematically distorted communication that must be eradicated before ordinary conversation among citizens may proceed in a rationally justified manner.

Habermas recently has extended the discourse principle of his moral philosophy to the pragmatic arena of law and politics, thereby providing a striking contextual example of his approach to critical theory that clearly reveals the continuing tensions in his psychoanalytic model. Habermas argues that the conflict between the empirical features of legal institutions and the normative requirement that lawmaking processes be legitimate imposes a heavy burden on legal systems. He regards the historical development of the modern constitutional state as a series of attempts to bear this burden successfully. Criticizing a wide range of philosophers who have suppressed either the factual or normative aspects of legality, Habermas insists that the task of political theory is to synthesize the sociology of legal power and the philosophy of legal legitimacy. By grounding legal rationality in the universal discourse principle that is presupposed by communicative action, Habermas argues that he is uncovering universal critical standards, albeit standards that regulate only the procedures of employing social reason.

Unlike the classical form of practical reason, communicative reason is not an immediate source of prescriptions. It has a normative content only insofar as the communicatively acting individuals must commit themselves to pragmatic presuppositions of a counterfactual sort. That is, they must undertake certain idealizations...[and] are thus subject to the "must" of a weak transcendental necessity, but this does not mean they already encounter the prescriptive "must" of a rule of action...

Communicative reason thus makes an orientation to validity

78. Id. at 89.
79. See HABERMAS, supra note 6, at 39-41.
claims possible, but it does not itself supply any substantive orientation for managing practical tasks—it is neither informative nor immediately practical.

[Nevertheless] the concept of communicative reason . . . offers a guide for reconstructing the network of discourses that, aimed at forming opinions and preparing decisions, provides the matrix from which democratic authority emerges. [This reconstruction would provide] a critical standard, against which actual practices—the opaque and perplexing reality of the constitutional state—could be evaluated. 80

Habermas’s conception of critique clearly accords with the psychoanalytic model that he developed thirty years earlier. He begins with theoretical insights into the universal characteristics of reason and works toward concrete claims about the shape of reason in modern constitutional democracies as a standard for judging current practices. Yet he does not presume that his theory can deliver the correct answers to specific political questions. He is content to leave the substance of social policy-making to democratic resolution, but only after the procedural requirements of rationality that the philosopher identifies have been institutionally realized. 81

The irony in Habermas’s approach is clear. The philosopher delivers theoretical knowledge about the general features of the democratic constitutional state without need for conferences with his fellow citizens. Recognizing the tension between facts and norms in modern society is a matter of historical reconstruction and the elucidation of the principles of communicative rationality. The philosopher’s power is limited, however, to a rather thin conception of rationality, with the “good life” to be defined and pursued only in the actual coordination of life plans by the members of society. Nevertheless, these actual communicative exchanges are adjudged rational only by virtue of a philosophical inquiry into procedural prerequisites by the expert critic who stands outside these exchanges in his role as critic. While far more subtle and less hubristic than Freud’s metapsychology, Habermas’s philosophy of communicative rationality plays the same role as a regulative theoretical truth. In his

80. Id. at 4-5.
81. This model of critique is vividly displayed in his discussion of rights as inherent features of modern, rationalized legal systems. On one hand, Habermas identifies a number of seemingly specific rights that are presupposed by the legal medium. That is, actors must be oriented toward these rights if they are acting rationally and legally. On the other hand, Habermas insists that the specific normative content of rights can only be provided by actual social participants acting within a concrete legal setting. See id. at 125-26.
recent work, then, Habermas has attempted to make good on his earlier intuition that the "structural model which Freud introduced as the categorical framework of metapsychology is... reducible to a theory of deviations in communicative competence."\(^n 2\)

I have argued that Habermas's most recent work continues to reflect his thesis that psychoanalytic critique is an appropriate model of critical social theory. Far from embracing a crude conception of psychoanalytic theory, Habermas's criticism of Freud's self-misunderstanding is persuasive and devastating. Nevertheless, he connects the legitimacy of critical theory to a strong, even if thin, conception of the power of theory. The social theorist is never engaged in conversation with others in his role as social theorist, but rather is engaged in a theoretical project of reconstruction. Only after clearing the ground for rational discourse does the philosopher resume his place in social dialogue with others. Like a good psychoanalyst, the social critic cannot take seriously (at face value) the communicative exchanges within society until he has assured himself that the theoretically-ascertained prerequisites of rational communication are satisfied.

B. The Hermeneutical Significance of Psychotherapeutic Dialogue in Gadamer's Philosophy

Habermas has persisted in following an unsatisfactory course in his philosophy, but he still provides strong arguments in response to Gadamer's hermeneutical approach. Despite the power and persuasiveness of Gadamer's philosophy, Habermas exploits an obvious weakness in Gadamer's argument against the psychoanalytic model of critical inquiry. When Habermas challenges the potentially pathological character of background agreements, arguing that they may systematically distort understanding and render explicit agreements irrational, Gadamer's response is limited to a defense of the ontological primacy of the hermeneutical situation. As important and convincing as this defense may be, Gadamer does not fully meet Habermas's challenge. Even if critical theory does not rest on independent epistemological grounds, it does not follow that Habermas is wrong to assert the independent significance of critical theory.

Gadamer's use of conversation as a metaphor for the experience of understanding provides an illustration of the inadequacy of his limited response to Habermas. Who has not had the experience of conversing with another person when something important remains unsaid, and perhaps even unrecognized, by the other person? In this

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82. Habermas, supra note 24, at 311.
situation one often moves the conversation to a reflexive level, inquiring "behind" the conversation, so to speak. This intuitive, folk-psychological capacity to "read between the lines" is not necessarily a prelude to the application of an interrogative methodology, and in fact quite often is a sensitive response to one's dialogical partner that serves to open pathways for a deeper conversation. Habermas's psychoanalytic model of critical theory, once shorn of its residual theoretical overreaching by Gadamer's critique, suggests that the reflexive practice of enabling conversational understanding to proceed may, in some cases, require the participants to relax the hermeneutical engagements of everyday life by adopting a critical perspective, even if Gadamer is correct that they never can completely overcome these engagements.83

In a recently translated collection of essays on the elusive concept of health, Gadamer reveals that he is much more attuned to the hermeneutical significance of the special relationship that physicians have with their patients, leading him to a more nuanced approach to psychotherapy that is responsive to Habermas's critical challenge.84 Gadamer contends that the practice of medicine provides a particularly vivid example of the central tension in the modern age between the breathtaking technical achievements of science and the radical limits placed on this technical capacity by virtue of our finite existence.85 Characterizing medical practice as the effort to restore a patient to her previously established equilibrium, Gadamer emphasizes that the physician must attend to the patient's whole person.86 In contrast, modern scientific consciousness misconstrues
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medicine as *techne*, and asserts that the physician's role is to "construct" good health. Because modern "science is based not on the experience of life but on that of making and producing, not on the experience of equilibrium but on that of projective construction," Gadamer concludes that medicine "represents a peculiar kind of practical science for which modern thought no longer possesses an adequate concept."98 One example of the ill effects of this inattention to the nature of medical practice is the agonizing dilemma presented when patients are kept alive in the face of death, even when they have succumbed to a persistent vegetative state.89

We can understand medical practice, Gadamer argues, only if we appreciate its dialogic character. At a superficial level, dialogue obviously is involved in medical practice, since proper diagnosis often requires the physician to listen to the patient's complaints, and proper treatment often requires a patient to receive instructions from the physician. However, the dialogic character of medical practice involves far more than the transmission of information. By regarding the healing process as an effort to restore the patient's disrupted equilibrium, Gadamer suggests a new understanding of the physician's role. First, he believes that a genuine dialogic encounter in which physician and patient develop shared understandings is necessary to subvert the hierarchical relationship that otherwise would follow if the doctor simply applied technical skill to a physical ailment.90 Even more important, the patient's equilibrium cannot be constructed by reference to a standard, but instead must be discerned in a cooperative process that "involves the entire life situation of the patient, and even of the physician."91 Although dialogic encounters in Gadamer's robust sense are difficult to achieve in the era of managed care and scientific medicine, Gadamer claims that the art of healing requires something in the nature of a
difficult to achieve the "necessary integration of a differentiated body of knowledge and skills into the practical unity of treatment and healing" that the art of healing requires. Id. at 35.

87. The prevailing neo-Kantian belief that nothing that is "capable of being experienced can remain withdrawn from the competence of science," id. at 3, has fueled the developments that have reduced the practice of medicine to a sterile technology. Gadamer believes that the practice of medicine raises the central question of modern existence with dramatic persistence: "[H]ow can we successfully reconnect our instrumental reason, especially in light of the vast scale of its modern development, with the totality of our being-in-the-world in a fruitful and productive way?" Id. at 72. Responding to this problem in the context of medical practice is made all the more difficult because patients are even more strongly affected by scientific false consciousness, leading them to demand that their doctors adopt a technological role. See id. at 164.

88. Id. at 38-39.
89. See id. at 79.
90. See id. at 112-23.
91. Id. at 41.
conversational exchange: “In our everyday lives we fall into discussions which are sustained by everyone involved rather than led by one person in particular. And this is how it should be even for the special form of dialogue that takes place between doctor and patient.”92 The practice of medicine dramatically reveals the nature and limits of science, then, even as many practitioners clothe themselves in the language of scientific methodology and technical expertise.

Gadamer contends that the specialized practice of restoring the equilibrium of those afflicted with mental disturbances dramatically reveals the hermeneutical essence of the art of healing. Although psychotherapeutic dialogue is often disparaged as a set of verbal techniques that cannot match the efficacy of psychopharmacological cures, Gadamer contends that this specialized form of discourse in fact embodies the inescapable hermeneutical nature of the healing process generally. He writes:

It seems to me of great importance that this radical form of disturbance which we do not even properly term an illness—as when we talk, for example, of someone being mentally “disturbed”—requires us to recognize the central role played by speech and dialogue. And by this I do not simply mean therapeutic dialogue, as it has been developed by psychoanalysis in the strict sense. Rather, I mean that in all medical treatment the patient needs to receive guidance, and here the discussion and shared dialogue between doctor and patient plays a decisive role. What we can learn from this conception of the full realization of the doctor-patient relationship as it ought to prevail is that for all these forms of disturbance it is less a case of “taking something away” than of assisting in the process of adaptation and reentry into the cycle of human, social, professional and family life. And this is something which transpires in the shared medium of communication between human beings. The extreme case of mental disturbance, where we attempt to help someone to rediscover their own internal balance and equilibrium, strikes me as prototypical for the general experience of disturbance and the task of readaptation with which humankind has always been confronted, and with which it always will be confronted.93

What is generally recognized to hold in respect of the relationship between the psychiatrist and the mentally ill, and as constituting the accepted task of the psychotherapist, must also be recognized to possess a more universal validity. The doctor’s

92. Id. at 137.
93. Id. at 77.
art ultimately consists in withdrawing itself and helping to set
the other person free. . . . For the doctor has not simply brought
about a special piece of work that he or she has actually made.
Rather the doctor has been entrusted with a human life which
must now be released from this protective care. 94

Earlier, Gadamer rejected Habermas’s psychoanalytic model of
critical theory on the ground that psychoanalytic treatment involves
a limit situation that obscures the hermeneutical character of
understanding. Now, in contrast, he trumpets the exemplary
significance of the “talking cure” as a manifestation of the dialogical
character of all healing.

Several years ago, and over twenty years after his debate with
Habermas, Gadamer addressed a convention of psychiatrists on the
hermeneutical significance of their work. 95 Although he did not raise
the question directly, it is clear from Gadamer’s remarks that his
perspective on the significance of a psychoanalytic model of critical
theory had evolved. Beginning with the observation that psychiatry
is a praxis and not merely a scientific enterprise, Gadamer
acknowledged a similarity between psychiatrists and lawyers: Both
must constantly justify their art to a suspicious clientele who
(improperly) demands scientific certainty and fears sophistic
charlatans. 96 All physicians hermeneutically engage their patients in a
manner that demonstrates that the character of their practice is
praxis rather than techne, but psychiatrists face a special problem
since they are attempting to restore the equilibrium of patients who
suffer from diminished capacity for understanding and forging social
partnerships. 97 Gadamer writes:

Here the specific hermeneutic problem of psychiatry, so familiar
to the psychiatrist, is once again revealed. The psychiatrist must
seek to reach understanding with the patient, even where the
patient withdraws from such understanding. We can find further
confirmation for this when we consider that it is an
indispensable precondition of the psychoanalytic “talking cure”
that patients enter into analysis on the basis of their own
recognition that they are unwell. 98

In many such cases the partnership between doctor and patient
remains separated by an unbridgeable divide. Here it seems that

94. Id. at 43.
95. See id. at 163-73. The address, entitled “Hermeneutics and Psychiatry,” was presented
in an English translation before the Conference of Psychiatrists in San Francisco in 1989.
96. See id. at 163-64.
97. See id. at 168.
98. Id. at 169.
no hermeneutics can help to bridge this gap, and yet even in these most difficult cases the doctor—and, who knows, perhaps the patient as well—must give due recognition to the fact that what is involved is always a relationship between two human beings. . . . And yet the doctor must at least try to forge some sort of connection with the patient through whatever fragments of sense he can grasp hold of."

Gadamer concludes by urging his audience to acknowledge the special manner in which they are professionally "participating in the hermeneutical openness that is human life," rather than simply engaging in a "specialized technical discipline."

Viewed as a whole, Gadamer's conception of psychoanalytic dialogue appears contradictory. On the one hand, he chastises Habermas for according special epistemological significance to psychoanalytic dialogue as a model of critical theory. In this context, Gadamer seemingly disparages psychoanalytic dialogue as a technical intervention that occurs at the limits of hermeneutical understanding and that therefore has no special philosophical importance. On the other hand, in more recent essays, he champions psychotherapeutic dialogue as an art of healing that reveals the hermeneutical dimension of human experience in a particularly striking, perhaps even unique, manner. In this context, Gadamer seemingly lauds psychotherapeutic dialogue as a disciplined attempt to overcome a disruption in the patient's hermeneutical capacity by means of a specialized ability to forge a hermeneutic partnership.

The paradox is resolved by recognizing that in the former case Gadamer is criticizing the Freudian conception of psychoanalysis as a theoretically guided method of revealing the patient's true psychological state, whereas in the latter case he is acknowledging the significance of psychotherapeutic dialogue carried out within a hermeneutical engagement, however fragile and tentative, between therapist and patient. Gadamer may not draw the distinction in precisely these terms, but I am confident in concluding that he would endorse a model of critical theory grounded in the experience of

99. Id. at 171.

100. Id. at 173. Gadamer's point is reinforced by a recent study that demonstrates the effectiveness of individualized psychotherapeutic intervention to treat schizophrenia. See Gerard E. Hogarty et al., Three-Year Trials of Personal Therapy Among Schizophrenic Patients Living with or Independent of Family, II, Effects on Adjustment of Patients, 154 AM. J. PSYCHIATRY 1514, 1514 (1997). Anti-psychotic drug therapy should be augmented by psychotherapy for the simple reason that schizophrenia is not just a biological deviation that is easily cured by drugs alone. See id. As the lead author of the study observed in a news account, "There's no drug out there to teach you how to get along with anybody, or how to get a job and keep one." Denise Grady, Studies of Schizophrenia Vindicate Psychotherapy, N.Y. TIMES, Jan. 20, 1998, at F9.
psychotherapeutic dialogue, even while he would continue to reject vigorously a model of critical theory grounded in psychoanalytic theory.

Habermas no longer expressly invokes Freudian psychoanalysis, but his theory of communicative action is premised on his psychoanalytic model of critical theory. In place of Freud's mechanistic and biological metaphors of the psyche, Habermas begins with the linguistic nature of human experience and the universal features of communicative rationality. Although Habermas provides a sophisticated and provocative alternative to Freud's misguided metapsychology, Freud's theoretical orientation still captivates Habermas's agenda. Habermas's turn away from Freud's metapsychology and toward his clinical practice was a productive corrective, but it was insufficiently radical because he continued to search for a universal foundation for critical theory. His resulting theoretical edifice—premised on fundamental distinctions between morality and ethics, critique and understanding, philosophy and jurisprudence—ultimately fails to overcome the postmodern challenge issued by Gadamer and others.

Gadamer successfully undermines Habermas's psychoanalytic model of critical theory. However, in more recent essays, he acknowledges that a radically different conception of psychotherapeutic dialogue fits well with his philosophy. By breaking entirely free of the Freudian theoretical conception of psychoanalysis and attending to the multi-dimensional practice of psychotherapeutic critique, Gadamer now appears to appreciate that this practice is a paradigm of hermeneutical understanding. Nevertheless, Gadamer's single-minded attack on methodological practices designed to expose unproductive prejudices and ideological distortions has blunted his appreciation of the special character of psychotherapeutic practice and the lessons that it holds for understanding the practice of critique.\textsuperscript{101} Psychotherapy inevitably is

\textsuperscript{101} Two commentators recently challenged the view that a hermeneutical philosophy precluded the development of methods for engaging in successful psychotherapeutic dialogue. Some thinkers, they claim, who have adopted an interpretive stance have argued that hermeneutics has no method.\ldots But what Gadamer calls “Method” (with a capital M) and sets up in opposition to “truth” is not the actual methods of science but the sloganistic statements of positivism; explicitly the canons of induction laid out by Hume and Mill, and by extension the procedures of hypothesis and deduction asserted by Popper.

In other words Gadamer's distinction between Method and understanding is somewhat overdrawn, and perpetuates a mythology about the way the natural sciences operate.\ldots Our understanding of method must change. But to throw method away entirely, as Gadamer does, is to accept the very mythology that needs to be debunked. Martin J. Packer & Richard B. Addison, \textit{Introduction} to \textit{ENTERING THE CIRCLE: HERMENEUTIC INVESTIGATION IN PSYCHOLOGY} 32-33 (Martin J. Packer & Richard B. Addison eds., 1989).
hermeneutical, but it clearly is different from a free-flowing conversation that occurs naturally. Extending Gadamer's philosophy by adopting a psychotherapeutic model of critical theory provides a necessary corrective to Gadamer's one-sided focus on the ontological character of human understanding.102

C. A Psychotherapeutic Model of Critical Theory: Beyond the Gadamer-Habermas Debate

A psychotherapeutic model of critical theory that accords with Gadamer's hermeneutic ontology but still remains responsive to Habermas's efforts to overcome ideology must include two central characteristics. First, the model must provide sufficient critical distance to distinguish the critical theorist from an unreflective social actor. Habermas is correct that Gadamer's notion of conversational understanding can too easily devolve into Stanley Fish's claim that theory is unavailing except as a move within practice.103 Second, the model must characterize critical distance as a feature of the hermeneutical situation. Habermas's fear that postmodern thinking leads to irrationalism has pushed him to search for an extra-hermeneutical ground for critique that Gadamer correctly asserts does not exist. In sum, the psychotherapeutic model of critical theory must provide a new understanding of the relationship between theory and practice if it is to improve understanding.

Gadamer and Habermas have both written about the relationship between theory and practice in ways that reflect their differing assessments of the psychoanalytic model of critical theory. Near the end of his debate with Gadamer, Habermas emphasized that the connection between theory and practice had been misunderstood due to a failure to distinguish different functions in the critical enterprise. First, critical theorists must develop a true description of some feature of social reality that can be defended in scientific discourse (e.g., the Marxist account of political economy). Then, theoretical truths must enlighten individuals about their situation (e.g., through the vanguard's efforts to raise the consciousness of the proletariat). Finally, enlightened individuals can join together to address political or ethical questions by achieving the consensus of affected persons in dialogue (e.g., the proletariat revolution

102. In the foreword to the second revised edition of Truth and Method, Gadamer admits the distorting effect of his limited approach but also argues that his ontological focus is necessary in light of the philosophical hubris of our day. See GADAMER, supra note 13, at 37-38.

103. See FISH, DOING WHAT COMES NATURALLY, supra note 4; Fish, Play of Surfaces, supra note 4.
overthrows capitalism). Following this clarification, Habermas regards his theory of communicative rationality as a true philosophical theory that establishes the parameters for rational practical discourse, but that cannot arbitrate between competing practical norms operating within a given social context. Just as the Freudian psychoanalyst cannot provide pre-determined answers to the practical demands facing a patient but can be guided by her valid theoretical insight into the etiology of the patient’s neurosis, Habermas argues that the social critic ascertains certain philosophical truths through reconstruction but cannot attempt to translate her own valid theoretical insight into specific political prescriptions for the future that remain above democratic debate and resolution.

The residual homage to theory in Habermas’s approach is apparent. Habermas’s central concerns are the disproportionate role of functional reason in modern society, coupled with the breakdown in the felt sense of the unity of reason caused by the differentiation of rationality into specialized discourses with attendant systems (such as law, politics, and science). He diagnoses this problem as the “colonization of the lifeworld,” by which Habermas means the encroachment of functionalist reason in its various modes into the tacit knowledge of social life. Joseph Dunne incisively argues that Habermas reaches an impasse because he simultaneously champions the rationalization processes of modernity while also seeking to reconnect these processes to the lifeworld in order to avoid the overwhelming bureaucratic tendencies of functionalist reason. Dunne argues that Habermas’s theoretical project of first isolating the cognitive structure of rationality as a universal critical standard and then seeking to reintegrate rationality with lifeworld-generated norms is doomed to fail and must be supplanted by a different picture of human understanding. He writes, “In this different picture, the cognitive self is dependent on certain culturally shaped passions not just for ‘translating,’ ‘applying,’ or ‘realizing’ what, with justification, it knows, but rather for the very knowing itself.” In other words, there is no sound basis for dividing critical theory into an epistemologically layered process of theoretically decoding social reality, achieving authentic insights, and then making prudent political decisions in concert with others.

105. See HABERMAS, supra note 104, at 38-39.
106. See DUNNE, supra note 76, at 201-26.
107. Id. at 222.
Dunne’s incisive reading is reinforced by Habermas’s expressed ambivalence about his psychoanalytic model with regard to the relationship of theory and practice. Habermas agrees that his model raises legitimate concerns at both ends of the political spectrum. On one hand, the doctor-patient model might “encourage the uncontrolled exercise of force on the part of self-appointed elites, who close themselves off against potential opponents with dogmatic claims of privileged access to true insight,” as Gadamer objects. On the other hand, Habermas agrees that his model threatens to foster “the pacifist illusion . . . that the critical insight will by itself destroy the dominating dogmatism of existing institutions,” with the result that theory will supplant and inhibit the necessary political struggle. Habermas addresses these conflicting problems by distinguishing the philosophical projects of generating a true theory and promoting individual enlightenment from the political project of creating change in social relations, which must be accomplished through dialogue rather than monologue. Habermas concludes that the vindicating superiority of those who do the enlightening [pursuant to theoretical truths] over those who are to be enlightened is theoretically unavoidable, but at the same time it is fictive and requires self-correction [through later practical engagements in dialogue]: in a process of enlightenment there can only be participants.

Theory and practice must be distinguished to preserve each realm, and yet Habermas concedes the important connections between these realms as exemplified in the psychoanalytic practice that grounds his model of critical theory.

Dunne responds to Habermas’s increasingly complex constructions by arguing that theory must be reconceived in terms of Aristotle’s practical philosophy. He claims:

Aristotle’s position stems not from a grudging or weak conception of theory but from a very strong conception of practice. If practice resists theoretical penetration (of the kind envisaged—albeit in their very different ways—by Habermas and Plato) this is because it has an intrinsic, irreducible makeup to which agents cannot but submit and which any “theory” of action (in the sense of an inquiry like Aristotle’s own in the Ethics) can do no more than bring to a just articulation.

108. HABERMAS, supra note 104, at 16.
109. Id.
110. See id. at 36.
111. Id. at 40.
112. DUNNE, supra note 76, at 224.
Gadamer's reflections on the relationship of theory and practice follow Aristotle's path and radicalize Habermas's insight by weaving together the theoretical attitude of the philosopher and the practical orientation of the citizen, rather than sharply distinguishing them and then later seeking to repair the breach. In recounting Gadamer's understanding of the relationship between theory and practice, it will become apparent that his recent appreciation of the significance of psychotherapeutic dialogue provides a concrete example of his thesis.

Modern technological consciousness has had a debilitating effect on social life, Gadamer believes, because it reduces theory to nothing more than applied research and it reduces practice to nothing more than the implementation of efficient technologies. The bureaucratization that overwhelms the practical interest in establishing solidarity with others in society has an equally devastating effect on the curiosity that manifests itself in theory.

Although Gadamer's rehabilitation of Aristotelian practical philosophy in the face of contemporary scientific ideology often is regarded as a rejection of the importance of theory, in truth he is emphasizing only one part of what he regards as an essential equilibrium. Gadamer argues 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."

But in order to achieve this equilibrium, Gadamer stresses, we must embrace a different understanding of theory.

Gadamer regards Aristotle's practical philosophy as an excellent example of a theoretical treatment of practice. Gadamer takes from Aristotle the idea that theory is a relinquishment of immediate and pressing questions and an openness to different understandings that can reveal the unproductive nature of certain prejudices. Outside the limited domains of mathematical certainty and technological manipulation of natural processes, theory is not a power that provides answers but instead is a disposition that is intimately connected with the practical-ethical engagements that

115. Id. at 68.
define social life. This broader realm of theory also girds the more precise (and limited) theoretical work in the natural sciences, inasmuch as pathbreaking scientific theorists must constitute a hermeneutic relationship between fact and theory by moving beyond their habitual mode of thinking to see the same "facts" in a new light. Gadamer concludes that this theoretical disposition cannot be segregated from practical engagement with others. He writes:

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 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.

Theory is a distinctive means of dealing with the paradoxical demands placed on social actors, then, but it remains intimately related to practice.

Gadamer's embrace of theory should come as no surprise, since philosophical hermeneutics is a manifestation of this broader sense of theory. Gadamer argues that his hermeneutical philosophy is a theoretical account of human understanding in the same way that Aristotle's practical philosophy is a theoretical account of ethics. Philosophical hermeneutics is a "unique sort of science" because it "must arise from practice itself and, with all the typical generalizations that it brings to explicit consciousness, be related back to practice." He continues:

So when I speak about hermeneutics here, it is theory. There are no practical situations of understanding that I am trying to

117. See HANS-GEORG GADAMER, The Ideal of Practical Philosophy, in PRAISE OF THEORY, supra note 113, at 50, 53.
118. GADAMER, supra note 113, at 35.
119. GADAMER, supra note 116, at 92.
resolve by so speaking. Hermeneutics has to do with a theoretical attitude toward the practice of interpretation, the interpretation of texts, but also in relation to the experiences interpreted in them and in our communicatively unfolded orientations in the world. This theoretic stance 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 theoretic 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 the 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.120

Like Habermas, Gadamer refuses modernity's temptation to displace practical engagement with theory. However, Gadamer portrays the relationship between theory and practice as much more intimate and nuanced.

Gadamer's reflections on the connections between practice and theory must be refined and concretized in order to develop a model of critical legal theory. My thesis is that the theoretical and practical features of psychotherapeutic discourse provide a model of this relationship, and that by examining this model in detail we can bring the features of critical legal theory into sharper focus. The practice of psychotherapy has moved beyond Freud's approach, in which theory reigned supreme even as it was cabined by scientistic ideology. The emerging postmodern approach to psychotherapeutic dialogue challenges the overbearing claims of theoretical knowledge construed narrowly as mere technique, emphasizes the priority of practical engagement, and draws productive theoretical insights from experience with the objective of facilitating this practice. The psychotherapeutic model of critical theory connects Gadamer's conception of the relationship between theory and practice to his acknowledgment of the hermeneutical significance of

120. Id. at 112; see also HANS-GEORG GADAMER, Hermeneutics as a Theoretical and Practical Task (Frederick G. Lawrence trans.), in REASON IN THE AGE OF SCIENCE, supra note 42, at 113.
psychotherapeutic dialogue, while also revealing the objectives and limits of the enterprise of critical theory.

III. POSTMODERN PSYCHOTHERAPEUTIC PRACTICE: DEFINING THE MODEL

Although the contemporary emphasis on psychotherapeutic dialogue is often characterized by general terms such as “hermeneutic” or “postmodern,” in reality a diverse set of perspectives and orientations comprises this movement. I do not pretend in this Article to adjudicate the competing claims made by contemporary psychotherapists. My more limited goal is to identify and describe some of the shared features of these accounts for the purpose of providing an alternative to the psychoanalytic model of critical theory that was the focus of the Gadamer-Habermas debate. In the interest of simplicity, I will refer to the general features of the most radical elements of this movement as the postmodern conception of psychotherapy. Postmodern conceptions of psychotherapy start with the premise that Freud erred by adopting the methodology of the natural and social sciences to govern and describe the practice of engaging in psychotherapeutic dialogue. Although many critics of psychoanalysis agree that Freud’s attempt to found a new science failed, postmodern psychotherapists respond to this failure in a distinctive and positive manner.

Before describing the postmodern account, though, I will address two fundamental challenges to the postmodern turn in psychotherapeutic practice. Some critics argue that Freud’s dramatic failure was the result of theoretical overreaching, and they call for renewed commitment to a rigorously scientific approach to psychoanalysis. In their view, the postmodernists have capitulated where Freud merely failed. Other critics take the opposite tack and argue that Freud failed because he subjected his impressive theoretical insights to the technical interest in developing a medical therapy, and that postmodern psychotherapists compound this error by abandoning theory and focusing on helping patients to experience a “cure.” In their view, the postmodernists have blunted the critical insight first articulated in Freud’s psychoanalytic theory. The collapse of Freudian psychoanalysis as a science does not make the “postmodern turn” inevitable, but I argue that these two primary challenges fail to make a persuasive case against using postmodern

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121. For example, it is not uncommon for commentators to lump Habermas and Gadamer together as adopting a “hermeneutic approach” to psychoanalysis, despite the important differences (including fundamental differences in their epistemologies) between these two thinkers. See, e.g., Grünbaum, supra note 56, at 9-11.
psychotherapeutic practice as a model of critical theory.

After addressing these challenges, I describe the general features of postmodern psychotherapy. By acknowledging the hermeneutical, rhetorical, and narrative characteristics of successful psychotherapy, therapists are charting a new approach to psychotherapy that provides a much better model for critical theory than Freudian psychoanalysis. The emerging postmodern account pays particular attention to the linguistic character of human understanding and the tension between theory and practice, thereby aligning psychotherapy with long-standing philosophical investigations by Gadamer and Habermas. I conclude this part of the Article by linking the postmodern conception of psychotherapy to a new model of critical theory that moves beyond the original terms of the Gadamer-Habermas debate.

A. Objections to the Postmodern Turn in Psychotherapy

1. The Scientific Objection to the Postmodern Turn

After criticizing Freud because his metapsychology and clinical theories fail to live up to the standards of scientific validity, many critics deliver equally harsh indictments of the postmodern psychotherapists who respond to Freud's deficiencies by rejecting the scientific method as the sole criterion of validity. Adolph Grünbaum has persistently advanced this critique, but his rejection of postmodern accounts is deficient in a number of respects. First, Grünbaum uses Habermas as his principal foil, but Habermas hardly represents the full breadth of the postmodern or hermeneutic approaches. As related above, Habermas attempts to reconstruct Freud's theory in terms of a distinct cognitive interest in emancipatory self-reflection because he wants to overcome what he perceives as the limitations of Gadamer's hermeneutical perspective. In short, by responding to Habermas, Grünbaum does not confront a radically postmodern hermeneutic alternative to the Freudian model.

122. See GRÜNBAUM, FOUNDATIONS, supra note 54; GRÜNBAUM, VALIDATION, supra note 54.

123. See GRÜNBAUM, FOUNDATIONS, supra note 54, at 1-43.

124. A detailed critique of Grünbaum's account would take me too far afield, but suffice it to say that he misunderstands Habermas's project and therefore misses the mark. Grünbaum argues that Habermas claimed psychoanalysis for the hermeneutic and social sciences due to Habermas's limited understanding of the natural sciences. However, this critique misses the core of Habermas's argument—that there is a third cognitive interest served by psychoanalysis—and displays an ideological commitment to a unitary scientific method, which prevents him from appreciating the similarities and differences in the philosophies of Habermas, Ricoeur, Gadamer, and others.

125. Grünbaum also discusses Paul Ricoeur's critique of Freud's theories. Although
Moreover, Grünbaum amply demonstrates that he doesn’t understand the nature of Habermas’s project when he disputes Habermas’s claim that psychoanalysis is different from the empirical sciences because the validity of the therapeutic intervention is established only by the patient’s acceptance and consequent reorientation. Grünbaum argues that extra-clinical studies are the best source of validation for the claim that psychoanalysis truly identifies and counteracts the cause of mental disturbances, and that it is absurd for Habermas to grant the patient the cognitive privilege to assess the efficacy of psychoanalytic techniques. But Habermas plainly is not making a claim about who is in the best position to assess the causal factors relating to a cure. Rather, he is arguing that the self-reflective quality of analysis fundamentally deviates from the scientific metaphor of bringing a technology to bear on a malfunctioning object. Grünbaum asserts that patients are unreliable sources for discovering what really “worked” to repair their condition, but Habermas is making the different point that therapeutic dialogue can only “work” if it motivates the patient’s emancipatory self-reflection. Psychoanalytic cures cannot be imposed on a patient in the same way that an appendectomy can be performed on them.

Because Freud claimed scientific status for his theories, Grünbaum accuses hermeneutic critics of abandoning the defining feature of psychoanalysis in their effort to save the practice. Of course, Habermas’s primary claim is that Freud’s methodological adherence to the scientific model was a mistake. In other words, Habermas agrees with Grünbaum’s reading of Freud, but he would challenge Grünbaum’s acceptance of Freud’s self-description. Grünbaum’s argument—that psychoanalysis cannot be validated as an effective treatment until empirical studies isolate and discount the placebo effect—epitomizes his assumption that postmodern clinicians must

Ricoeur adopted a hermeneutical approach more radical than Habermas’s approach, his assessment of Freud also remained trapped within the Freudian model because he accorded far too much significance to Freud’s theoretical self-understanding. See Gadamer & Ricoeur, supra note 43, at 311.

126. See GRÜNBAAUM, FOUNDATIONS, supra note 54, at 21-43.
127. Grünbaum writes that “when a patient deems his own analysis to have issued in the alleviation of his suffering, he is no better able to certify whether this gain was actually wrought through the mediation of Freudian etiologic insights than are outside students of therapeutic process.” Id. at 30.
128. See Adolf Grünbaum, Are Hidden Motives in Psychoanalysis Reasons but not Causes of Human Conduct?, in HERMENEUTICS AND PSYCHOLOGICAL THEORY: INTERPRETIVE PERSPECTIVES ON PERSONALITY, PSYCHOTHERAPY, AND PSYCHOPATHOLOGY 149, 150 (Stanley B. Messer et al. eds., 1988) (“I claim that [the hermeneutical critics] proposed conception of unconscious motives as noncausal or acausal reasons cannot be accommodated in Freud’s explanatory edifice short of dismembering it.”).
demonstrate empirically that they are employing an effective technology, even though they have plainly disclaimed this account of their practice.\textsuperscript{129} Although Habermas does not argue for a radically postmodern alternative to the scientific measure of the validity of psychoanalysis, he does offer an alternative epistemological conception of psychoanalytic dialogue that is subject neither to scientific nor to hermeneutic standards of validity.

Edward Erwin offers a more sophisticated version of the scientific critique of postmodern accounts of psychotherapy, but he too begs the question. Erwin correctly argues that postmodern psychotherapists make claims about the distinctiveness and effectiveness of their practice—at least to the extent that they attempt to justify extended costly treatment and even more costly educational programs for training therapists—and that these claims should be subject to some manner of verification.\textsuperscript{130} But Erwin goes...
beyond the commonsense plea that we attempt to measure psychotherapy's tendency to help clients and insists that psychotherapy must prove the efficacy of its techniques in isolation from the influence of extra-therapeutic factors and placebo effects. Like Grünbaum, he demands that psychotherapy meet the standards of validation for an instrumental technology that can be isolated and measured, ignoring the salient fact that postmodern approaches to psychotherapy place great emphasis on the therapist's ability to utilize extra-therapeutic factors and the placebo effect to assist the client. 

This misunderstanding is revealed most clearly when Erwin concludes his book by admitting that psychotherapy may be beneficial for clients, even if it is not yet shown that particular psychotherapeutic techniques are more effective than just providing a supportive relationship or a credible placebo. Ironically, postmodern psychotherapists believe that the skill and training of the psychotherapist may in large part involve learning how to provide this substitute relationship and to foster this self-fulfilling hope for improvement. "The data indicates that successful psychotherapy would be best understood as a rather simple, straightforward, and oftentimes boring business, distinguishable from other helpful experiences in life only by the explicit socially sanctioned contract to be helpful that exists between a therapist and a client."

The point of the postmodern approach to psychotherapy is to regard Erwin's temporary way station as the final destination, to get over the urge to reduce psychotherapy to a scientifically verifiable technology, and to get on with the project of understanding what beneficial role it plays in clients' lives.

The scientific critique of Freudian psychoanalysis poses a significant challenge for the postmodern conception of psychotherapy: If Freud failed to provide scientific backing for his

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131. See Erwin, supra note 54, at 139.

132. In a recent book, several therapists argue that extra-therapeutic factors, the nature of the therapeutic relationship, and placebo effects far outweigh the significance of therapeutic techniques in achieving a successful outcome. They claim that this understanding does not undermine the practice of psychotherapy, the usefulness of empirical studies, nor the education of therapists, although this new understanding does revise how we would go about these practices. See Scott D. Miller et al., Escape from Babel: Toward a Unifying Language for Psychotherapy Practice (1997).

133. See Erwin, supra note 54, at 161.

134. Miller et al., supra note 132, at 32. See also John McLeod, Narrative and Psychotherapy 6-21 (1997) (describing contemporary psychotherapy as merely the latest incarnation of a socially sanctioned process of healing that is slowly overcoming the scientific overlay recently placed on the practice by Freud).
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claims, the solution must be to engage in better science. However, a demonstration that postmodern conceptions do not meet the scientific criteria of validity is question-begging, since the very point of these conceptions is to question the applicability of scientific criteria to therapeutic practice. Postmodern approaches to psychotherapy do not reject all manner of extra-clinical research, nor do they reject the scientific method entirely. Nonetheless, they do challenge the unsupported assumption that the legitimacy of psychotherapeutic dialogue depends on a demonstration that it is a distinct technical intervention that is both necessary and sufficient to eliminate mental disturbances, and that its efficacy can be explained and guided by an overarching theory of the causation and persistence of these disturbances. The criticism that postmodern approaches are not scientific is persuasive only if it is true that a scientifically validated practice is the only legitimate means of dealing with mental disturbances. Significantly, Erwin relaxes this very assumption by ending his book with what might be the core postmodern insight into clinical practice: While we await the mythical scientific technology that can “raze the troubles of the brain,” we must concede that “psychotherapy is the only game in town,” and that for some people it “can be of great value.”

2. Grand Theory as a Critique of the Postmodern Turn

After the collapse of Freudian psychoanalysis as a curative science, some critics have pulled in the opposite direction by arguing that Freud’s metapsychology represents a significant theoretical advance, which was debased by his attempt to translate it into a medical cure for particular maladies. For example, David Caudill advocates abandoning the dubious clinical practice of psychoanalysis as a model for critical legal theory in favor of a philosophical appropriation of Freudian psychoanalytic theory as it has been developed by Jacques Lacan. Caudill argues that Lacan’s psychoanalytic theory about the social construction of the self addresses the problem of legal ideology directly, since in Lacanian theory it is pointless to attempt to distinguish the “subjective”

135. ERWIN, supra note 54, at 161.
experience of the individual from the symbolic order in which law plays such a large role.\textsuperscript{137} Lacan, therefore, "invites a reconsideration of the role of social structures, including law, in constituting the subject of psychoanalysis."\textsuperscript{138}

To say the least, embracing a grand theory that is not an extension of scientific knowledge runs counter to the postmetaphysical themes of contemporary philosophy. Asserting that Lacan's project was to transform psychoanalysis into the "official philosophy of France," Mikkel Borch-Jacobsen expressed reservations to an interviewer about the productivity of a theory-driven approach. He stated:

Having been part of this French psycho-philosophical culture, I tend to be a little less enthusiastic about it. . . . I believe that psychoanalysis should have more modest claims. I view psychoanalysis mainly as a therapeutic technique that came out of the practice of hypnosis in the late nineteenth century. We too often forget that curing, or at least changing people, is what psychoanalysis is really about. Does psychoanalysis really change people? And if it does, how does it work? What is efficacious—and why? Quite frankly, I find these modest, "technical" questions much more philosophically interesting than the pseudo-philosophy that you can so easily build upon Freudian texts.\textsuperscript{139}

Even if the proponents of a theoretical reading of psychoanalysis could make a persuasive case for the significance of their efforts, this would not necessarily impeach postmodern investigations of the dynamics of psychotherapeutic dialogue.

Perhaps a larger problem confronting the proponents of grand theory is their tendency to invoke authority equivalent to that conferred by scientific truth, despite the gap between their theory and discrete measurable events. Lacan's rhetorical claim that he was returning to Freud "was a highly strategic move that enabled Lacan to sell Freud to the philosophers, while at the same time selling philosophy to the psychoanalysts under the same, good-old-Freud label,"\textsuperscript{140} but it also accurately revealed the modernist character of his undertaking. Lacan shared Freud's desire to establish a "scientific" theory of human experience, but he acknowledged that

\textsuperscript{137} See David S. Caudill, Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory 49-50 (1997). Caudill contends that while "the language of legal processes and institutions was not a specific subject of inquiry for Lacan, the ordering role of legal language provides a ready example of Lacan's complex notion of the constitutive signifier in human relations." Id. at 58.

\textsuperscript{138} Id. at 140.


\textsuperscript{140} Id. at 213.
psychoanalysis could never satisfy the criteria of validity of the empirical sciences.\textsuperscript{141} Whereas Freud looked \textit{through} language to discern the real events that caused trauma in the individual (thereby subjecting his theory to a devastating empirical critique), Lacan looked \textit{within} language to locate the structural presuppositions of our experiences of the "individual" and "real" events.\textsuperscript{142} "Following Kant and the modern structuralists, Lacan sees structures as the mode of organizing experience: a theory which organizes experience neither needs testing nor can be tested."\textsuperscript{143} Despite the fact that "there is no point in testing psychoanalytic theory," Lacan claims "it is nonetheless true."\textsuperscript{144} Lacan resumed Freud's theoretical work, but only after abandoning clinical claims that would subject him to the same critiques that undermined Freud's theory.

Lacan's theory has some affinities with postmodern accounts of psychotherapy, particularly the tenet that the purpose of analysis is not to exorcize the effects of past events but rather to understand the socially constructed nature of individuality. Charmed by the interdisciplinary power of Levi-Strauss's structuralism, Lacan's psychoanalytic theory located these structures of experience in language.\textsuperscript{145} Driven by Freud's scientific ambitions, however, Lacan's grand psychoanalytic theory transformed language into an abstract topic, leading him to neglect the more immediate lessons of therapeutic discourse regarding the social construction of reality in language.\textsuperscript{146} One commentator stresses that Lacan's insights regarding language threaten to become disconnected from reality, and that only a clinical focus drawing on pragmatics, speech-act theory, and discourse analysis can provide appropriate points of

\begin{footnotesize}
\begin{enumerate}
\item Laor & Agassi, \textit{supra} note 141, at 81.
\item \textit{Id.} at 78.
\item See Caudill, \textit{supra} note 137, at 49-58.
\item In a bitter critique, former Lacanian disciple François Roustang reports that Lacan was not concerned with a "cure" nor with explaining how psychoanalysis "worked" precisely because he sought to establish a "scientific" grounding for his theorizing by remaining at the abstract level of structuralist accounts of language. \textit{See Roustang, \textit{supra} note 141, at 15-16, 38-39. He writes:}

\begin{quote}
In declaring that language was the sole object of psychoanalysis, Lacan believed it could be given a scientific basis, for he was then on terrain where something objective could be grasped. But in reality, something quite different happened; the instrument psychoanalysis employs in order to function took the place of its object, an object that belongs—and this bears repeating—to the order of subjectivity, singularity, effectivity, and life.
\end{quote}

\textit{Id.} at 113-14.
\end{enumerate}
\end{footnotesize}
reference for pursuing these insights. For my purposes it is necessary to stress only that Lacan's approach does not foreclose such pragmatic investigations. Because Lacan's grand theory stakes a claim to truth without the bothersome need to demonstrate empirical results—this is the very heart of its seductive quality—Lacan offers no per se argument against circumspect accounts of localized practices, such as those offered by postmodern approaches to psychotherapy. Freud linked his metapsychology and clinical theories by adopting a scientific model, but Lacanian theorists expressly sever this link to protect theoretical insight from the challenges that would follow from claims about clinical practice. This move seemingly leaves the clinical experience relatively free from their concern, at least to the extent that the clinical experience is regarded as a therapy for troubled clients.

At the outset, then, I distinguish the response of postmodern psychotherapists to the deficiencies of Freud's psychoanalytic theory from competing responses. Postmodernists take the pragmatic experience of critical insight in therapeutic discourse as their point of reference, rather than attempting to force this experience into the mold of Lacanian grand theory or scientific ideology. Informed by this postmodern understanding of psychotherapeutic dialogue, I will argue that it is possible to develop a more productive psychotherapeutic model of critical theory that breaks free of the limitations inherent in the original exchange between Gadamer and Habermas. After describing the general features of the postmodern conception of psychotherapeutic dialogue, I will use this practice as

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147. See Daniel Bougnoux, Lacan, Sure—and Then What?, in RETURNS OF THE "FRENCH FREUD," supra note 136, at 91, 96. Feminist theorists are particularly critical of Lacan's structuralism, arguing that pragmatic accounts of language use open paths for contesting the cultural hegemony of dominant social groups through emancipatory politics. See Nancy Fraser, Justice Interruptus: Critical Reflections on the "Postsocialist" Condition 155-66 (1997). In response, Jeanne Schroeder provides a subtle reading of Lacan that attempts to address feminist attention to social contexts of plural discourses while retaining Lacan's structuralist theory of language. See Schroeder, supra note 136. Although returning to the clinical experience would be one obvious vehicle for carrying out her reading of Lacan, Schroeder adheres to Lacan's claim that the goal of analysis is to perceive the structure of the human psyche as it is articulated in his theory rather than to effect a change or to discover a cure. For Schroeder, Lacanian analysis seems more akin to a philosophy seminar than to a practical experience of dialogic understanding, and therefore it does not play a role in her attempt to correlate his theory with feminist concerns.

148. Dave Caudill defends Lacan from the charge that he was an abstract intellectual by arguing that he was a practicing psychoanalyst who drew on the "clinical aspect of psychoanalysis" for his insights. See Caudill, supra note 137, at 22. But this fact just underscores how Lacan repeats Freud's error: Lacan's experience as an analyst undoubtedly played a role in his theorizing, but his attempt to provide a true theory that was not subject to empirical testing or refutation precluded him from addressing these experiences. Postmodern accounts of psychotherapeutic dialogue promise to make sense of this practice in a manner that neither confirms nor rebuts Lacan's theoretical claims.
my guide for extending and revising the insights generated by the Gadamer-Habermas debate.

B. The Postmodern Description of Psychotherapeutic Dialogue

Postmodern psychotherapy is not just a set of techniques, nor is it just a distinctive form of clinical theory. Postmodern psychotherapy displaces techniques and theories from the foreground by turning to the practical experience of psychotherapeutic dialogue. In light of a number of studies suggesting that virtually all forms of credible psychotherapy are equally successful in helping clients, some therapists have concluded that "the similarities rather than the differences between therapy models account for most of the change that clients experience in treatment. What emerges from examining these similarities is a group of common factors." Although not all adherents to the "common factors approach" are postmodernists, the postmodern account begins by drawing back from the confusing array of schools and techniques to the general features of psychotherapeutic dialogue. Postmodern therapists contend that the common factors of successful psychotherapy reveal that the therapist has recourse only to the therapeutic dialogue itself: There is no theoretical or technical safety net.

Postmodern psychotherapists adopt a fundamentally different perspective on the role of the therapist and the nature of psychotherapeutic dialogue. For example, in a feminist critique of the Freudian tradition, two scholars argue that the failure of the natural scientific model of psychoanalysis is epitomized by Freud's hopeless attempt to sharply separate the knowing analyst who meticulously gathers accurate information, from the troubled patient who submits to the analysis. They explain that the postmodern approach proceeds from a different understanding of the nature of psychotherapeutic dialogue and the knowledge that it produces. They write:

Ultimately reciprocity between the analyst and the patient, not separation of subject and object, is the goal of analysis. Furthermore, the goal of analysis is to change its object (patient-subject) and its laws of causality, not simply to use or discover them as in empiricist natural science.

To give an account of the analytic subject or to evaluate the

149. See Miller et al., supra note 132, at 1-7.
150. Id. at 15.
knowledge that results from analysis would require an epistemology that is simultaneously empirical, intersubjective, and process-oriented. Such an epistemology does not currently exist. If psychoanalysis were to give up its inappropriate attachment to the empiricist model of science, a disciplined reflection on the analytic situation could contribute much to the generation of such epistemologies.152

Effecting such a bold reorientation in our understanding of psychotherapeutic dialogue leads to an obvious rejoinder: How can we characterize psychotherapeutic practice after embracing such a novel framework? As Louis Sass asks:

If one dispenses with, or de-emphasizes, the past, the instincts, the unconscious, and the metapsychological apparatus . . . what is there to motivate a therapeutic journey? If one no longer moves outward toward a metapsychological scheme felt as real, nor backward toward a past felt as solid, nor downward toward the unconscious and the instincts, what is left as the goal of one’s exploration?153

But Sass does not pose this question to postmodern psychotherapists. Instead, he is challenging modernist therapists who have abandoned the strong Freudian model and are left with nothing more than humanist valorizations of the individual subject.154 Sass and other scholars have attempted to answer this provocative question by embracing a postmodern explanation of the nature and goal of psychotherapeutic dialogue in the post-Freudian world.

152. Id. at 362.
154. Sass is criticizing the approaches adopted by Heinz Kohut and Roy Schafer for placing a “quasi-solipsistic stress on the first-person perspective, on the feeling that this experience is my experience” in response to the collapse of objectivist models. Id. at 326. Schafer aligns himself with an ontological hermeneutical account drawing on Gadamer’s philosophy, in opposition to the modernist, humanist focus on the priority of the individual subject. See, e.g., Donald Meichenbaum, What Happens When the Brute Data of Psychological Inquiry Are Meanings: Nurturing a Dialogue Between Hermeneutics and Empiricism, in HERMENEUTICS AND PSYCHOLOGICAL THEORY, supra note 128, at 116. Sass is being a bit unfair to Schafer, who pioneered the hermeneutic approach to psychoanalysis from within the Freudian framework. Schafer argues that analysis is hermeneutical rather than scientific, that a narrative focus on the use of language by the analysand is central, that psychopathology is a mode of being rather than a “cause” in the past that must be “cured,” and that techniques are less important than the structured relationship created in the analytic setting. See ROY SCHAFER, THE ANALYTIC ATTITUDE (1983). Even if he is not a postmodernist, Schafer’s conception of analysis represents an important break from the Freudian system and a significant movement toward postmodern psychotherapy.
1. The Primacy of Language: Psychotherapy as Hermeneutics, Rhetoric, and Narrative

Postmodern therapists return to the “talking cure” that was the heart of Freud’s clinical practice, but they do so in a manner that represents a radical break. They regard psychotherapy as a hermeneutical engagement with another person rather than the scientific investigation of an objectified pathology. Consequently, they reject the Freudian methodology of looking behind the analytic conversation to discover a deeper realm of causal reality, and they abandon the goal of gaining access to a dark psychic history by means of a depth hermeneutic guided by strong theoretical constructs. Postmodern psychotherapists engage clients in a dialogue with the purpose of augmenting their client’s capacity for satisfactory social interaction and self-awareness in the deeply relational world in which we live. Therapeutic dialogue is not a tool or method of inquiry, it is therapy. In dialogue the therapist and client seek to understand the client’s present state of affairs, marshal the resources available to the client, and work together to improve the client’s situation by drawing on these resources.

By changing the focus from uncovering a psychic reality to engaging the client in a productive dialogue, postmodern therapists have embraced hermeneutic criteria of validity as a viable alternative to the model of the empirical sciences. Rather than investigating psychic reality by means of an objective, value-neutral stance that can provide perspicacious descriptions, postmodern therapists attempt to discern the client’s actions and frames of reference as the first step in responding to the disturbances that motivated the client to seek assistance. This practice is not validated by revealing “something real” in the client’s past, but instead by initiating a dialogue in which the client can “make the past intelligible” to himself as a feature of his present behavior and self-understanding. Therapeutic interpretations of events are validated when the client accepts the interpretation as a plausible account and regards this new account as sufficient to motivate and facilitate a change.

A hermeneutic conception of psychotherapy extends beyond the

155. In their introduction to a volume on hermeneutic perspectives, Martin Packer and Richard Addison summarize the differences between the empiricist, rationalist, and hermeneutic conceptions of psychotherapy in a helpful grid. See Packer & Addison, supra note 101, at 16.


challenge to Freud’s scientism. Drawing from Gadamer’s radical ontological claims about the nature of human understanding, Louis Sass contends that psychotherapeutic practice disrupts traditional humanist conceptions of autonomous selves. Language is not a tool employed by self-directing individuals, but rather is a web of human understanding in which “selves” are constructed and recognized. Richard Chessick argues that disturbances occur when clients are enmeshed in this web in such a way that they understand and respond to the world in an impoverished manner. The purpose of psychotherapeutic dialogue is to expand the client’s hermeneutical capacity to make sense of the world in its rich variety. Despite its postmodern epistemology, the hermeneutical approach does not require wholesale rejection of existing research orientations. However, advocates of the hermeneutic approach insist that therapeutic techniques and research programs can be productively extended if they are reconceived in light of the hermeneutic nature of human understanding generally, and of psychotherapeutic dialogue specifically.

Limiting the description of psychotherapy to hermeneutic principles remains incomplete because postmodern psychotherapists do not regard the client simply as an interpretive puzzle to be solved. The therapist also faces a rhetorical demand: She must persuade the


159. See Chessick, supra note 158, at 270. This profound shift in perspective both limits and broadens the possibilities of psychotherapy. As Chessick explains, Diagnoses and formulations in the practice of psychotherapy, if the hermeneutic approach is employed, cannot be viewed as disease entities and natural science “facts,” but rather as temporary formations that change with changing times, historical eras, cultures, and prevailing prejudices and practices. The problem of a hermeneutic psychiatry would be to steer between the Scylla of naive realism ignoring the major participation of the psychotherapist on the one hand, and the Charybdis of relativism, nihilism, and hopeless scepticism on the other. A hermeneutic psychiatry offers us the best hope of not losing sight of the methodological horizons that delimit our clinical work, and of widening these horizons so as to provide further understanding of our patients.

Id. at 271. As a psychiatrist, Chessick is quick to emphasize that this radical hermeneutic understanding of psychotherapeutic dialogue does not entirely displace the role of natural science in the treatment of mental illness. See id. at 270; Richard D. Chessick, *Prolegomena to the Study of Paul Ricoeur's Freud and Philosophy*, 75 PSYCHOANALYTIC REV. 299, 315 (1988). He thus appears to embrace a “two cultures” approach to psychotherapy that would be criticized by those adopting more radical postmodern views.

160. For example, there are a number of points of convergence with widely used non-behavioristic cognitive therapy techniques. See Meichenbaum, supra note 154, at 116, 126 (“one could conceptualize cognitive behavior modification as a form of teaching clients the nature of hermeneutic inquiry”).

161. Thus, the hermeneutic perspective would reshape our understanding of cognitivism and overcome cognitivism’s limitations even though it would not render all of cognitivism’s work irrelevant or suspect. See John Drury, *Cognitive Science and Hermeneutic Explanation: Symbiotic or Incompatible Frameworks?*, 1 PHIL., PSYCHIATRY & PSYCHOL. 41 (1994).
client that different interpretations and orientations are plausible while also remaining open to the client’s efforts to persuade the therapist of the client’s insights into her own neuroses. Psychotherapeutic dialogue is not just a means for the client to transmit data to be interpreted by the therapist, it is a rhetorical activity designed to bring jointly-authored interpretations to bear on the client’s troubles. Jerome Frank blends his hermeneutic perspective with a recovery of the ancient rhetorical tradition in order to describe the full breadth of psychotherapeutic dialogue, arguing that therapists can learn a great deal about what they often do intuitively by studying principles of rhetoric. As he puts it,

[for Plato, noble or therapeutic rhetoric sought to produce in the soul sophrosyne: “a beautiful harmonic and rightful ordering of all the ingredients of psychic life, by strengthening will, reorganized beliefs, or by eliciting new beliefs more noble than the old.” The aims of psychotherapy, although more modest and circumscribed, can easily be subsumed under this definition.]

Interpretation and persuasion are not complementary techniques, but rather two features of the unitary experience of psychotherapeutic dialogue.

The rhetorical tradition has a radical strand, no less than the hermeneutical tradition. The dominant conception of rhetoric reflects the Enlightenment prejudice that rhetoric is a deviation from logical argumentation and an unwelcome relapse into appeals designed only to stir the emotions. But this pejorative conception

162. See Martin Derksen, Dream Interpretation as Test Case for Hermeneutics, 22 J. PHENOMENOLOGICAL PSYCHOL. 134, 140 (1991) (emphasizing the need to supplement hermeneutical interpretation with rhetorical persuasion). Derksen correctly emphasizes the importance of rhetoric, but he misreads Gadamer’s hermeneutics as a set of techniques for interpreting a text rather than as an ontological claim about human existence, thereby missing Gadamer’s emphasis on rhetoric within a hermeneutical approach. See Mootz, Rhetorical Knowledge, supra note 9, at 503-09. Dersken adopts a decidedly modern approach by championing a monological rhetoric in which the all-knowing therapist attempts to persuade the patient of the therapist’s superior interpretation of the patient’s situation. In the current Article, I join the emphasis on rhetoric with the ontological themes of philosophical hermeneutics.

163. See FRANK, supra note 157, at 65-70; see also Erling Eng, The Significance of the Rhetorical Tradition for the Self-Understanding of Psychotherapy, 5 THE HUMAN CONTEXT 569, 569 (1973) (“A psychotherapist acquainted with the writings of antiquity is likely to be struck by the affinities between the practices of his profession, especially if this includes psychoanalysis, and the doctrines of ancient rhetoric”).

164. FRANK, supra note 157, at 66 (quoting Robert Spillane, Rhetoric as Remedy: Some Philosophical Antecedents of Psychotherapeutic Ethics, 60 BRIT. J. MED. PSYCHOL. 217, 217 (1987)).

165. See Eng, supra note 163, at 570. The assumption that emotions are brute events that intrude on an otherwise rational consciousness misses the fact that emotions are storied events no less than explicit narratives, and that it is precisely the rhetorical dimension of behavior that opens the client to the benefits of psychotherapy. See KENNETH J. GERGEN, REALITIES AND
has faced a fundamental challenge from the beginning of the Western philosophical tradition. Some of the Sophists viewed rhetoric as an activity that motivates action by employing a diverse set of incommensurable topics to craft arguments grounded only on probabilities rather than certainties. Under these conditions, rhetoric is the art of securing the confidence of one's audience and then making a persuasive argument that provisionally recovers "the sense of unity in a situation of contraries." Psychotherapists, no less than rhetoricians in this Sophist account, seek the recovery of a sense of unity in a lifeworld of unavoidable contraries. As Erling Eng explains:

The situation in which the psychotherapist today finds himself is one in which the mediations between logos as word, speech, meaning and consciousness and logos as "-ology," i.e. science, have become increasingly multiple and obscure. Within this situation rife with unmediated "contraries," it is the task of the psychotherapist to find ways of confronting the distress he shares with his afflicted fellows.

Postmodern conceptions of psychotherapy regard the dialogue between therapist and client as a hermeneutical-rhetorical event. Because interpretation and persuasion necessarily figure prominently, psychotherapy is not just a collection of techniques wielded by an expert for the purpose of "creating" mental health. Psychotherapeutic dialogue produces knowledge about the client's situation and illuminates the resources available for overcoming perceived inadequacies, even though this knowledge is not generated by logical deduction or empirical quantification. Consequently, it makes no more sense to say that psychotherapy is an irrational or ungrounded activity than to say that political or ethical discourse is irrational and ungrounded. In recent years, a number of therapists have investigated the hermeneutical-rhetorical nature of psychotherapy by emphasizing the narrative qualities of the practice. A narrative focus captures both the hermeneutical activity of discernment and the rhetorical activity of elaboration in a more concrete manner, and it provides a useful heuristic for exploring the
radical challenge to prevailing epistemologies issued by the postmodern approach to psychotherapy.

The narrative focus of postmodern psychotherapy operates at multiple levels. In the most obvious sense, psychotherapy is just a socially sanctioned venue in which clients can tell certain kinds of stories. However, the narrative character of psychotherapy involves more than self-expression by the client. Postmodern psychotherapists do not regard client narratives as second-order accounts that describe the client's underlying existential reality more or less accurately. Instead, they regard narratives as contingent, socially constructed frameworks that structure reality. The therapist enters into dialogue with the client to hear his (troubled) narrative and to co-construct a revised narrative, but narrative reconstruction is not a simple matter of the all-knowing therapist identifying the “correct” or “true” narrative that the client should adopt. Because the client's prenarrative experience permits a range of narrative constructions rather than only one accurate representation, therapy is always a contextualized and pragmatic assessment of the adequacy of the client's narrative construction and an identification of the

170. John McLeod defines this function as providing a “cultural form or arena in which people are given permission to tell their personal stories of troubles, in the presence and with the assistance of another person with special skills and status in relation to this task.” McLeod, supra note 134, at 10. Ceremonial narration has always played a role in reintegrating individuals into the range of appropriate social roles that are constructed and maintained by shared narratives. Although Freudian scientism has severely hampered the ability of psychotherapy to play this role in modern secular society, this role is a significant reason that psychotherapy is such an important dimension of modern life. See id. at 20. Many therapists have emphasized the importance of being caring and responsive, but the true significance of these qualities may be that they provide an environment in which clients feel comfortable enough to narrate and re-narrate their stories. See id. at 105; Miller et al., supra note 132, at 81-82 (describing a case history involving a client who required only a space in which to narrate her story).


172. Krippner and Winkler write:

In summary, postmodern psychotherapists bring considerable modesty to their therapeutic interactions admitting that they have no certain "truths" or final "answers." However, they can assist their clients to narrate part or all of their life story, and to identify options as to that story's next chapter. . . . [P]ostmodern therapists understand that they are engaged in a process of cooperative construction as their clients attempt to revise or change the meanings and values of their life narratives, and develop an ethical code consistent with this realization.

range of alternatives open to the client.

The adequacy of our self-narration is not a matter of carrying over into language what we already know of ourselves, but is, to borrow a phrase from Merleau-Ponty, a matter of a *creative adequation* that first generates an explicit sense from our otherwise mute prenarrative experience. Imaginative elaboration and potential distortion cannot be exorcized from this latter process. Authenticity, after all, is not the mere recounting of one’s past, but, as Heidegger has said, also the projection of one’s possibilities.\(^{173}\)

The role of the therapist is to act “as a facilitator,” to join with clients “in the development of a new story about their lives that offers them a view that is different enough from their situation, yet not too different, to further the conversation.”\(^{174}\)

Because postmodern psychotherapists accord ontological status to narratives, regarding them as the very fabric of the self, they begin by acknowledging that life-narratives cannot be discarded or adopted at will during therapy. There simply is no “self” standing outside the narrative who can do the discarding or adopting. Consequently, psychotherapy is a process of broadening the client’s successful participation in socially structured narratives that are beyond the client’s complete control.\(^{175}\) Reconstructing a narrative is a collaborative effort to construct a plausible account of how the patient’s narrow version of reality developed through a series of accidental events, misunderstandings, and frozen emotions. . . . The therapist thus tries to get the patient to see that what he takes to be unchangeable reality is really simply his particular and quirky story, and that this understanding has a high price. This “genealogy” will tend to undermine the patient’s conviction that his way of seeing things is the way things are and have to be.\(^{176}\)

This ontological conception of narrative reinforces the postmodern


\(^{175}\) Parry and Doan write, “No one ever fully becomes the author of his/her own story; any such assumptions can only lead back into the illusions of control, individual autonomy, isolated selfhood, and single truth. The person goes forth instead to join with others in the universal human action of multiple authorship.” ALAN PARRY & ROBERT E. DOAN, *STORY RE-VISIONS: NARRATIVE THERAPY IN THE POSTMODERN WORLD* 43 (1994).

dismissal of the story of a hidden trauma first producing a comportment that has become generalized into pathology, since the pathology is sustained by the client’s continuing self-narration rather than as a continuing effect of a lingering (but still “real”) cause.\textsuperscript{177}

Working from Merleau-Ponty’s conception of a breadth psychology, Hubert Dreyfus and Jerome Wakefield contend that “pathology occurs when a particular way a person relates to some people or some objects becomes a way of relating to all people and all objects,”\textsuperscript{178} and so the therapist’s task is not to supply a new narrative but to rather to restore a sense of equilibrium in the client’s disrupted narrative.\textsuperscript{179} Beginning with the premise that “psychoanalysis is informed with a thought which nevertheless is expressed only very indirectly in certain Freudian concepts,”\textsuperscript{180} Merleau-Ponty attempts to reform the theoretical description of psychoanalysis by drawing on phenomenology.\textsuperscript{181} Dorothea Olkowski connects Merleau-Ponty’s later work on the philosophy of the “flesh” with Freud’s insights, rejecting causal etiology as the goal of therapy in favor of uncovering the embodied style that is impairing the client’s life in some manner.\textsuperscript{182} She writes:

The meaning of each psychological situation of each bodily activity, is what Merleau-Ponty describes as the invisible dimension of each visible. We do not “produce” these activities, events and creations; rather, they dominate our lives, just as the sexuality of the child is the pre-history of the adult and so may dominate the life of the adult.

\ldots

A fixation is the “investment” of the openness of our flesh in a certain style of perception, a matrix that closes off any dimensions of life which might interfere with its self-maintenance. If an individual tries to turn away from his or her opening upon the world by repressing it, an area of life is closed

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\textsuperscript{177} See Hubert L. Dreyfus & Jerome Wakefield, Rejoinder to Joel Kovel, in \textit{Hermeneutics and Psychological Theory}, supra note 128, at 295, 296.

\textsuperscript{178} Dreyfus & Wakefield, supra note 176, at 276.

\textsuperscript{179} See id.

\textsuperscript{180} Id.

\textsuperscript{181} See Maurice Merleau-Ponty, \textit{Phenomenology and Psychology: Preface to Hesnard’s L’Oeuvre de Freud} (Alden L. Fisher trans.), in \textit{Merleau-Ponty and Psychology} 67, 68 (Keith Hoeller ed., 1993). Merleau-Ponty argues that psychoanalysts are not disadvantaged by the poverty of Freud’s theoretical discourse because their practice always confronts them with a “surplus of meaning” that pulls them beyond the “meager concepts of the theory.” Id. at 68.

\textsuperscript{182} See Dorothea E. Olkowski, \textit{Merleau-Ponty’s Freudianism: From the Body of Consciousness to the Body of Flesh}, in \textit{Merleau-Ponty and Psychology}, supra note 181, at 97, 114.
\end{flushleft}
off. Yet, if in the establishment of a relation between a patient and an analyst a reopening upon the world occurs, the flesh of the patient’s life can once again reveal distance. A single dimension, or many must be opened by the analysis and once again take its or their own route, altering with every new encounter.

A provisional “truth” is discovered in psychoanalysis; it is a meaning open to the patient to recognize as the direction (sens) of his/her flesh.\(^{183}\)

The client’s “style” is expressly shaped into narrative and expanded during therapy, but it is not dissolved or abandoned. Therapy amounts to developing a better adequation to life’s challenges from within an inescapable but still malleable embodiment.

Merleau-Ponty’s ontological arguments emphasize that psychotherapy is not just an exercise in making up a happy story. Postmodern psychotherapists stress that narratives are not stories conceived by individuals and then later related to others, but instead are social resources from which each individual continuously borrows in creating her identity as a “self” within a social matrix. A client experiencing disequilibrium requires assistance “in negotiating the fit between his or her individual experience and the story-lines that are available. The task of therapy is, as a result, to open a ‘space’ in which the correspondence of person and story can be reviewed and re-adjusted.”\(^{184}\) The social character of narrative corresponds to the deeply relational character of human existence. For example, any effort to describe something as “personal” as anger inevitably will be structured as a story that includes reference to “a set of intentions and social situations.”\(^{185}\) Just as Plato’s dialogues establish that thinking is the dialogue of the soul with itself and therefore is social in character,\(^{186}\) so too even deeply personal narratives are always social in character. “As a way of knowing, narrative implies a relational world. A story exists in a space between teller and audience.... Even a story written alone, such as a novel, has an implied audience.”\(^{187}\)

Kenneth Gergen provides a comprehensive account of the radical

\(^{183}\) Id. at 113.

\(^{184}\) MCLEOD, supra note 134, at 93.

\(^{185}\) Id. at 92; see also Lynn Hoffman, A Reflexive Stance for Family Therapy, in THERAPY AS SOCIAL CONSTRUCTION, supra note 174, at 7, 12 (claiming that emotions are “just one more part of a complex web of communication between people and [should not be accorded] special status as interior states”).

\(^{186}\) See GADAMER, To What Extent Does Language Perform Thought, in TRUTH AND METHOD, supra note 13, Appendix at 542, 542-44.

\(^{187}\) MCLEOD, supra note 134, at 38.
implications of postmodern psychotherapy that integrates the
hermeneutical, rhetorical, and narrative dimensions of the practice.
Gergen begins by rejecting a simplified hermeneutic approach that
would regard patients as texts to be interpreted by the skilled
analyst. Even if this approach overcomes Freud's scientism, it
leaves in place the modernist glorification of the individual as both
the investigator and the mysterious subject to be studied. As a
postmodernist, Gergen construes the hermeneutical-rhetorical
practice of psychotherapy as a collaborative effort to revise the
intersubjective web of narratives that structure the client's life.
Regarding "self-narratives as forms of social accounting or public
discourse," Gergen insists that "narratives of the self are not
fundamentally possessions of the individual but possessions of
relationship—products of social interchange. In effect, to be a self
with a past and potential future is not to be an independent agent,
unique and autonomous, but to be immersed in interdependency."
In other words, narrative reality is a socially constructed reality.

In Gergen's view, psychopathology is not an individual "illness"; it
is a relational dysfunction. Therefore, the challenge facing
postmodern psychotherapists is to develop a "language of
understanding in which individual characteristics are derivatives of
more essential forms of relationships." For example, depression
should not be viewed "as a personal event, but as a constituent of a
particular relational dance" from which the client cannot extract
himself. Even emotions—customarily regarded as the brute data of
individual experience that subend psychological disturbances—are
relational in character: "Emotional discourse gains its meaning not
by virtue of its relationship to an inner world (of experience,
disposition, or biology), but by the way it figures in patterns of
cultural relationship . . . . Emotions do not 'have an impact on social
life'; they constitute social life itself." Because emotions are
"storied"—they are intelligible only in the context of the unfolding
narratives and actions of which they are a part—psychotherapy is the
project of identifying alternatives within these relational scenarios
that permit the client to adopt a relational role other than that of the

188. See Kenneth J. Gergen, If Persons Are Texts, in HERMENEUTICS AND
PSYCHOLOGICAL THEORY, supra note 128, at 28, 43-44.
189. GERGEN, supra note 165, at 188.
190. Id. at 186.
191. Id. at 214.
192. Kenneth J. Gergen, When Relationships Generate Realities: Therapeutic
kgergen1/text6.html/>.
193. GERGEN, supra note 165, at 222.
“angry” or “depressed” person. The purpose of psychotherapy is not to gain insight about the client’s supposedly deeply personal emotional makeup, but rather to effect a change in her narratively structured relationships.

Gergen believes that therapists are effecting a “significant transformation” in psychotherapy by showing an “abiding concern . . . with the significance of communal meaning making, the constructed nature of reality, co-constructive processes in therapy, and the cultural and political character of therapeutic practice.”

Adopting the Wittgensteinian view that to have a language is to inhabit a form of life, Gergen insists that psychotherapy is an intervention into the client’s forms of life (which include actions and beliefs) rather than a set of techniques designed only to adjust the client’s linguistic performance. It is a profound mistake to equate the narrative approach to psychotherapy with assisting the client to articulate a more expansive narrative during the therapy session because the client will “change” only if the new narrative proves to be successful within the client’s relational context.

Arguing that replacing an unworkable narrative with a better narrative is only a “first-order therapeutic approach,” Gergen stresses the importance of not succumbing to the modernist image of the all-knowing therapist who points the way to the “correct” narrative for the client’s situation. If the psychotherapist is to avoid a facile understanding of the narrative dimension of psychotherapy, Gergen insists that she must embed her emphasis on narrative and narrative thinking in a broader

194. In describing the relational dynamics attendant to a violent episode that at first appeared to be random, Gergen emphasizes the objective of recognizing and pursuing alternatives to the seemingly natural relational dances in which the client is enmeshed:

According to traditional empiricist standards, the scientist’s task is complete when research has “carved nature at the joint.” In contrast the [social] constructionist aim here is transformative—to generate alternatives to existing patterns of action. The shift is from carving nature to enriching it. Thus, explicating patterns of escalating hostility is only a beginning. Should this particular construction seem plausible and compelling, and should one find the pattern disturbing and thus worthy of change, then the challenge is to generate alternative possibilities. Are there other moves that can be made by participants in the traditional scenario, perhaps during its early stages, that might avert disastrous outcomes? Can the scientist or the practitioner locate or invent actions that could plausibly be inserted into the unfolding pattern, thus enabling combatant couples or hostile nations to transcend or abandon the all too “logical” sequence?

Id. at 228-29.

195. See Gergen, supra note 192.

196. Id.

197. See id.; PARRY & DOAN, supra note 175, at 157-73. Jennifer Clegg insightfully notes that some postmodern theorists make the same mistake as cognitive/behavioral theorists by focusing only on the present moment rather than on the client’s historical and relational context. See JENNIFER CLEGG, CRITICAL ISSUES IN CLINICAL PRACTICE 60-63, 122-23 (1998).

198. GERGEN, supra note 165, at 250.
concern with the generation of meaning via dialogue. This involves a preconception of the relativity of meaning, an acceptance of indeterminacy, the generative exploration of a multiplicity of meanings, and the understanding that there is no necessity either to adhere to an invariant story or to search for a definitive story.199

The goal of revising the client’s narrative is not to approximate an ideal narrative but to demonstrate the malleability of narrative reality to the client so as to enable her “to participate in the continuous process of creating and transforming meaning.”200 In short, postmodern psychotherapy is a dialogue in which therapists help to “liberate participants from static and delimiting conventions and enable a full flexibility of relationship.”201

In summary, postmodern psychotherapy is grounded in therapeutic dialogue, which can be understood only as a hermeneutical, rhetorical, and narrative event that takes place within a social context that is hermeneutically, rhetorically, and narratively structured. The therapist engages in a dialogue with a client that is designed to externalize—to some degree—the narrative structure of the client’s life. Psychotherapy is a process in which the therapist and client together uncover options in the client’s life by exposing the contingent and multivalent character of the socially constructed narratives that the client had formerly regarded as inflexible and given.202 The ontological premise that narratives shape an individual’s

200. GERGEN, supra note 165, at 245.
201. Id. at 252. Roy Schafer comes to a similar conclusion in his hermeneutic rereading of psychoanalysis:

But the beneficial change brought about by analysis involves more than recognizing and accepting how much one has been implicated in developing the meanings, the forms, and the continuation of one’s usually lifelong difficulties, and it involves more than recognizing the extent to which one has inappropriately assumed responsibility. For what has also changed is the analysand as life-historian, as maker of sense, as definer and designer of possible futures. I have described what amounts to a cognitive revolution on the part of the analysand.

SCHAFER, supra note 154, at 191 (1983). Although Schafer’s conclusion remains embedded in a humanist model of ego development, it is remarkably close to Gergen’s postmodern account.

202. See MCLEOD, supra note 134, at 107-26; Laura Fruggeri, Therapeutic Process as the Social Construction of Change, in THERAPY AS SOCIAL CONSTRUCTION, supra note 174, at 40, 49-51. Ken Gergen describes therapy as an invitation to the client
to find exceptions to their predominating experience; to view themselves as prisoners of a culturally inculcated story they did not create; to imagine how they might relate their experience to different people in their lives; to consider what response they invite via their interactional proclivities; to relate what they imagine to be the experience of others close to them; to consider how they would experience their lives if they operated from different assumptions—how they might act, what resources they could call upon in different contexts, what new solutions might emerge; and to recall precepts once believed, but now jettisoned.
experience indicates that it will be extremely difficult to alter an impoverished narrative construct "once it has been identified as the map of 'reality,'" for the simple reason that an avenue of change literally will not appear on the map that guides the client's experience of life. Even if a revised narrative is co-constructed in the therapy sessions it will remain tenuous and vulnerable; unless it becomes embedded in the client's relationships, it is unlikely to survive or have any lasting effect. Postmodern psychotherapists do not accede to the Prozac mentality of quick and easy fixes.

2. At Risk in Dialogue: Working Without a Theoretical Safety Net

The postmodern approach to psychotherapy raises important questions about the ability and authority of the psychotherapist to guide the client's narrative reconstruction, since the psychotherapist's life is no less narratively structured and deeply relational than her client's life. Freudian analysts are trained to neutralize the reflexivity of their theories by submitting to their own analysis and by paying scrupulous attention to the counter-transference phenomenon during sessions. The subjective limitations of the analyst are superceded by the theoretical insight into the workings of the psyche. Because postmodern psychotherapists do not pretend to have recourse to a theoretical reconstruction of an objective psychological reality that can secure the authenticity of their practice, they are forced to confront a rather dramatic question:

Are we yet bold enough to proceed into the postmodern Zone without any security blanket—not even the moral superiority provided by at least an implicit assumption that a particular point of view or way of working is just a little bit better or truer than the others? In a word, are we prepared to work entirely within the rather humble acknowledgment that in the intersubjective and even the intrasubjective realm in which therapy takes place, all is interpretation?

In an important sense, the postmodernists vindicate the Freudian insight that the therapy session is a stand-in for the client's life

Gergen & Kaye, supra note 199, at 183.
203. PARRY & DOAN, supra note 175, at 36.
204. The successful revision of a narrative does not mean that the older narrative is "replaced." As Parry and Doan explain: The new story, because of its relative recency, will remain vulnerable to subversion by the treachery of the old story, because of the powerful outside influences that authored this account initially. Old stories do not die easy deaths; in fact, our experience suggests that they do not die at all! Instead, they continue to extend invitations to the person throughout the remainder of his/her life.
Id. at 157.
205. Id. at 22.
through transference, but they insist that the therapist cannot stand aloof from this engagement as an objective observer. John McLeod makes this point forthrightly: “Certainly, therapy clients may be expected to leave the therapy room with new or modified stories-about-self that they then tell to other participants in their social world. But much the same process occurs also for therapists.”

Michael Moore has forcefully challenged postmodernists to provide a theoretical account of their practice, alleging that a focus on the pragmatics of therapeutic dialogue constitutes “something of a salvage operation” that attempts to do away with an explanatory theory in a desperate attempt to save the clinical practice. Moore argues that hermeneutic approaches ultimately “flounder” without a theoretically defined standard for distinguishing productive interpretations of the client’s situation from unproductive interpretations. Conceding that therapy may be a distinct form of discourse in which the therapeutic effect of interpretations provides the criterion of success, Moore nevertheless remains adamant that it is necessary to provide a theoretical explanation of this clinical activity with an explanatory discourse that is not limited to clinical language. He writes:

Can clinical psychoanalysts refuse to leave their clinics and practice their interpretive methods uninterrupted by the clamor of external criticism? They can, of course, in the same sense that an ostrich can refuse to look at the world. But none of them do, and for very good reason: Without seeking explanations they could not know whether or not they were achieving the whole point of their interpretive practice.

Questions of truth, reference, reality, and justification must be asked at some point, no matter how distinct are interpretive activities from explanatory activities.

In other words, even if a hermeneutic perspective provides the best account of the nature of therapeutic dialogue, a hermeneutic approach cannot explain the role of therapeutic dialogue in successfully reducing mental distress because it does not include a theory of causation or a criterion of “mental health.”

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206. McLEOD, supra note 134, at 95.
208. See id. at 926.
209. Id. at 940-41.
210. See Louise E. Silvern, A Hermeneutic Account of Clinical Psychology: Strengths and
The response to Moore is succinct and direct: Postmodern psychotherapists do operate on the basis of a (sometimes implicit) theoretical understanding of their practice, but they embrace only a modest conception of the role and power of theory. Postmodern theoretical accounts of psychotherapeutic dialogue—and of human understanding generally—comport with the hermeneutical, rhetorical, and narrative character of the practice. As one therapist emphasizes, a radical reconceptualization of psychotherapy as "clinical praxis" yields the conclusion that the theoretical backdrop for postmodern psychotherapy is a suspension of representational thinking and an acknowledgment that a radically contingent practical wisdom is at work in therapy. Moore does not understand that this is a theoretical claim, rather than a rejection of theory altogether. Carlo Strenger, working as a clinical psychologist and a philosopher, argues that therapy can be understood as a reasonable activity only by embracing an understanding of rational argumentation and demonstration that is broader than the scientific method. Against Moore's insistence that therapists must employ theoretical language premised on causal claims even though the language of clinical practice eschews this orientation, Strenger argues that the clinical shift from reconstructing traumatic events in the client's past to working with the client to expand an impoverished narrative requires a corresponding theoretical shift: namely, from the causal model of the natural sciences to the humanistic rationality at work in disciplines such as history and law. "We are all perfectly capable of distinguishing between good political argument and empty rhetoric. The fact that we do not have an algorithmic decision procedure [generated by political theory] does not make all arguments equally non-rational." Postmodern psychotherapy's failure to meet Moore's strict requirements of an explanatory theory reveals Moore's limited conception of theory rather than the irrationality of therapy. Commentators sharpen the critique of postmodern therapy by insisting that if the practice is to have disciplined integrity, therapists must be guided by their theoretical commitments while working within a therapy session. Morris Eagle emphasizes that even after stripping Freudian psychoanalysis of its theoretical backing and reducing it to therapeutic dialogue, "there would nevertheless

212. See STRENGER, supra note 176, at 27.
213. See id. at 86, 123-52.
214. Id. at 183.
remain some theory that guided therapeutic practice."²¹⁵ Although the language used in a therapy session might be oriented to the client's intentions, reasons, desires, and motives, Eagle insists that using the same limited language in building a philosophical theory of the efficacy of the clinical practice represents a category mistake.²¹⁶ Therapists require a theory and methodology that can tell them what to do and when to do it, even if this theoretical knowledge is not expressed to the client during the course of therapy. Given "the understandable and necessary limitations of the strictly clinical language," Eagle argues, insisting that theoretical discourse be limited to clinical language "is like upholding the virtues of not knowing or understanding too much."²¹⁷ Eagle's sarcasm unintentionally uncovers the principal theoretical claim made by postmodern therapists: the theoretical posture of "not-knowing."

Theoretical conceptions clearly shape the background assumptions and general orientation of the psychotherapist, but postmodernists argue that such theoretical conceptions cannot provide specific directions in the practice of psychotherapy. The distinctive nature of psychotherapeutic practice as a hermeneutic, rhetorical, and narrative dialogue places important limits on theory, since no theory could hope to "tell the therapist what actually needs to be done in therapy from moment to moment."²¹⁸ Postmodernists do not make this concession because they believe it is pragmatically difficult to apply a true theory of psychopathology in the immediacy of the clinical setting. Rather, they make the more radical claim that the very idea of a theory that could prescribe the next move in psychotherapeutic dialogue is profoundly mistaken. Harlene Anderson draws on her years of clinical practice to reach the conclusion that theory cannot provide a road map for the therapist's

²¹⁵ Eagle, supra note 130, at 319.
²¹⁶ See id. at 319-20.
²¹⁷ Id. at 320-21.
²¹⁸ Berger, supra note 211, at 175. Most practicing psychotherapists use some form of theoretical language in describing their approach to psychotherapy in order to vindicate the legitimacy of their practice, but they disavow this language as a source of detailed direction in their practice. Louise Silvern argues that the traditional view of clinicians manipulating symptoms by working from a theoretically-grounded critique is no more than a set of rhetorical moves to establish expertise and legitimacy rather than an accurate description of practice. She writes:
   As an example, most clinicians never conduct (or read?) empirical research after graduation. More crucially, even while using the terms and practices associated with a theory, many clinicians subjectively disregard the theory's explanations about the causes of development, pathology and cure. After all, it is no secret that competing theoretic explanations often cannot be operationalized differently from one another. Thus clinicians do practice without taking seriously the causal explanations which they putatively apply.
Silvern, supra note 210, at 7; see also McLeod, supra note 134, at 16.
practice because the conversational essence of the practice is not susceptible to methodological prescription. Anderson embraces precisely the theoretical position that Eagle assumes is unacceptable: namely, the position of "not-knowing." \(^{219}\)

Anderson describes the evolution of her approach to psychotherapy as moving from an effort to diagnose the client’s problems and intervene with corrective suggestions to an effort to listen closely to her client and to engage in genuine conversation. \(^{220}\) She adopts a position of "not-knowing" by entering into dialogic conversation with the client rather than adopting the expert’s objectifying attitude and remaining aloof from the client because she is convinced 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.” \(^{221}\)

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. \(^{222}\)

What begins as a therapist’s learning about a client begins to arouse the client’s curiosity as well, inviting the client to join the therapist in a shared inquiry into the issues at hand. As a

\(^{219}\) Anderson draws heavily from Gergen’s theoretical writings to describe what she has experienced in her clinical practice. Gergen similarly advocates the “not-knowing” approach, which he characterizes as involving a pervasive abnegation of the role of the therapist as superior knower, standing above the client as an unattainable model of the good life. There is, instead, a strong commitment to viewing the therapeutic encounter as a milieu for the creative generation of meaning. The client’s voice is not merely an auxiliary device for the vindication of the therapist’s pre-determined narrative, but serves in these contexts as an essential constituent of a jointly constructed reality. [The] emphasis, then, is on the collaborative relationship between client and therapist as they strive to develop forms of narrative that may usefully enable the client to move beyond the current or continuing crisis.

Gergen & Kaye, supra note 199, at 174-75.

\(^{220}\) See HARLENE ANDERSON, CONVERSATION, LANGUAGE, AND POSSIBILITIES: A POSTMODERN APPROACH TO THERAPY 59-69 (1997).

\(^{221}\) See id. at 108-31.

\(^{222}\) Id. at 133.
therapist begins to learn about and understand a client's story—his or her view, experience, desires—this therapist learning mode, initially an asking-telling-listening sequence, shades into a conversational process characterized by shared inquiry. As shared inquiry develops, fixed, frozen, or monological constructions begin to change.223

Anderson concludes that a "therapeutic conversation is no more than a slowly evolving and detailed, concrete, individual life story stimulated by the therapist's position of not-knowing and the therapist's curiosity to learn" what only the client is in a position to tell her.224

Although provocative and catchy, the "not-knowing" label is perhaps misleading. It would be a mistake to interpret this approach as erasing all manner of distinction between the therapist and client, or as surrendering therapy to an "anything goes" nihilism. Clearly, the therapist and client bring different resources to psychotherapy. The therapist continues to be an "expert" in light of her counseling experience, even if this expertise cannot be systematized in advance and imposed on the client.225 It is more accurate to regard the therapist as a "co-expert" who openly acknowledges that she cannot master the client's situation from a removed stance but can only join with the client in a shared undertaking.226 Anderson emphasizes the paradoxical conclusion that the therapist is an expert in "suspending" her urge to diagnose; she is an expert in not "establishing understandings, explanations, and interpretations based on prior experiences, formed truths, and knowledge."227 In other words, the therapist is an expert only in the process of facilitating dialogic conversation rather than in the content of her client's narrative.228 Gergen shares this relational view of therapy by characterizing the therapist as a skilled partner who is able to encourage the client to join a "conversational dance" rather than as

223. Id. at 113.
225. See Jay S. Efran & Leslie E. Clarfield, Constructionist Therapy: Sense and Nonsense, in THERAPY AS SOCIAL CONSTRUCTION, supra note 174, at 200, 206.
227. ANDERSON, supra note 220, at 137.
228. See id. at 67, 132-65. Clegg writes:
   It is an entirely different matter to work with people on their own stories and to debate stories told by others than it is to provide people with stories we believe to be good for them. We need to know how to recognize when story-providing interventions are intrusive, to know what limits should be placed on this approach.
   CLEG, supra note 197, at 134.
an all-knowing expert who decodes the unknowing layperson.\textsuperscript{229}

Anderson's "philosophical stance" of "not-knowing" is a theoretical claim about the nature of psychotherapeutic dialogue and the means for facilitating the goals of this dialogue. Her claim is that the therapist must relinquish a theory-driven technical approach and engage in genuine conversation, since it is only within dialogue that new meanings can be constructed.\textsuperscript{230} She writes:

Circling back [to] the philosophical premise that knowledge and meaning are the products of the generative process and social discourse, therapy may be viewed as a special kind of social discourse and best described as a purposeful conversation, whose aim is to create an environment facilitating a process in which cogeneration and coconstruction of meaning by therapist and client lead to new narrative and thus new agency. Through

\textsuperscript{229} Gergen writes:
Rather than exploring the unknown world of the interior, one moves to the level of client-therapist relationship... When a client reports depression, for example, what form of "dance" is the therapist being invited to join? Are the achieved patterns the client has developed in other relationships likely to be manifest? Can the therapist help to develop new dances or relational forms that are more beneficial to the client? In this sense the therapist is not attempting to "get to the bottom" of the case or to "plumb the inner depths," but to make manifest the patterns of interchange that are invited by the client's actions, to explore their viability, and to develop means of altering or expanding the repertoire of potentials.

This relational account views the interpretive process not as the act of the single individual attempting to locate the inner region of the other, but as a process of mutual collaboration. The metaphor of the dance or the game replaces that of the text.

Gergen, supra note 188, at 49-50.

\textsuperscript{230} Anderson's conversational approach finds support in an early and influential book in which two linguists provided an extended micro-analysis of a 15-minute segment of a therapy session in support of their theory that psychotherapy operated like ordinary conversation. See \textsc{William Labov \& David Fanshel, Psychotherapy as Conversation} (1977). The authors scrupulously avoided a theoretical surrender to linguistic reductionism and emphasized that the coherence of the therapeutic conversation was a product of the pragmatic dimension of the relationship. See \textit{id.} at 30, 349-61. In particular, the authors cautioned against attempting to reduce the therapeutic conversation to a linguistic technique that could be employed methodologically. Labov and Fanshel acknowledged the potential distortions of their investigation:

The paradox of micro-analysis applies to the evaluation of the therapist as well as to the study of the patient. When the technique of the therapist is exposed in detail, the analysis produces the illusion that the therapist is manipulating the patient in a crude and obvious way. This is an inevitable product of the analytical study of spontaneous interaction... These reactions often fail to take into account the sense of mutuality that has developed in this series of therapeutic sessions, and the special relationship between a young adult and a mature therapist. In any case, the illusion of mechanical and directive behavior disappears when one becomes more familiar with the materials and enters into the delicate problem of therapy from the therapist's point of view. In the course of this analysis, we became convinced that the therapist had gained great insight into the problem and was dealing with it in a sensitive and professional manner.

\textit{Id.} at 346-47. Cf. \textsc{Robert Elliott, Comprehensive Process Analysis: Understanding the Change Process in Significant Therapy Events, in Entering the Circle, supra} note 101, at 165, 167 (explaining that efforts to quantitatively measure significant events in therapy by debriefing patients could not succeed due to the qualitative and complex elements at work).
dialogue new possibilities evolve.\textsuperscript{231}

Anderson emphasizes that the "not-knowing" stance is not a strategic posture, but instead is a way of being for the therapist:

The 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.\textsuperscript{232}

This requires the therapist to engage genuinely in the therapeutic relationship. By suspending the urge to diagnose her client she holds her own limited horizon of understanding open to the risk that all dialogic encounters pose: finding that her presuppositions in fact are unproductive prejudices that must be revised.\textsuperscript{233}

The "not-knowing" approach characterizes the therapist as a co-expert who must place her understandings at risk in conversation with the client, but this does not mean that psychotherapy is just a kind of meretricious friendship that draws upon folk-psychological intuitions. As Anderson insists, she is an "expert" in facilitating conversation, and she teaches this expertise to new therapists in a collaborative and dialogic manner that is patterned on the therapy relationship.\textsuperscript{234} Consequently, the effectiveness of psychotherapy in

\begin{footnotesize}
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\item[\textsuperscript{231}.] Anderson, supra note 220, at 67; see also Clegg, supra note 197, at 134.
\item[\textsuperscript{232}.] Anderson, supra note 220, at 107. Tom Andersen makes the same point that theory-driven techniques are precluded by postmodern theoretical understanding:
\begin{quote}
Therapy is not a technique. It is a way for the "therapist" to engage in client relationships. It was a relief for me to leave the hierarchical relationship I tried to conduct before [as a medical doctor] and join the more heterarchical (egalitarian) relationships that characterize "reflecting processes," where client and "therapist talk together and work together as two equally important partners."
\end{quote}
Tom Andersen, See and Hear, and Be Seen and Heard, in The New Language of Change, supra note 226, at 303, 305-06 (Steven Friedman ed., 1993).
\item[\textsuperscript{233}.] See Anderson & Goolishan, supra note 224, at 29-33. The "not-knowing" approach leads many postmodern therapists to insist on much greater honesty and openness with the client about the tentative and fallible efforts of the therapist to assist in the revision of life narratives, with some therapists going so far as to use a "reflecting team" of therapists to observe a therapy session and then immediately provide their critical assessment in front of both the therapist and the client. See id. at 58; Parry & Doan, supra note 175, at 130-36. Anderson reports that she gives her clients the opportunity to ask questions of her at the end of the session, in recognition that conversation is mutual. See Anderson, supra note 220, at 104.
\item[\textsuperscript{234}.] See Anderson, supra note 220, at 248. Strenger contends that a therapist is justified in claiming that she has "special skills" not because she employs techniques in conformity with an overarching theory of psychopathology, but instead because she has refined ordinary competencies. He writes, "None of the tools used by the therapist is essentially dissimilar from cognitive processes everybody is acquainted with from everyday life. He just uses them with some more sensitivity and in a conscious, more complex manner than usual." Strenger, supra note 176, at 98.
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assisting clients is a legitimate subject of research and inquiry, but its effectiveness must be assessed with attention to the nature of the practice. It would be a mistake to measure the effectiveness of psychotherapy with causality-driven efficacy studies based on the theoretical self-understanding of natural science, but it would be entirely appropriate to measure its pragmatic results with effectiveness studies.235 Just as the theoretical backdrop for psychotherapy fits with the nature of the practice, so too must an assessment of its effectiveness.

The “not-knowing” approach does not preclude an investigation of the techniques and methods that foster successful psychotherapeutic dialogue. The process of reconstructing narratives can be described in terms of cognitive models premised on biological claims,236 but more often attention is directed toward the linguistic practices at work in therapy. In an early and influential theoretical account, Richard Bandler and John Grinder claimed that successful psychotherapy is the process of overcoming narratively structured cognitive limitations by guiding the client to adopt a richer representation of reality.237 Analogizing their approach to Chomsky’s generative linguistics, they argued that the goal of the psychotherapist is to challenge deletions in the surface structure of the client’s linguistic capacities in an effort to align this surface structure more closely with the client’s deep structure of narrative reality.238 This theoretical reconstruction explained the success achieved by “master therapists” by viewing their dialogic moves as intuitive efforts to challenge deletions.

235. Effectiveness studies measure client satisfaction. Efficacy studies are highly constructed and relatively brief studies that strictly control the techniques used by the therapist. They focus on a single disorder and seek to measure discrete symptom reductions. Martin Seligman contends that efficacy studies are particularly inappropriate for assessing the real world effectiveness of psychotherapy because clients present multiple problems, therapists adopt different approaches in different circumstances, most therapy is lengthy, and the client measures success by a general sense of well-being. See Martin E.P. Seligman, The Effectiveness of Psychotherapy: The Consumer Reports Study, 50 AM. PSYCHOLOGIST 965 (1995). For a criticism of empirical efforts to validate certain treatments for certain problems, see Stanley B. Messer & Paul L. Wachtel, The Contemporary Psychotherapeutic Landscape: Issues and Prospects, in THEORIES OF PSYCHOTHERAPY: ORIGINS AND EVOLUTION 1, 21-27 (Paul L. Wachtel & Stanley B. Messer eds., 1997).

236. Susan Vaughan recently argued that there is evidence that psychotherapy alters the “story synthesizer” in the cerebral cortex, resulting in new pattern recognition and narratives that lead to a more productive life for the client. See SUSAN C. VAUGHAN, THE TALKING CURE: THE SCIENCE BEHIND PSYCHOTHERAPY (1997). Vaughan lends support to the postmodernist claim that narrative reconstruction rather than psychoanalytic “insight” is the key to successful psychotherapy, and that extended therapy to effect this cognitive/narrative change may be necessary.


238. See id. at 21-38.
Allan Parry and Robert Doan describe therapeutic techniques as the means for therapists to act as editors of their client's efforts to revision their life narratives, not by supplying a new story, but rather by serving as the catalyst for the client's authorial efforts. Their techniques, which generally track the strategies employed by Anderson, include: remaining curious, being compassionate, looking for resources within the client's story, permitting oneself "not to know," and suppressing the urge to diagnose "resistance." Essentially, these techniques are strategies to foster conversation, ways in which the therapist can engage the client in genuine dialogue rather than employing a diagnostic that merely appears dialogic. As Anderson emphasizes, techniques such as asking a certain kind of question cannot be planned in advance because the point of all techniques is to continue the dialogue at hand with a particular client, rather than to rehash a "standard" therapeutic story.

Thus, postmodern psychotherapists reject the idea of a methodological rulebook. They are theoretically committed to an eclectic approach because the dynamics of therapeutic dialogue are not amenable to detailed prescription in the abstract. Because postmodern psychotherapists utilize practical knowledge within complex and fluid situations, they generally embrace pluralistic and interdisciplinary approaches. This does not mean that models and techniques are irrelevant, but only that no particular model or technique is uniquely necessary to any particular outcome. Instead, models and techniques provide rules of thumb that are a resource for the therapist in her quest to develop practical knowledge through dialogic engagement. But this pluralism underscores the need for therapists to develop a theoretical account, since they can prevent eclecticism from degenerating into an incoherent muddle only by connecting their use of plural techniques to a theoretical account of

239. See Parry & Doan, supra note 175, at 119-20.
240. See id. at 118-56.
241. Anderson summarizes one of the principal means of creating a dialogical conversation as asking "conversational questions." She explains:
A therapist's task is always to find the question, the tool, through which to learn more about the immediate recounting of experience. This means that what we have just been told, the composition narrative, is the answer to which a therapist must find the next question; it gives the therapist the next question. That is, questions result from the immediate dialogical event, the developing narrative informs the next question, and the narrative is constituted differently by the questions directed at it. In this local and continuing process of question and answer, of recounting and redescribing, possibilities for understanding, meaning, and change are open and infinite.
Anderson, supra note 220, at 146.
243. See Miller et al., supra note 132, at 184.
the hermeneutical, rhetorical, and narrative features of understanding.\textsuperscript{244}

In conclusion, postmodern psychotherapists insist that their theoretical presuppositions are intimately bound to their descriptions of clinical practice. When Eagle and Moore concede the utility of hermeneutical discourse in the clinical setting, but then revert to the standards of traditional explanatory discourse at the theoretical level, they demonstrate that they have not fully understood the nature of the clinical practice. Because human interaction is a hermeneutical-rhetorical event that is narratively structured, so is psychotherapeutic discourse. A theoretical elaboration of the intersubjective character of human understanding can do little more than commend the pragmatic experience of therapeutic dialogue and seek to facilitate this dialogue by reflecting on the practice. It is an oxymoron to talk about developing a theory that can methodologically produce a genuine conversation. As with all pragmatist epistemologies, the underlying theoretical commitments of postmodern psychotherapy are real and unavoidable, but they are lodged within the practice itself.

\textbf{C. Mediating the Gadamer-Habermas Debate: Lessons of Postmodern Psychotherapy}

It is now possible to mediate the Gadamer-Habermas debate by recasting it in light of the preceding overview of postmodern psychotherapeutic practice and theory. Postmodern psychotherapy enacts the themes of the Gadamer-Habermas debate in a practical setting in which the practitioners display a relatively high degree of self-reflection. I propose to connect subsequent work by both philosophers to postmodern approaches to psychotherapy in order to sketch a psychotherapeutic model of critical theory that can provide a new starting point for critical legal theory.\textsuperscript{245} Just as Gadamer's

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\item Clegg argues against eclecticism and in favor of pluralism in order to maintain coherence, rooting a variety of techniques in a postmodern meta-theory. See Clegg, supra note 197, at 207-12. This underscores the important relationship of theory and practice, and the need to develop the theoretical presuppositions of postmodern psychotherapy offered by Gergen, Anderson, and others.
\item The most obvious point of comparison would be the therapist's interaction with her client during the session and a lawyer's interaction with her client during a meeting. The "not-knowing philosophical stance" described by Anderson and the "relational-narrative approach" developed by Gergen suggest intriguing applications to the lawyer's interactions with her client. Recent literature suggests that lawyers all too often impose their "expert" view of the client's desires and goals rather than attending to the client in a deliberative dialogue. See Mootz, Rhetorical Knowledge, supra note 9, at 569. Postmodern psychotherapy provides some direct instruction in how lawyers might learn to deliberate with their clients in a cooperative manner. This very important connection between the two practices is outside the scope of this Article, in which I assess the activity of critical legal theory.
\end{enumerate}
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phenomenological examination of the experiences of art and conversation serves as the point of entry for his exploration of human understanding in *Truth and Method*, my adoption of a psychotherapeutic model provides a grounded starting point for exploring critical legal theory. When we stand before an artwork or another person in conversation, rather than before a traditionary text, Gadamer reminds us, it is far more difficult to objectify the process of understanding and it is nearly impossible to ignore the playful fusion of horizons in which all understanding occurs. Similarly, the critical activity of psychotherapy more clearly reveals the nature of critical theory and its relationship to practice than the work of critical legal theorists who are not confronted with the immediacy of a distressed client.

How do postmodern reflections by practicing psychotherapists shed light on the project of critical legal theory? At the outset, it should be apparent from my discussion that postmodern psychotherapists approach their work in a manner that is foreign to most academic writers of legal theory. Legal theorists virtually never adopt a philosophical attitude of “not-knowing” in order to engage in dialogue with the legal tradition. The “not-knowing” stance would radically challenge the tendency of critical theorists to distance themselves from the legal practices about which they write. Unlike many postmodern psychotherapists who simultaneously engage in clinical practice while working out the theoretical implications of their practice, critical legal theorists tend to be traditional academics who have gladly relinquished the obligations of a practicing lawyer with ongoing client responsibilities. This disengagement from legal practice can lead to an inflated sense of the power of theory as a rational strategy for decoding and imposing order on legal practice. In other words, legal theorists frequently adopt an “all-knowing” posture in their critical assessment of legal practices.

I anticipate that my advocacy on behalf of a “not-knowing” stance will meet the same objection that is leveled against postmodern psychotherapists: How can the theorist gain any critical bite if she abdicates responsibility for seeing through the object of critique? This objection would appear to gain even greater force in the context of legal theory, where an analysis of institutional practices replaces an interpersonal dialogue with a client. It may be desirable, or even necessary, to engage a troubled individual in dialogue to assist him, but critics will argue that there is no comparable need for a hermeneutic partnership when the object of critique is a set of social practices and institutions. But it is precisely this difference that proves the worth of the psychotherapeutic model. Psychotherapy uncovers the critical element in understanding in an exemplary
fashion because the direct interpersonal exchange between a therapist and client makes it more difficult for the therapist to succumb to the "theoretical urge." Because postmodern psychotherapists bring their theoretical understanding to bear in a practical setting without treating their client as a bundle of neuroses to be diagnosed and repaired, the psychotherapeutic model suggests a way to recover the practical experience of critical theory in action.

Some critics might insist that the difference between psychotherapy and critical legal theory is so substantial as to undermine my use of this model. In contrast to an intersubjective dialogue oriented toward creating new meanings for the client, the argument would run, critical legal theory is a socio-legal project that does not participate within the dialogue of legal practice but instead consciously assumes an objectifying stance to assess the practice. The experience of interpreting art or literature might help illuminate the nature of all understanding, critics might argue, but the practice of psychotherapy is too far removed from critical legal theory to be a helpful model. At this level of challenge, my argument must rest on persuasion rather than demonstration. Of course it is logically possible that critical legal theorists might gain access to theoretical truths that could guide an assessment of legal practice from outside that practice, but it is no less logically possible that a therapist might develop a scientific theory of the etiology of mental distress that points the way to technical interventions that can dissolve an individual's pathology. Experience continually places the hope of developing strong theories into serious question; as a result, both Freudians and Marxists find themselves backing off from grand theoretical ambitions. Habermas's impressive effort to sustain rationality and critical theory by defending a thin, procedural theory is symptomatic of this intellectual crisis. It opens the way toward a reconceptualization of the critical project.

Postmodern psychotherapists provide a model for breaking free from the theoretical urge in a manner that suggests that reliance on strong theory runs counter to basic structures of human understanding. By invoking the psychotherapeutic model I am committing myself to the view that these basic structures of human understanding are no less operative in the case of social and legal criticism. I have recourse to nothing other than reasonable persuasion to defend this commitment. The point, quite simply, is that I cannot attempt to demonstrate the validity of my commitment

246. Steven Mailloux characterizes the "theoretical urge" as the desire to stand outside the flux of rhetorical-pragmatic practice and devise a methodological key for determining the "correct" interpretation. He claims that this urge must be overcome to achieve genuine critical thinking. See STEVEN MAILLOUX, RHETORICAL POWER 3-18 (1989).
definitively without thereby giving offense to the commitment itself. My description of postmodern psychotherapeutic practice builds toward an application of a psychotherapeutic model to critical legal theory, but only to the degree that the model resonates with experience. In this sense, my argument is phenomenological rather than deductive. I am in the same position as a pragmatist who cannot theoretically demonstrate the limitations of the theoretical attitude. My success will be measured by the extent to which the model that I develop and apply in the balance of this Article advances our understanding of the role and efficacy of critical theory.

If a legal theorist is persuaded that the philosophical stance of "not-knowing" facilitates her practice to the greatest degree possible, what further guidance does the psychotherapeutic model provide for her critical activity? I believe that the model redefines the theorist's project in terms of two general, and related, goals: First, the critical theorist should disrupt rigid narrative constructions that the client finds problematic; second, the critical theorist should expose how particular responses (such as anger) have been unsatisfactorily abstracted from discrete situations into a more generalized mode of being (such as depression). In the psychotherapeutic context these goals are pursued by attending to the client's story and engaging in dialogue oriented toward expanding the client's (and the therapist's) narratively-structured mode of existence. By adopting this practice as a model of critical legal theory I propose to extend these defining features to the different context of legal critique.

Modeling critical legal theory on psychotherapeutic practice appears problematic because there is no presenting client seeking the assistance of the therapist. But this difference underscores the very point of applying the model: Critical legal theorists must regard the legal tradition as a "presenting client." The legal tradition speaks no less than an individual client; the legal tradition is nothing more than the accumulation of individual voices rendered under particular institutional circumstances into texts that have a history of continuing effects.

A psychotherapeutic model of critical legal theory rejects 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 no less than an individual entering psychotherapy. The model 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 lawyers and judges struggling with practical problems seriously, rather than regarding them as self-deluding simpletons who must be diagnosed rather than dialogically engaged.
Treating the legal tradition as a client does not require a radical departure from the assumptions that guide traditional legal theory. As I emphasized in the introduction, critical approaches to law have proliferated, from the traditional efforts to discern the conceptual organization underlying the confused, often self-contradictory, discourse of lawyers and judges, to the work of gaylegal and feminist scholars to expose the homophobia and misogyny within ostensibly neutral legal discourse. As a general rule, critical theorists already locate the key to their critiques in the barely concealed anxieties and assertions of power that exist within the bland diction of legal language. The psychotherapeutic model is no different in this regard, although it illuminates this tendency by borrowing from the experience of practicing psychotherapists, who deal with clients in a more obvious manner.

The critical legal theorist disrupts unproductive abstractions and the false sense of necessity within legal discourse by means of a hermeneutical-rhetorical engagement that seeks to recover a broader, narratively structured sense of unity from within a situation of apparent contraries that are manifested in the practice. The theorist has no recourse to, nor any need for, an external standard of critique against which practices can be assessed because the critical project involves an identification and opening of possibilities within the narratively structured social realm of law. To appropriate Gergen's terminology, the goal of critical legal theory is not to develop an ideal legal narrative and then import it into practice, but rather to demonstrate the malleability of narrative reality to participants in the practice so as to overcome unhelpful, static conventions and to open the possibility for more satisfactory participation in the ongoing process of creating and transforming legal meaning.

The law is riddled with the anxiety of its actors, as judges and lawyers struggle to maintain the coherence and validity of their positions within a discourse that is constituted, as Chaim Perelman teaches, by "confused notions."247 The adversary system, in which lawyers argue on behalf of clients rather than in pursuit of truth, brings these anxieties to the fore; advocates mine the legal tradition for openings that benefit their clients, and judges struggle to reconcile these clashes with the ideal of the rule of law. The psychotherapeutic model couns

by attempting to preserve a distinct and superior theoretical posture, and yet also not like a friend (or adversary) wholly engaged in ordinary conversation (or legal argumentation).

I will defer a more concrete discussion of this model to Part IV when I apply the model to the work of a critical legal theorist. In the meantime, I will suggest some specific examples of the model to define it preliminarily. Critical theorists demonstrate that the doctrinal self-presentation of legal rules is never entirely successful in suppressing the social, political, and economic context in which these rules arise. The ambivalence and anxieties expressed in legal practice by “presenting” judges and lawyers invite an interdisciplinary, historical reconstruction of legal rules with the goal of developing a more expansive legal discourse. For example, Jay Feinman reconstructs the origins of the “at will” rule in employment law and connects the emergence of the rule to the social, economic, and political conditions in nineteenth-century America. Feinman does not purport to unmask a developmental logic inherent in law; instead he works to enrich the language of employment law by challenging the apparent naturalness or internal necessity of its doctrine. Feinman’s approach is critical under the model only to the extent that he eschews theoretical certainty (in this case, the temptation to provide a strong Marxist account of economic development) in favor of theoretical openness.

Perhaps the most illuminating means of describing the psychotherapeutic model, in light of the differences between working with an individual client and criticizing legal practice, is to review the guidance that it would provide to the theorist about her comportment when engaged in critique. The theorist would no longer be in a position to regard legal discourse as a hopelessly ideological and insular object of study. Adopting such a position removes the theorist from a genuine critical exchange. However, critical legal theorists generally adopt a posture similar to that adopted by “all-knowing” psychotherapists who develop incredibly complex accounts of the genesis and maintenance of pathologies but


249. Feinman’s commitment to critical inquiry might be tested by assessing his response to Deborah Ballam, who challenges his claim that the “at will” rule suddenly was adopted by courts in response to the economic development of the nineteenth century. Ballam contends that the rule dates back to colonial days and that its emergence reflected general differences between the conditions in England and the colonies. See Deborah A. Ballam, Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine, 17 BERKELEY J. EMPFL. & LAB. L. 91 (1996); Deborah A. Ballam, The Traditional View on the Origins of the Employment-at-Will Doctrine: Myth or Reality?, 33 AM. BUS. L.J. 1 (1995). If Feinman criticized the “at will” rule from a position of theoretical “knowing” he would likely remain deaf to Ballam’s assessment of legal practice.
then bemoan the client’s “resistance” to the therapist’s coercive application of these theoretically-driven insights to the client’s life.

The postmodern approach to psychotherapy provides a new model of critique and change, a pragmatic alternative to the now familiar discourse of the expert critic who is theoretically “in the know.” The psychotherapeutic model demands that the critic embody the characteristics that define the critical encounter that she is seeking to foster, namely openness to the possibilities that reside within a situation. Of course, this simple characterization represents a tremendous personal challenge, for it requires the critic not just to suppress the theoretical urge but also to embrace a variety of experience. The critical legal theorist utilizes the same basic competencies as lawyers and judges, but she does so in an effort to tease out the ambiguities that signal the openness within the tradition. The best examples of critical race theory exemplify this openness by bringing to the foreground the racial preconceptions at work in legal practice as well as the legal means within legal practice for expanding legal dialogue to better express and thereby potentially dissolve some of these manifest anxieties.250

Carlo Strenger emphasizes that psychotherapy is a reasoned activity only when the therapist embodies the kind of openness, flexibility, and pluralism in her interactions with the client that she seeks to help the client develop.251 The critical legal theorist must also approach the critical project with the curiosity and flexibility that permit the tradition to speak more fully, since a theoretically-informed methodology for re-conceptualizing the tradition will only further contribute to the narrow rigidity that is the principal target of critique. Critical legal theorists must suspend premature judgment in favor of a cooperative effort to define reasonable resolutions, refuse to hide behind theoretical abstraction, engage in the plural universe that they seek to reveal, and accept responsibility for the ethical


251. Strenger writes:
If an analyst has a highly monolithic picture of human development, both normal and pathological, his only justification for adhering to this could be that he has a strong, well-established, general theory of development and etiology. Such a theory, however, does not in fact exist.

[Consequently,] the expertise of the analyst does not consist in the mastery of a well-established theory with strong predictive and retrodictive power but rather in the richness of the analyst’s view of the condition humaine, the nuances and varieties of human emotional life, and a keen sensitivity for human affairs in general.

STRENGER, supra note 176, at 131, 133.
character of their activity.

The critical legal theorist, like the psychotherapist, utilizes ordinary hermeneutical and rhetorical competencies, but she does so in a disciplined manner that is informed by theory. The theoretical backing for the model supports the cultivation of a philosophical stance of “not-knowing” and the structured invitation of critical encounters, rather than the pronouncement of theoretically-derived truths. However, this theoretical orientation is not just a matter of adopting an “anything goes” eclecticism, in which every idea and approach is deemed equally valid. Clegg cautions against embracing eclecticism in the context of psychotherapy if it means treating contradictory theories and techniques as a collection of tools that can be utilized without the need for any theoretical coherence, but she simultaneously argues that a commitment to theoretical integrity should not undermine plurality and inventiveness.\(^2\) Admittedly, if “eclecticism is to be condemned but pluralism and openness welcomed, some neat footwork is going to be required,”\(^3\) but Clegg insists that the postmodern interest in uncovering a range of contexts of meaning “will become manageable through efforts to create dialogue.”\(^4\) In other words, by beginning with an ontological description of subjectivity as a product of hermeneutical-rhetorical constructions, the critical theorist can accommodate a variety of theoretical insights without regarding all theoretical claims as equally plausible. Similarly, critical legal theorists must develop a pluralistic approach guided by the same ontological commitment.

The philosophical stance of “not-knowing” does not preclude the use of techniques to facilitate critical inquiry so long as they are viewed in light of the underlying ontological commitment. There can be no science of critical legal theory in which the critic methodologically transforms legal practice in accordance with a strong guiding theory, but methodological inquiry is not entirely irrelevant. 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 of theoretical understanding that runs

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252. See Clegg, supra note 197, at 207-12. Strenger similarly stresses that it is “important to see that pluralism is not identical with eclecticism. . . . [T]here are limits to the extent different approaches can be combined. [T]hese limits are not due to rivaling empirical hypotheses, but rather the result of profoundly opposed perspectives on human reality.” Strenger, supra note 176, at 172.
254. Id.
counter to the pluralism of postmodern critical engagement.

It should be apparent that the psychotherapeutic model clarifies the assessments of the relationship between theory and practice offered by Gadamer and Habermas. We should recognize theory as a kind of practice, rather than an independent capacity to underwrite practical engagements. More precisely, theory should be viewed as a dimension of practice. Gadamer's rehabilitation of the Aristotelian conception of theory is exemplified in his own project of developing a "philosophical hermeneutics," in which he theorizes about practice without attempting to supplant practices. Gadamer's persistent challenge to Habermas's psychoanalytic model of critique is defined by his modest approach to theory, but it is important not to forget that Gadamer is theorizing. Although working from a less satisfactory account of theory, Habermas emphasizes the need for explicit theoretical reconstructions that are attentive to the hermeneutical-rhetorical complex of meanings that comprise the lifeworld. Unlike Gadamer, Habermas does not suppress the fact that he is theorizing by adopting a one-sided focus on lifeworld-constitutive practices, and his subtle criticisms of social and political institutions are powerful and illuminating even if his defense of theory is overly ambitious. The psychotherapeutic model of critical legal theory vindicates Gadamer's limited conception of theory but does not discount the relevance of Habermas's critical project if it is reconceptualized as an ethical-political argument within a tradition, rather than the elucidation of theoretically-derived truths.\footnote{Habermas distinguishes three uses of practical reason: 1) addressing pragmatic questions about appropriate means for securing agreed goals; 2) addressing ethical-political questions by critically appropriating a shared tradition in order to define appropriate goals; and 3) addressing moral questions by stepping back from all contingently existing normative contexts to discern universal norms. See \textsc{Habermas, supra} note 6, at 159-62. Gadamer convincingly argues that moral discourse in Habermas's sense is not possible, but the possibilities for ethical-political discourse are not inconsequential. I believe that Habermas's work can best be characterized (against Habermas's self-understanding) as an exercise of practical reason informed by critical theory that responds to ethical-political questions within the Western tradition of liberal democratic constitutionalism.}

IV. POSTMODERN CRITICAL LEGAL THEORY: APPLYING THE MODEL

In this part, I will apply the psychotherapeutic model by assessing the work of Peter Goodrich, a prominent critical legal theorist. Goodrich draws upon the critical legal studies tradition and Lacanian psychoanalysis, which makes his work an excellent focal point for application of my model. Goodrich adopts a complex and subtle approach to critical legal theory; he is an erudite and engaging writer who connects sweeping theoretical insights with careful and detailed...
descriptions of particular cases. I will use the psychotherapeutic model to distinguish productive and unproductive aspects of Goodrich's critical legal theory. Ironically, I will argue that Goodrich proves to be least productive when he expressly invokes psychoanalytic theory. Nevertheless, I will conclude that his work generally exemplifies the positive characteristics of the psychotherapeutic model of critical legal theory.

Goodrich's critical project reverberates with a fundamental tension. On the one hand, Goodrich argues that psychoanalytic theory provides access to the "real" dynamics of social existence that subtend and are obscured by the superficial documents of legal practice. At times, Goodrich appears to regard legal discourse as nothing more than an extended Freudian slip that only indirectly reveals the "other scene" of desire and conflict that comprises the unconscious. This element in Goodrich's work exhibits modernist tendencies, relying on the power of strong theory even to a greater degree than Habermas. On the other hand, Goodrich portrays his critical efforts as a series of historical reconstructions of forgotten features of the legal tradition. His goal is to reveal the contingency of legal forms and institutions, in order to open the critical distance necessary to overcome the false inevitability of legal doctrine. In this respect he embraces a more postmodern approach to critical theory that resonates with the psychotherapeutic model that I have described in this Article. By using this model to explore the tension between the modernist and postmodernist elements in Goodrich's critical theory, I will demonstrate that the model substantially clarifies the task and possibilities for critical legal theory.

Goodrich grounds his project in an effort to translate—both literally and figuratively—the work of Pierre Legendre to the English common law tradition. Legendre, a Lacanian psychoanalyst and law professor, displays in his thinking the fundamental tension that reappears in Goodrich's work. A central theme of Legendre's work is that legal texts operate as images rather than simply as instruments of communication, and that they connect to social issues at a deeper level than the surface structure of meaning as explicated


in legal "dogmas." As Goodrich reports, Legendre's scholarly agenda is to recover a repressed poetics of law, a poetics that lies beneath the obscurity and tedium of legal doctrine and that creates social subjects by capturing their souls with its powerful imagery.

For Goodrich and Legendre,

[t]he subject of legal authority is bound to law far more strongly by identificatory images or phantasms of a shared substance, by interior and self-imposed limitations, than by the external dictate of positive law.

It is... the function of a psychoanalytic account of law to provide symptomatic readings of the history of the legal institution and to attend to the desires that underpin law, to listen to the narrative of the lawyer's love of power and to the latent poetry of the legal text.

....

.... [P]sychoanalysis attempts to listen not to the apparent logic of legal rule, but rather to the figures of its texts and the erotics of its practice, of its theater and its rites. The classical notion of an art of law is thus to be recuperated and interpreted quite literally, so that the legal scholar can begin to address directly the significance of the symbols, emblems, rituals, icons and diverse other signs through which a legal tradition establishes a culture and embeds itself in its subjects.

This focus on images engenders the tension between the theoretical project of looking through legal practice into a hidden realm of desire, on the one hand, and a reconstructive project of looking within legal practice to discover the surplus significance of its images and overcome the calcifications and intellectual laziness that limit legal practice, on the other hand.

A thinker as sophisticated as Goodrich does not expressly embrace a crudely Freudian explanatory theory of social dynamics; consequently, it requires close reading to reveal the modernist

259. In the words of Anton Schütz, "The sole ambition of Legendre's... style is, thus, to confront lawyers, and whoever else asks questions concerning or involving law, with the unexpected, but incomparably intense, psychoanalytic weight or undercurrent from which legal matters cannot be detached or abstracted." Anton Schütz, Sons of the Writ, Sons of Wrath: Pierre Legendre's Critique of Rational Law-Giving, in LAW AND THE POSTMODERN MIND, supra note 258, at 193, 202.


261. Goodrich, Maladies, supra note 256, at 1038.

262. Goodrich, Unconscious is a Jurist, supra note 260, at 209-10.
tendencies in his work. In recovering the “suppressed” elements of law, Goodrich claims to read the “traces” of the “other scene” in the same manner that a Freudian psychoanalyst would read deeper meaning into seemingly innocuous or mundane statements by a patient. Criticism requires “an analysis in the strongest of senses” and “in a manner very close to that of psychoanalytic reconstructions.” Thus, the analyst “must attend to the slight indications, the symptoms or lapses, which hide that which law seeks to forget.” When confronted by the critic’s insightful and destabilizing reading, though, law inevitably responds like an unwilling patient who resists the analyst’s superior insight. Consequently, Goodrich promotes critical legal theory as an “analysis” that must be imposed over the protests and resistance of recalcitrant participants.

This traditional psychoanalytic model of critical theory is evident in several of Goodrich’s historical reconstructions. In an extended reading of the opinion in Cundy v. Lindsay, he begins with “a principle of onirocriticism or interpretation of dreams that ‘nothing is dreamed of in vain’” and argues that in interpreting case-law, “no fact can be ignored” for its symbolic significance. The case involved a con artist who ordered a number of handkerchiefs under false pretenses and resold them, leaving the innocent third party purchasers and the manufacturer to fight over ownership. Throughout his reading, Goodrich places great emphasis on the significance of the subject matter of the dispute. He writes, “The handkerchief symbolises an emotive and complex message, it is the other text or allegory of the law, the sign of a certain mourning for the past or for the laws that have been handed down from origins or immemorial sources which both exceed and survive the present.” After elaborating the symbolic significance of the handkerchief and other details of the case at some length, Goodrich concludes by

263. In a friendly review of Goodrich’s book Oedipus Lex, Costas Douzinas suggests that Goodrich’s refusal to provide a “sustained theoretical discourse as to the importance or relevance of Freud or Lacan” in favor of relying on “unargued assumptions about the value of psychoanalysis” to critical legal studies might best be explained as a strategy “to lower the critical defenses of the agnostic” reader. Costas Douzinas, Psychoanalysis Becomes the Law: Notes on an Encounter Foretold, 20 LEGAL STUD. F. 323, 334 (1996). Despite this understated approach, Goodrich reveals his theoretical assumptions sufficiently to invite a critical appraisal.


265. See id. at 122; Goodrich, Maladies, supra note 256, at 1039-41.


267. Goodrich, supra note 264, at 146-47 (quoting H. Cornelius Agrippa, Of the Vanitie and Uncertaintie of Artes and Sciences (1575)).

268. Id. at 149.
reflecting on his underlying theoretical assumptions:

It remains, finally, to ask what else can be read in this precedent from the 1870s? What is transmitted by and through this example? Of what is the handkerchief an acheiropoietic—and so lawful—sign? The answer, of course, is that the transmission of law is not simply a matter of law but is also a question of genealogy and of the incidental, marginal, symptomatic and circumstantial features of institutional texts. What the analysis of transmission suggests is nothing less than a species of therapy for the self-effacement or erasure of those caught up in or otherwise addicted to the interpretation of law. Such therapy takes the form of tracing the varying identities and differing jurisdictions of law so as to comprehend something of the desire which motivates law's textuality and drives its interpreters.269

Goodrich employs a Freudian "hermeneutics of suspicion,"270 focusing on a seemingly insignificant fact (the misappropriated goods were handkerchiefs) to weave a complex symbolic interpretation of a repressed realm of desire located behind the decisionistic pretense of legal opinions.271 Consequently, his critique bears almost no resemblance to legal practice, and it appears to have been tied to the case at hand only with tenuous and speculative interpretive strategies. Legal doctrine becomes almost an inconsequential vehicle that indirectly expresses desire and dread.

The psychotherapeutic model makes clear not only that this strain in Goodrich's work is unproductive, but also why it is unproductive. It is difficult not to appreciate the aesthetic quality of Goodrich's reading of a case and to be drawn into the mesmerizing symbolic tapestry that he weaves. But the working assumption behind such readings is problematic: namely, that there are critics "in the know" who understand the deeper forces that are only vaguely and indirectly revealed in the seemingly irrelevant factual details of a case report. The great multitudes are left to struggle with the banal intellectual puzzle of determining the respective rights and duties of a defrauded seller and a bona fide purchaser for value. Goodrich

269. Id. at 157-58.


271. Goodrich's extended essay on the homosociality of the Inns of Court similarly presents a wildly speculative Freudian reading of the tradition of taking meals together. See GOODRICH, supra note 264, at 72-94. In part, Goodrich concludes: "Why open the mouth of the Law with food if not to indicate a certain paternity linked to a carnivorous sacrifice and to the internalization, through food, of the principle of a community held together, if not through the recollection of a pre-existent or primordial guild at an earlier act of lawlessness, of killing, then at least through a common bond established through the denial or destruction of the flesh." Id. at 85.
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does not work within legal discourse to reveal artificial and historically contingent constraints; instead, he provides an external explanation uncovering forces and motivations that are only dimly reflected in legal discourse. In this mode, Goodrich criticizes law with an extravagant hermeneutics that is backed only by vaguely articulated and largely undefended theoretical commitments—commitments that would find little support in experience if they were foregrounded for discussion.272

The psychotherapeutic model of critical legal theory rejects this reliance on strong theory. Freud's rhetorical prowess lent an air of unimpeachable authority to his interpretations, but critics claim that his theoretical edifice proved to be, at best, metaphorical and suggestive. Postmodern psychotherapists reject the goal of developing a definitive depth hermeneutic because the implicit faith in strong theory undergirding such a project is unwarranted. There is no "other scene" that lurks behind conscious reality waiting to be teased out of the commonplaces of life with the guidance of a comprehensive theoretical construct. Goodrich's wildly Freudian interpretations of incidental features of legal discourse are unproductive because his theoretical construct reinstates the very rigidity and insular self-assurance that he seeks to displace.

Donald Spence's critique of Freudian psychoanalysis applies equally well to Goodrich's critical theory in this regard. Spence argues that Freud abandoned a scientific model of psychopathology built on empirical evidence in favor of an unfalsifiable theory verified only by rhetorical force.273 From the beginning, psychoanalytic clinical reports have been shaped by Freud's followers to fit his explanatory theory and have been reported in a selective manner that precludes reassessment by other psychiatrists.274 In a similar fashion, Goodrich's dramatic claims about the symbolic significance of the misappropriated handkerchiefs invite neither debate nor discussion about the expansion of legal dialogue; they call only for acceptance or rejection.

272. In a personal communication, Goodrich reminded me that his reading of Cundy v. Lindsay employs humor, parody, and irony to persuade the reader in addition to psychoanalytic language claims. See Email from Peter Goodrich, Corporation of London Professor of Law, Birkbeck College, University of London, to Francis J. Mootz III, Professor of Law, Western New England College School of Law (Mar. 30, 2000) (on file with the author). This important point would confirm my critique, to the extent that the heavy psychoanalytic language obscures his destabilizing reading of the case.

273. As Spence writes: "Rather than representing an earnest and possibly fallible attempt to tell a true story about the world, psychoanalytic theory may function much more as a shared fantasy that binds its followers in a common belief system and protects them from uncertainty and doubt." DONALD P. SPENCE, THE RHETORICAL VOICE OF PSYCHOANALYSIS: DISPLACEMENT OF EVIDENCE BY THEORY 4-5 (1994).

274. See id. at 118-20.
of the rather abstract theoretical truth that he unfolds.

Of greatest interest for present purposes, Spence contends that Freud was correct to move from the experimental science exemplified by Galileo to a rhetorical elaboration of the universals that can be revealed by careful attention to a single case. Spence agrees that psychoanalysis is not amenable to experimental scientific approaches, but he criticizes Freud's failure to open his rhetorical-hermeneutical practice to a rigorous assessment appropriate to the nature of this practice. Elsewhere I have described "rhetorical knowledge" as a legitimate form of knowing, but one that must be assessed differently than empirical-logical knowledge. He argues that psychoanalytic researchers should discontinue their practice of using highly selective anecdotal evidence to buttress Freud's theoretical model and instead should develop shared understandings of the clinical situation that are contingent and even fallible, primarily by analyzing the rhetorical and hermeneutical features of complete session transcripts. Similarly, critical discourse should embody the open and pluralistic characteristics that are the goal of psychotherapeutic practice—leading by example, so to speak—rather than establishing a grand theory that replicates itself by absorbing and recasting the complexities of psychotherapeutic practice.

Although this unsatisfactory turn to traditional strong theory marks Goodrich's psychoanalytic analyses, the great majority of his work invites critical engagement and provides an example of my psychotherapeutic model of critique in action. By relinquishing the baggage attendant upon psychoanalytic language, Goodrich would more clearly employ the critical perspective that is captured in the psychotherapeutic model of critical legal theory. Goodrich originally grounded his critical project in rhetorical, rather than specifically psychoanalytic, principles. He has maintained this rhetorical orientation in his later work, noting that "rhetoric is the premodern form of psychoanalysis." The psychotherapeutic model of critical theory reaches back to rhetorical principles as well, but rejects the modernist psychoanalytic development of these principles. The psychotherapeutic model, therefore, provides a guide for removing the psychoanalytic gloss from Goodrich's rhetorical critique.

Rhetorical analysis overcomes the conceptual rigidity engendered

275. See Mootz, Rhetorical Knowledge, supra note 9.
276. See SPENCE, supra note 273, at 118-39.
277. Goodrich writes: "The interpretive tradition which comes closest to the aims and aspirations of critical legal studies is... rhetorical." Peter Goodrich, Historical Aspects of Legal Interpretation, 61 IND. L. J. 331, 350 (1986).
by legal dogmatics by demonstrating that the rhetorical dimensions of legal texts are not merely ornamental but also constitutive. Goodrich insists that critical theorists must refuse to surrender to Wittgensteinian quiescence on one hand, or to seek false solace in structural linguistics on the other hand. Instead, critical theorists must reveal the rhetorical construction of law within institutional and social practices as a means to demystify the apparent naturalness and conceptual integrity of legal discourse. In a detailed elaboration of this premise, Goodrich emphasizes that structural linguistics and legal positivism are equally unsatisfactory approaches to law because they both seek to avoid the rhetorical dynamics attendant upon the exercise of power, in favor of postulating linguistic or dogmatic systems that require only exegesis.

A rhetorical focus does not look past texts, but rather looks within them to uncover the operation of power. As Goodrich explains:

Rather than starting from an analysis of ideology and then reading the structural categories of legal ideology into the legal text, it is more consistent, more accessible and less arbitrary to commence with the text itself, and to analyse the specific linguistic devices whereby choices, readings and meanings are engendered.

Rhetorical analysis serves to undermine ideology not by seeing through legal texts to a true state of affairs, but by seeing within legal practices the plurality and unrealized potential that law struggles to obscure. As an example of this critical practice, Goodrich analyzes a court opinion declaring that an administratively imposed fare reduction contravened a statutory requirement that rates be "economic." He argues that the court’s rhetorical devices for making its judgment appear necessary obscure the social and political context in which the content of "economic" criteria remains contested and only contingently established. Rhetorical critique rejects law’s self-understanding as a univocal, autonomous, and


282. Id. at 182.

283. See id. at 208-09.

284. See id. at 199-204.
coherent system of doctrine in favor of a view of law as the contingent effect of social practices of signification. This approach presents the questions at the core of critical legal theory: "[W]hat politics does this discourse enshrine and what are the political effects of this text—not simply what does it say, but what does it do, by what means and to whom?"285

This rhetorical orientation serves as the fulcrum for Goodrich's political criticism of the critical legal studies movement in America for parroting the received wisdom of European philosophers in the guise of developing a radical critique. By "instituting an idolatry or romanticism of great theorists, great names and great men,"286 those critics have become enmeshed in grand theoretical narratives that cause them to lose sight of the American legal tradition they criticize, resulting in "a largely passive relation to the inheritance, transmission and reproduction of the legal tradition."287 The critical project is not a matter of resolving dense theoretical issues. Critical legal studies must instead begin with a historical reconstruction that identifies the institutions and practices that account for the reproduction of law within society and then focus on "the epistemic structures," "the systems of classification, the conceptual grids or schemata, whereby doctrine divides, categorizes and represents the subject matter, the disciplines of law."288 Critical legal scholarship is just an analysis of the rhetorical means by which law produces unproductive abstractions and the sense of false necessity, and critique is accomplished by revealing the malleability of the social narratives that thematize the complexity and plurality of experience.

Goodrich argues that critical legal theory invites the "return of the repressed," but his reference is best understood as a form of rhetorical, rather than Freudian or Lacanian, critique. The critique of ideology should be conceived as uncovering the social determination of meaning in legal rhetoric by exposing the doctrinal residues of a conflicted tradition. The "repressed" features of law do not "return" so much as they are revived by recuperating long forgotten texts and procedures. Positive law inevitably gestures to a mythical "pristine immemorial law"289 (whether spiritual or conceptual in nature) that underwrites its authority, and historical

285. Goodrich, supra note 277, at 354. Goodrich contrasts the rhetorical model of uncovering the contingent reduction of plurality to "law" with the biblical model of reinforcing the certainty and givenness of the "law" embodied in the univocal word of the text. See id. at 334.
286. GOODRICH, supra note 264, at 209.
287. Id. at 217.
288. Id. at 216.
289. GOODRICH, supra note 278, at 7.
traces of this reference persist as "fragments and contaminations of the science of doctrine, the purity of reason or the ideality of law." Rhetorical critique underscores that legal narratives are always open to question and revision through the same rhetorical means by which they are created and maintained.

Goodrich brings this approach to bear with great skill in his discussion of the "minor jurisprudences" that have been suppressed in the service of an institutional desire to eliminate the roles of choice and historical chance in the development of modern law. By recalling archaic legal practices, Goodrich intends to issue "a challenge to the science of law and a threat to its monopoly of legal knowledge [by providing] a space within which a radical legal studies can begin to unravel both the history and the resources of alternative legal forms and the practices to which they attached." Although his work is laced with Freudian imagery, Goodrich proposes a rather straightforward critical methodology: By uncovering the forgotten features of ancient legal forms, we can better understand the severe limitations imposed by modern legal consciousness. Goodrich argues that the contemporary crisis of the legal form, its modern history of positivisation, irrationality and injustice are symptoms of the return of a distant and traumatic past, that of the repression of the spiritual jurisdiction and the exclusion or closure of law to those other knowledges that were inherent in its classical designation as being also a form of justice, an art which mixed spirituality and temporality, body and soul.

The recuperation of repressed traditions, of abandoned customs, of the positive unconscious of legal science, can serve finally to remind the contemporary legal institution and profession of the more extensive and varied scholarly and popular traditions whose repression both accompanies and undermines the positivistic or scientific conception of law.

Critical legal studies do not provide a causal explanation of our entrenched ideologies; instead, they recall past practices with the purpose of revealing that our current narrow perspective is ideological and susceptible to change.

290. Id. at 13.
291. Goodrich describes a minor jurisprudence as "an alternative jurisdiction or forum of judgment drawn from the diversities of the legal and literary past," part of an "as yet unwritten history of repressed, forgotten and failed jurisdictions." GOODRICH, supra note 264, at 1-2.
292. Id. at 2-3.
293. Id. at 11.
294. GOODRICH, supra note 278, at 150.
One of Goodrich's most fascinating studies concerns the "courts of love" that operated during the Middle Ages. Established by royal decree on February 14, 1400, the High Court of Love in Paris developed a coherent body of doctrine and law to govern amorous relationships. In contrast to the sharp distinctions that contemporary law draws between public and private realms and between economic and emotional loss, the courts of love provide a historical example of the law's "willingness to accept and address, in the form of principles and rules, the demands of intimacy, the ethics of relationship and the beginning and ending of love."

Recalling this long-forgotten, even repressed, jurisdiction of "women's law... does not reverse so much as it remembers or reinstates certain of the possibilities of law." Goodrich elaborates on this function of historical reconstruction:

The judgments discussed in this chapter may appear to concern the emotive and the private, the obscure and the intimate, the subjective and merely personal, but such is simply the value we place on them. They represent in their own right something much more lasting and much less easily dismissed. They represent an attempt to think through the most pervasive, the most political and the most immediate problems of social intercourse and institutional life, namely the relation between the sexes conceived neither as a war of the sexes nor as a play of power and possession but rather as a question of reciprocal recognition and mutual right. That the desire for truth in relationship, in the interaction of the sexes, be deemed a feminine characteristic, or that values of care, relationship, fidelity and truth be regarded as matters outside of law does not reflect upon the judgments of love so much as it condemns the contemporary institutions and doctrines of law.

Goodrich develops this critical posture by reflecting on the adoption of the Janus symbol as a metaphor of law by John Selden, a seventeenth-century common law theorist:

The Janus face of common law was a reference not only to the repressed history of the spiritual jurisdiction but, more than that, it was a recollection of the plurality of laws that subsisted

295. See GOODRICH, supra note 264, 1-3.
296. Id. at 52.
297. Goodrich notes that "the doctrine and rules of the courts of love were eventually to be defined as a heresy by the medieval church and as a phantasm by later literary and legal historians" because they didn't fit the circumscribed vision of law that emerged with the beginning of modernity. Id. at 30.
298. Id. at 70.
299. Id. at 70-71.
within the tradition and which, in their fragmentary and partial forms, made up the commonality of English law. It was justice, in Selden's argument, that lay hidden by the positivization of law, and it was against that very local, contemporary, and oblivious sense of legal rule that he counterposed the "reverse or back face" of English law. The other face was of plural histories, of fragments or scraps of forgotten rule, of the lost customs, myths, and other remainders of neglected laws and injured subjectivities that convention, desuetude, and blindness had obscured from view. The other faces of English law were, for Selden, those of plurality and of the diversity of its legal jurisdictions, times and peoples. His work indeed constantly returned to the history of laws that had been excluded or ignored by the unscholarly breed of lawyers at the Inns of Court. In the broader and more synoptic terms of the present argument, the Janus face of English law may be taken to refer quite simply to its dual character and to the repression or duplicity whereby it shows only one face and simulates a science of dogmatics pertaining to a singular law.300

Recovering an appreciation of the rhetorical, or narrative, construction of legal reality opens the path to rhetorical critique, which involves a pragmatic and fallible effort to construct a revised narrative.

The institutional rigidity that is the target of critique is not a mechanistic process with a life of its own, but instead is created and maintained by the inculcation of young lawyers into a narrow and constricted form of life through professional training. Goodrich writes that the history of the judgments of love recollects an aspect and possibility of legal tradition which is not valued by contemporary doctrine and in consequence is not recognised by legal historicism. In a parallel sense, it can also be argued that the same history and repression is enacted at a personal level in the repressed subjectivity of the lawyer. In biographical terms, entry into law—training as a lawyer—institutes and reproduces a comparable blindness. Legal training teaches the subject to separate the personal and the legal, it demands the repression of emotion and the privileging of the objectivity of rules over the subjectivities of truth—Aristotle's wisdom without desire.301

The psychotherapeutic methodology is manifest in the transition from institution to individual. My sense, based on observations and reported studies, is that lawyers are much more likely to suffer from depression, substance abuse, and other unsatisfactory life patterns; I expect that successful psychotherapy often depends primarily on breaking down the rigid forms of life that many hard-driving legal professionals regard as inevitable or natural. Critical legal theory works in the same manner, but the focus is on the institutionalized manifestations of the deformation of life's possibilities. Goodrich's analysis suggests a provocative analogy between the legal theorist's role in helping to expose and undermine unhelpful institutional ideologies and the psychotherapist's role in assisting individual clients to do the same.

CONCLUSION

I constructed a psychotherapeutic model of critical legal theory in two stages. First, I reviewed and extended the Gadamer-Habermas debate by arguing that Gadamer's critique of Habermas's psychoanalytic model of critical theory was persuasive, but that in subsequent work Gadamer has acknowledged the exemplary significance of psychotherapeutic dialogue. In opposition to Habermas's Freudian-inspired bifurcation of reconstructive theoretical knowledge and prospective political dialogue, Gadamer offers a postmodern account of the reciprocal relationship between theoretical curiosity and practical engagement. Gadamer's bias against the hubris of critical theory limited his development of this insight. Thus, a detailed investigation of psychotherapeutic dialogue was necessary to provide a focus for exploring Gadamer's nuanced view of the relationship between theory and practice.

Next, I surveyed contemporary literature that characterizes psychotherapeutic dialogue as a hermeneutical, rhetorical, and narrative practice. From this perspective, critical insight is not a theoretical achievement that must later be translated to practical applications, but instead is a feature of practical engagement itself. Psychotherapists engage in critique by seeking to disrupt rigid narrative constructions that are presented by the client as problematic. They attempt to uncover how particular responses to life's challenges have been unsuccessfully abstracted into a generalized mode of being by the client. These critical engagements

302. See Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 VAND. L. REV. 871, 874-81 (1999); see also Rick B. Allan, Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?, 31 CREIGHTON L. REV. 265 (1997).
require a theoretical disposition that is best described as “not-knowing,” according to which the therapist rejects an objectifying view of the client as a pathological product of past events and instead enters a dialogic partnership designed to reconstruct the client’s relational world to some degree. The “not-knowing” approach does not eschew techniques and generalizations but keeps them subordinate to the dialogue that unfolds with the client.

The psychotherapeutic model of critical legal theory that emerges from these investigations provides distinctive answers to the three foundational questions that I posed in the introduction. The first question—What is the function of critical legal theory?—must be answered by rejecting the traditional conception that the function of critical theory is to reveal the deep structure of law by decoding its surface representations. Critical legal theory is an openness or curiosity within legal practice that is channeled into a disciplined confrontation with the “presenting” legal tradition by remaining attentive to expressed anxieties. The function of critical legal theory, in other words, is to acknowledge the numerous conundrums raised by legal practice and to expand the capacity of legal practice to address them. For example, modern employment law consists of a mind-numbing array of common law, statutory, regulatory, and constitutional doctrines that lack a coherent, guiding principle and that cry out for some manner of synthesis. Furthermore, it is obvious that these confused doctrinal strands attempt to balance the rights and responsibilities of labor and capital by articulating the interests of contracting individuals, propertied enterprises, and the general public. Critical legal theory does not address this broader task by beginning with a theoretical truth about political economy and working forward to enlightenment and economic change. Rather, critical legal theory exposes the failure of legal rhetoric to provide anything close to a coherent account of these interests; it must then work toward achieving a more capacious legal discourse.

The second question—What authority underwrites critical theory?—can be answered simply. Authority is inherent in the practice and cannot be secured by recourse to unimpeachable principles external to the practice in question. The search for authority, in effect, betrays the theoretical curiosity that is inevitable in any practice. To return to the example of employment law, there is no need to identify an external standard that secures the critical enterprise. Employment law is not just a technical legal idiom; it already incorporates a wide variety of moral, political, social, and economic commitments that continue to evolve with the passage of time. The authority for critique inheres in this conflicted discourse, even though critique is an effort to broaden the discourse so that it
may more satisfactorily address the problems at hand.

The third question—What is the relationship between critical legal theory and legal practice?—follows from the answers to the first two questions. Critical legal theory cannot hope to be more than a disciplined effort to challenge the everyday prejudices of legal practice through a process of questioning designed to expand the capacity of the practice to resolve its dilemmas. As Gadamer emphasizes, theory is always a feature of practice and derives from practical engagements, even as it foregrounds the assumptions of the practice to some degree. Theory is not just a delusion; we are quite able to distinguish the activity of a law professor who writes a memorandum of law for a case that she is handling pro bono from the activity of that same law professor who writes a book seeking to reconceptualize and reform employment law. However, it is not helpful to draw sharp distinctions between theoretical efforts and practical engagement.

The answers to these fundamental questions are clarified by assessing Peter Goodrich’s critical legal theory. Goodrich employs psychoanalytic language in a sophisticated and suggestive manner, but ultimately this reference amounts to an empty flourish. In fact, most of his work is rhetorical and historical in emphasis. Goodrich effectively identifies aspects of legal discourse that have become truncated and unsatisfactory to its participants, and he responds by seeking to broaden legal discourse. Once relieved of the theoretical baggage attendant to Freudian and Lacanian psychoanalysis, Goodrich’s critical legal theory can exemplify the psychotherapeutic model of critical legal theory that I have outlined in this Article. We should analyze law by adopting the critical approach that a therapist uses with a client, by working to expose the historical limits of an ongoing self-narration in order to expand the possibilities for further development in response to life’s challenges. Goodrich voices this agenda in straightforward terms:

At a philosophical level the closure of law is a denial, a negative incorporation, of the substance of the legal tradition: of its history, its violence and its politics. It is the interruptive argument of the minor jurisprudence presented in this book that[,] rather than mastering or by some other means denying the politics and ethics of law, it is precisely these indeterminate and plural features of law that should seduce the lawyer and define the goals of jurisprudence. Using the classical definition of law as the human form of fate the argument is made that the historicity of law, its singular and heterogeneous practices, inevitably break down its closure. It is the fate of law to act according to principles it cannot know in circumstances of
instability and flux. The fate of law is thus its most radical potential; in pursuing the call of justice it is forced to abandon the already known, the prejudiced or predetermined, and to confront a singular destiny that is moved not by rule but by desire.\footnote{GOODRICH, supra note 264, at 7.}

Critical legal theory does not deliver an answer from beyond, but rather a provocation from within. Finally, the humility expressed in the epigraphs drawn from writings by Gadamer and Walker Percy at the beginning of this Article stands as the most important lesson for critical legal theorists. Postmodern psychotherapists have discovered that the philosophical attitude of “not-knowing” facilitates critical dialogue with their clients—a lesson yet to be learned by legal theorists. Theory ceases to fulfill its function when it becomes an exercise in self-assertion and a refusal to put oneself and one’s own prejudices at risk in a dialogic confrontation. We need much less grand theory and much more humility. We do not need answers so much as we need better articulations of the troubling questions presented in legal practice and a reminder that the practice of providing answers is a historical process that is never complete. If critical legal theorists are willing to listen, they will find that in a genuine hermeneutical experience a critical assessment can occur in which the legal tradition will reveal not only its own inadequacies, but theirs as well. This reorientation is not a grudging resignation to the impotence of theory, but rather an embrace of the power of critical theory that is always rooted within the hermeneutical features of our practices.