2000

Are There Nothing But Texts in This Class? Interpreting the Interpretive Turns in Legal Thought

Robin West
Georgetown University Law Center, west@law.georgetown.edu

Georgetown Public Law and Legal Theory Research Paper No. 11-93

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/269
http://ssrn.com/abstract=1871953

76 Chi.-Kent L. Rev. 1125 (2000)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Constitutional Law Commons, Judges Commons, Jurisprudence Commons, and the Legal History Commons
ARE THERE NOTHING BUT TEXTS IN THIS CLASS?
INTERPRETING THE INTERPRETIVE TURNS IN LEGAL
THOUGHT

ROBIN L. WEST*

INTRODUCTION

Allan Hutchinson remarks at the beginning of his interesting article that Gadamer’s writings have had only a peripheral influence on legal scholarship—only occasionally cited, and then begrudgingly so, and never given the serious attention they deserve or require. Nevertheless, Hutchinson acknowledges, Gadamerian influences can be noted—particularly in the now widely shared understanding that adjudication is, fundamentally, an interpretive exercise. Even with this qualification, though, I think Hutchinson understates Gadamer’s impact. Whatever may be true of Gadamer’s influence in other disciplines, his influence in law has been unambiguously both broad and deep—although it has come in what, at least at first glance, seems to be a surprising place. Gadamer has had less of an impact than one might have thought on conservative or liberal legal thought, particularly given the Burkean conservatism of much of his writing, and the striking similarities between his own and liberal theories of adjudication. But in the Canadian, American, and English critical legal studies movement, Hans-Georg Gadamer’s influence has been undeniable, and recognition of the debt owed has hardly been begrudging. Indeed, it is no exaggeration to say that Hans-Georg Gadamer directly or indirectly set much of the agenda for the entire founding generation of critical legal scholars. That is no insignificant feat, given that the critical legal studies movement was the first movement since the legal realists of a half century earlier to be

* Professor of Law, Georgetown University Law Center.
2. Id.
3. The exception of course is Ronald Dworkin, who explicitly relied upon Gadamer in his major work on judicial interpretation, Law’s Empire. RONALD DWORIN, LAW’S EMPIRE 55, 62 (1986).
rigorously and consciously critical, rather than reformist, of our most basic legal norms, institutions, and adjudicative practices. Gadamer set the direction, tone, and much of the content of our critical contemporary movements in legal thought.

This outstanding group of articles in this Symposium on Gadamer’s work and the current state of critical legal theory provides an opportunity to assess the influence of Gadamer’s ideas in critical legal thought. More specifically, it provides an opportunity to assess, amplify, and then respectfully criticize the “paradigm shift” in critical legal thought that Gadamer’s meditations on the nature of interpretive meaning helped to trigger. In large part because of the influence of Hans-Georg Gadamer, critical legal scholars now commonly regard the task of understanding legal texts, and the task of criticizing legal texts as, essentially, interpretive enterprises—rather than (to take just a few possibilities), historical enterprises, adjudicative enterprises, political enterprises, or, for that matter, unambiguously critical enterprises. 4 What legal scholars, legal historians, judges, and legal critics essentially do, according to Gadamer, is interpret—not just analyze, discover, apply, or criticize—legal texts. 5 Consequently, understanding the nature of interpretation—how it is possible, what constrains it, what does not constrain it, what ought to constrain it, what it consists of, what it requires of us, and how it does (or does not) facilitate criticism of law, and if so what sort of criticism, is now a central task—is perhaps the central task—of critical legal scholarship.

This quite fundamental shift in the way we think about the work of both understanding and criticizing legal texts is what is generally captured in the provocative phrase “the interpretive turn,” 6 at least as that phrase applies to legal scholarship: when used by legal scholars, the phrase typically refers to the somewhat diffuse moment, in late

4. The literature on the interpretive turn in law is voluminous. This Symposium, coupled, perhaps, with Interpretation Symposium, 58 S. Cal. L. Rev. 1 (1985), might be the best “bookend” approach to the subject for the uninitiated.


6. See George H. Taylor, Critical Hermeneutics: The Intertwining of Explanation and Understanding As Exemplified in Legal Analysis, 76 Chi.-Kent L. Rev. 1101 (2000) (providing an excellent and short summary of the origin and impact of the “interpretive turn” in the humanities, social sciences, and law); see also Clifford Geertz, The Interpretation of Cultures 3-33 (1973). This classic work is widely and correctly credited with achieving this “turn” in anthropology and, by extension, the social sciences generally. Gadamer’s Truth and Method had the same effect for the humanities. The interpretive turn in law—in some ways a social science itself, in another way a branch of the humanities—was predetermined, or at least influenced, by both developments.
twentieth-century critical legal scholarship, when attention shifted to the tasks of doing and understanding the work of interpretation.\(^7\) And, Hutchinson's reservations notwithstanding, that interpretive turn, which has had such a pervasive, across-the-board impact on both the nature of the questions asked and provisional answers given in critical legal studies, owes a huge debt to Hans-Georg Gadamer. Gadamer himself, after all, authored the strongest, most persuasive set of arguments supporting the claim that adjudicative work in particular, (as well as many other sorts of work) is essentially interpretive.\(^8\) Further, Gadamer's opus has inspired two generations of critical legal scholars to work through the implications of that quite basic and important stance. If that is correct, then Gadamer's influence (whether or not acknowledged by those who are in fact indebted to him), at least in legal thought, can hardly be overstated.

What I want to offer in this Article commenting on the articles in this Symposium celebrating the centennial of Gadamer's birth is an interpretation of the interpretive turn itself—and I want to do it toward the end of criticizing where the interpretive turn has taken us. The critical interpretation I will offer of the interpretive turn will emphasize two of its relatively unremarked features. First, I want to emphasize, indeed insist upon, its multiplicity. There has been, I will argue, not one interpretive turn in legal theory, but several, or at least, several distinct ways in which the interpretive turn has altered the direction of critical legal thought. More concretely, as I will argue in the bulk of this Article, there have been at least seven such turns in legal thought, and my first goal is simply to map them out. Second, I want to try to clarify, in my interpretation of various interpretive turns of legal theory and critical legal theory, not so much the nature of hermeneutic interpretation—the subject in some way of all of these articles—as the nature of the turn. Every turn in life is a turn away from something as well as a turn toward something. This is as true of turns in critical legal theory as it is true of turns on the Appalachian Trail. My basic claim is that every interpretive turn in critical legal thought has entailed a turn away from something, as it has directed us


\(^8\) See generally GADAMER, supra note 5.
toward interpretation. I want to highlight what the interpretive turn has turned us from, rather than what it has turned us toward.

Of course, some might deny that there has been any turning from, other than, perhaps, the turn from the darkness of self-deception to the light of self-discovery and authenticity. For some Gadamerians, including some writing for this Symposium, the Gadamerian truth that we are always interpreting is as inevitable and necessary a truth about the human condition as the truth that day follows night. To switch metaphors, interpretation is as constant a human occupation as breathing; that we always do it, when acting socially or communicatively, which is all the time, expresses a descriptive truth about us rather than a prescriptive goal toward which we ought strive. But if that is so, then there is something very wrong with the phrase "interpretive turn" itself: obviously, interpretation cannot be something toward which it is possible to turn and also be ubiquitous; to turn toward interpretation clearly implies that we are turning away from something else. Perhaps the conjoining of the words "interpretation" and "turn" in the phrase "the interpretive turn" is an unfortunate mistake, and not quite intended. But whether intended or not, I think interpretation is not inevitable, and that consequently the phrase captures an important truth: at least within critical legal theory the interpretive turn is just that—it is a chosen path—or that is what I will try to show. It is the way we have chosen to go. It was not necessary, and it could have been otherwise. As critical scholars tirelessly remind us in all contexts, save this one, we should not mistake as essential or necessary to the human condition that which is in fact chosen.

Let me just list here, roughly in the chronological order in which they appeared, the Gadamerian-inspired interpretive turns evidenced by the current terrain of critical legal thought, and then take them up sequentially below. I think the articles in this Symposium amply demonstrate that all of these interpretive turns have been strengthened by, and in some cases triggered by, some aspect of Hans-Georg Gadamer's work. The interpretive turns in legal theory include, so far, (1) a turn, in critical constitutional scholarship

(although not, noticeably, in either constitutional adjudication or constitutional law), toward hermeneutical, reader-centered forms of constitutional interpretation, and away from constitutional intention-alism, or as it is sometimes called, "originalism";\textsuperscript{10} (2) a turn, in constitutional scholarship, toward hermeneutical, reader-centered interpretation and away from noninterpretivism;\textsuperscript{11} (3) a turn, still in constitutional scholarship, toward an understanding of the Constitution as necessarily interpreted, and hence necessarily textual, and away from a nontextual understanding of what it means to have and to understand a national constitution; (4) a turn toward interpretive rather than consequentialist ways of criticizing laws and legal decisions;\textsuperscript{12} (5) a turn toward an understanding of legal criticism as being essentially a type of interpretation, and as such, both targeted toward texts—legal criticism is criticism of legal texts—and informed by, constituted by, and facilitated by the texts, traditions, and prejudices of the group of which the critic is a member, and consequently, I will argue, a turn away from social criticism;\textsuperscript{13} (6) more broadly, a turn toward an understanding of our moral sensibility as being a part of our interpretive capacity, and hence itself constituted largely by texts, and away from understandings of our moral sensibility as distinct and differentiated from our interpretive abilities, with a different genesis and history, and hence not so constituted by or dependent upon texts;\textsuperscript{14} and finally (7) a turn toward an understanding of the human animal, and the human telos, as being essentially interpretive, communicative, and discursive, and a turn away from other understandings of the human essence.\textsuperscript{15}

Every one of these turns toward interpretation in critical legal theory has unquestionably shifted our horizons and facilitated fresh insights, as these articles in part show, and those insights will no doubt be a large part of the legacy of Gadamer. Every turn toward interpretation has also meant, however, that we have turned our backs on other modes of acting, criticizing, communicating, or being.

\textsuperscript{10} This turn is explored in Taylor, supra note 6, at 1105-09; Valauri, supra note 9, at 1093-95.

\textsuperscript{11} See Grey, supra note 7, at 2; Valauri, supra note 9, at 1095-99.

\textsuperscript{12} This is explored, although not in these terms, in Taylor's critique of Posner's critique of United States v. Virginia, 518 U.S. 515 (1996). See Taylor, supra note 6, at 1111-15.

\textsuperscript{13} This is the subject of a number of the articles in this Symposium, concerned generally with whether or not Gadamerian hermeneutics can support radical criticism. See, e.g., Feldman, How to Be Critical, supra note 7; Hutchinson, supra note 1.

\textsuperscript{14} For an elucidation of this turn, and the debate between Habermas and Gadamer that it triggered, see generally Dallmayr, supra note 9, at 843-51.

\textsuperscript{15} See id. at 827-35.
As we follow the path laid out by the interpretive turns, we should from time to time glance over our shoulder and appreciate those horizons we have left behind. We might want to go back and reclaim them.

I. THE TURN AWAY FROM CONSTITUTIONAL INTENTIONALISM

It is clear that very few, if any, liberal, leftist, or critical scholars believe that the intentions of either the framers of the Constitution or the framers of the reconstruction amendments should be determinant of constitutional outcomes in contemporary constitutional adjudication. It is also clear that this would most likely be the case whether or not Gadamer had ever entered the picture. After all, a host of non-Gadamerian considerations weigh against intentionalism in constitutional law. For example, intentionalism apparently forecloses the Court's decision in Brown v. Board of Education, as the Warren Court itself recognized. Brown looks morally necessary to a contemporary just order in a liberal society; there is no obvious normative argument for constraining contemporary legislation with the intentions of lawmakers two centuries past. Contrary to myth, the framers were not saints, but were, arguably, a notably self-interested, class-conscious and amoral bunch, as anxious to secure the institutions of slavery and property against democratic redistribution as they were to secure the rights of individuals against overly zealous states. There is no moral reason to slavishly abide by the framers' distorted normative judgments. After all, the United States has a government of laws—not men. Accordingly legal texts—not the psychological states of dead people—should be King. The framers themselves intended otherwise. Therefore, intentionalism in the constitutional context paradoxically entails anti-intentionalism. In any event, the framers intentions are opaque, lost to the past, conflicting, and multiple. Legal critics, post-Brown, for these reasons and others, are virtually, by definition, nonoriginalists, for decidedly homegrown and nonhermeneutical reasons.

18. Id. at 489.
Nevertheless, it would be a mistake to assume from this healthy surplus of arguments against constitutional intentionalism (or originalism) that Gadamer's powerful hermeneutic description of interpretive enterprises was merely redundant. Most important, intentionalists in this homegrown American debate have conventionally called themselves (and, until recently, been called by their critics) "interpretivists." If Gadamer has accurately captured the nature of interpretation, then our own homegrown conservative interpretivists ought to forego intentionalism. This argument cleanly implied against constitutional intentionalism by Gadamer's philosophical reflections on interpretation is extraordinarily powerful. If Gadamer is right, then we should not, and possibly cannot, ever, in some militaristic hierarchic fashion, simply hear, understand, and then follow orders. If we never do that, then judges and commentators most assuredly do not do it in constitutional law. Furthermore, whether or not it is possible, a nonhermeneutical "command and obey" style of communicative order—particularly in the constitutional context—is deeply antithetical to the very idea of a democratic order, and Gadamer's hermeneutical account of the nature of interpretation clearly showed why. To truly understand a text is to interpret it, and to interpret it, just is to do so by using, not setting aside, the prejudices and traditions that constitute both the reader (or hearer) and the reader's (or hearer's) community—it is precisely those prejudices and traditions that facilitate the reader's conversational capacity. So to understand the Due Process Clause or the First Amendment in anything but a hermeneutical, participatory fashion is as impossible for us human creatures as it would be to fly close to the sun and not get burnt. Given our nature, so to speak, interpreting the communications of others just is collaborative work; a fusing of the reader's, the text's, and the writer's horizons. If this reasoning is correct, it suggests a powerful argument against even the desirability, and maybe even the possibility, of intentionalism in constitutional law and scholarship, and powerful arguments cannot be lightly put aside.

Furthermore, and perhaps of equally great interest to contemporary constitutionalists, if Gadamer is right, then those claiming to be intentionalists or those judges claiming to decide cases by reference to authorial intent alone are engaged either in acts of bad faith or a peculiar sort of unintentional blindness to the bald fact

20. See Grey, supra note 7, at 1; see also Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975) [hereinafter Grey, Unwritten Constitution].
of their own role in a shared enterprise. Intentionalist judges are wittingly or unwittingly obfuscating by denying their own participation in the creation of meaning from a text. Importantly, the Gadamerian claim is not the neo-Nietzschian (or Holmesian) claim that these judges are denying their own power, or freedom. The Gadamerian interpreter is not particularly free, and not necessarily all that powerful, and as other authors in this Symposium rightly argue, it is a mistaken reading of Gadamer to insist to the contrary. But he or she is a participant in the creation of meaning, and is participating by bringing to the quest for meaning a panoply of facilitating traditions, prejudices, and predispositions—all of which make the act of gleaning meaning both possible and human. To deny this is not so much to deny one's freedom, power, or responsibility, as to deny the ever present influence of one's own era, community, and history, as that era, community and history make itself felt through one's enabling prejudices. This positive, affirmative aspect of Gadamerian hermeneutics—Gadamer's description of the "horizon fusing" nature of hermeneutical understanding—not only captures, quite perfectly, a suspicion that nonintentionalists have harbored against intentionalists throughout the twentieth century, but perhaps more importantly captures precisely the relation of text, past ties, and present dispositions necessary to sustain the image of an evolving, or living, Constitution. To practice in the area of constitutional law, an attorney must be reading a text that speaks to him or her from the past, but the practice of law also requires that those texts be interpreted, and interpretation, if Gadamer's description is right, requires a set of historically situated understandings and prejudices that simply must be brought to bear on the project of reading—the words just would not come to life otherwise. As John Valauri shows in the long but valuable prelude to his contribution to this Symposium, Gadamerian hermeneutics seems to be a perfect fit with a credible constitutional orientation that is situated between originalism on the one hand and noninterpretivism on the other. When acting sensibly, judges will read the constitutional text in a way that Gadamer suggests is true of all meaningful interpretation. If Gadamer is right, no further argument should be required, at least with those calling themselves "interpretivists"; originalism is a human

21. See, e.g., Hutchinson, supra note 1, at 1057.
22. See Valauri, supra note 9, at 1083-87.
23. See GADAMER, supra note 5, at 309-11.
impossibility, although to deny this is a seemingly ever present human temptation.

How precisely should we assess this quite decisive turn against constitutional intentionalism, particularly from a progressive viewpoint? Obviously, if Gadamer is correct, then the Warren Court was exactly right in Brown to eschew too heavy a reliance on the historical intentions of the framers of the Fourteenth Amendment, and to explicitly assert instead the necessity of reading the Constitution through the lens of present needs and predispositions. They were right to apply to the Fourteenth Amendment’s nineteenth-century text to their current understanding of the crisis in race relations. This first interpretive turn away from intentionalism, in other words, minimally, provides a needed account of constitutionalism that, narrowly, justifies Brown, (and belatedly responds to Herbert Wechsler’s invitation to do just that) and that, more broadly, underscores the desirability and necessity of constitutional interpretation not hidebound to the mental states of the founders. In addition, if Gadamer’s account is more right than not, this first interpretive turn is clearly to be cheered because it leads us away from intentionalism, and hence out of the darkness of self-deception and bad faith, and into the clarity of improved self-understanding. What Gadamer teaches us is something important about ourselves, not a “better way” to do the work of reading and applying texts.

Let me register two reservations about this first, foundational (and least controversial) of the interpretive turns. First, in the spirit of pragmatism, and for purely political and non-Gadamerian reasons, critical theorists should perhaps be somewhat more wary than they have been, over the last half century, of the claim that intentionalism in constitutional law is a sort of bogeyman that is somehow akin to original sin. Recourse to the framers’ intentions, as a way to decide cases, and from a moral or political perspective, depending upon what it is compared to, is obviously going to look better or worse. The assumption that it is always a bad thing to be tied to the moral sensibilities of the framers rather than current sensibilities of judges or their interpretive communities rests on a set of assumptions regarding moral progress through time that may be dangerously naive. There may be quite sound reasons, from a critical perspective,

to develop a "romantic," intent-based, historic account of the Constitution—or various romantic, intent-based accounts. Indeed, it is striking that a number of more or less progressive constitutional scholars are doing just that—developing conventional intentionalist arguments, Gadamerian and non-Gadamerian objections to intentionalism notwithstanding, concerning, to take just one salient example, an account of the original meaning of the Constitution that argue that the framers sought to enable rather than cripple federal power. It is not obvious why critical scholars should be abdicating or trivializing this historical work. Our history matters in constitutional law. Constitutional law is about how we have constituted ourselves—and if there were a history of constitutional intents (whether of the framers or not) that lend support to progressivism, it would behoove progressives to unearth it, not eschew its relevance.

The second reservation regarding the Gadamerian argument against constitutional intentionalism is more in the spirit of Ockham's razor: we should not embrace too readily the Gadamerian claim that hermeneutical interpretation, and its anti-intentionalist implications, rest on immutable truths of our nature, if our reasons for doing so stem primarily from a desire to defend Brown v. Board of Education, Roe v. Wade, or the integrity of the Warren Court, against originalist challenges, for the straightforward reason that we do not need to. Even if Gadamer is flatly (or partly) wrong about the nature (or ubiquity) of interpretation, there might be other, narrower, and perfectly sound, if less philosophically pervasive, reasons not to slavishly adhere to the original intent of the framers (and therefore, assuming non-Gadamerian intentionalist premises, the meaning of the Constitution) when deciding contemporary constitutional cases. If this is correct, then Gadamer's argument is just excessive fat for Ockham's razor. Constitutional law, after all, might quite sensibly be understood to encompass more than the meanings generated by the Constitution itself. Gadamer might be wrong, in other words, about the necessity of hermeneutical interpretation—even if not its possibility—and Brown and Roe might still be right, and the Warren Court right to turn away from a historical method. We may be saddling ourselves with a theory of interpretation (and criticism) that

26. See GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999) (a history of the idea that the Constitution was meant to instill suspicion in the people regarding their government).

27. See GADAMER, supra note 5, at xxx, xxxii, xxxvii-xxxviii.

is surely broad and deep, but also simply not necessary to the constitutional end to which it has been put—the validation of Brown, and Brown-styled constitutional interpretation. If so, then we have accepted a broad and difficult philosophical argument to answer a considerably narrower and more ordinary political and jurisprudential question.

In addition, it may be a broad and difficult argument that carries significant costs of its own, particularly for critical theory. There are at least two. The first cost is that noted or discussed by several of the contributors to this Symposium, and is one that I will discuss in more detail below. The argument is that Gadamerian hermeneutics looks like a plausible account of interpretation, but the very strength of its account of how we interpret seems to undercut the possibility of radical criticism. Gadamer's central and important point regarding the nature of interpretation is that we interpret texts through bringing the dispositions, prejudices, precommitments, and belief structures of the community and time of which we are a part, to bear on the text being construed. If that is so, then a pure intentionalism does seem to be an impossibility—the reader cannot help but participate in the process of creating meaning. However, there is a less happy implication of this argument for intentionalism, at least for legal critics. If interpretation of a text is only made possible through the lenses of the readers’, and hence the readers’ communities, prejudices, traditions, beliefs, and so forth, and if criticism is invariably interpretive, then it is indeed hard to see how we are going to get the project of criticizing our own prejudices, traditions, and precommitments off the ground. To criticize we must interpret, and to interpret we must invoke—not detach ourselves from—our prejudices and traditions. It is not clear how we are able to extract ourselves from the circle, and make those traditions the objects of our critical gaze. Gadamer’s distinctive argument against intentionalism—that a reader’s prejudices and traditions must invariably come into play when gleaning meaning from a text—does indeed seem to undercut the possibility of radical criticism, as a number of the participants in this Symposium duly note.

29. See, e.g., Feldman, How to Be Critical, supra note 7, at 897-99; Hutchinson, supra note 1, at 1018; Taylor, supra note 6, at 1101-05.
31. Id. See the general discussion of Gadamer’s argument against intentionalism in Valauri, supra note 9, at 1091.
The second argument, less remarked upon by the contributors to this Symposium, is that as a purely descriptive and even psychological matter, Gadamer might be wrong to insist upon the necessity of prejudice and precommitment to the connections forged, by language and through texts, between persons. It may be that sometimes even quite profound communications between persons occur in spite of, rather than because of, our acquired prejudices, traditions, and formulaic precommitments. I do not know that this romantic understanding of the relation of author and reader or speaker and hearer is as wildly implausible as contemporary Gadamerians have come to believe it to be. Sometimes people experience reading or listening in that way—with a romantic shock of recognition, so to speak, of the author or speaker—and it is not obvious why that experience should be discounted.

Nor is it the case, as Gadamerians perhaps too readily assume, that all human connections of any sort are facilitated by textual preconceptions, prejudices, and traditions. For example, basic human connections between infants and parental caregivers are established well before language facilitates the exchange of ideas, and hence the acquisition of those acquired prejudices, traditions, and formulaic precommitments. Bonds of affective and active connection, rather than traditions culled from texts and encoded in human transmitters, facilitate the love, empathy, dependency, trust, security, and care, as well as the fear of abandonment and experience of need, that characterize the preverbal human interaction between mothers and fathers and their infants. Those decidedly prelingual affective connections, furthermore, provide the basis for the trust that, no less than social tradition, is apparently necessary for even the acquisition of, much less the effective use of, language. It may be those prelingual affective connections, and the trust they engender, rather than fused horizons of blended traditions and prejudices, that constitutes the deeper, primordial basis for the occasional or frequent moments of mutual recognition that characterize some forms of genuine communication between adults.

I think this possibility—the possibility that mutual recognition of others, through texts, conversation, and otherwise, is facilitated, in part, by our prelingual experiences, and our biologically necessitated sociability—matters, and should not lightly be assumed away, and for at least two reasons. First, it might actually bear on the

32. See id. at 1071-72.
intentionalism debate. Some people, Gadamerian hermeneutics notwithstanding, do think we glimpse an authorial intent—quite pure and unadulterated by our own prejudices—behind an understanding of a textual composition. It may be that that glimpse is a dim echo or reflection of those moments of affective prelingual connection, as well as is facilitated by them. When we understand (or think we understand) the author's intent in a text, what we may be doing is glimpsing its author—its author's presence—free of our linguistic "constructedness" and then submitting to that intent. The claim that we cannot possibly do such a thing, because all human connection and communication is facilitated, software style, by text—digital or verbal—seems overstated. Not all such connection and communication is so facilitated.

But more importantly, it seems to me that the possibility of empathic, ethical connection between persons (or between persons and animals) stemming from a pre-prejudicial and nontexual regard for the human other is one we should not dismiss lightly, for both political and ethical reasons. We need to recognize the humanity and the pains and pleasures of human beings both here and around the globe with whom we may have no textual shared points of reference, and we need to act on that recognition if we are going to be morally responsible world-citizens. A sensibility of our moral obligations, as well as our critical capacities, grounded in a basic recognition of a shared universal humanity and a shared need (or a shared capacity for sentient pain and pleasure) for sustenance, rather than in a mosaic of overlapping texts, traditions, or prejudices, may be a stronger basis for the sense of global responsibility and entwined fate apparently necessary to sustain a decently moral response to our crisis-riddled, badly impoverished, and now disease-plagued world. The relentless focus on the necessity of linguistic conventions, community traditions, communal prejudice, and shared and overlapping texts—conventions, traditions, and texts that facilitate conversation but do so by demarcating and delineating boundaries between peoples—might undermine rather than undergird the ethical and humanistic universalist impulses necessary to do so—impulses which may have their roots in our mammalian and animalistic, rather than linguistic, selves. 33

33. Anyone who finds this point of even passing interest, should read Fred Dallmayr's article, supra note 9, which is a sustained meditation on some of the concerns I have raised here in the text, and a reading of the classic Habermas-Gadamer debate from this perspective.
II. AGAINST CONSTITUTIONAL NONINTERPRETIVISM—THE INEVITABILITY OF THE TEXT

More directly attributable to Gadamer’s influence than was the turn away from intentionalism—which, as noted above, would have occurred with or without his intervention—is surely the turn of intentionalism’s critics away from “noninterpretivism.” This turn, unlike the former, might well not have occurred at all but for Gadamer’s hermeneutical interventions. Before Gadamer’s work was absorbed into critical legal thought, it was quite conventional to describe the major divide in constitutional theory as being between intentionalists, strict constructionists, and originalists or “interpretivists” on one side and, on the other side, a group of scholars and a few judges who advocated a role for constitutional courts in the articulation and enforcement of “fundamental values” not necessarily articulated in the text—a group conventionally called “noninterpretivists.” For this group, the label “noninterpretivists” captured something fundamental to their view of constitutional doctrine—to wit, that the Constitution’s open-ended clauses, and particularly the Fourteenth Amendment’s open-ended clauses, had to be applied in a way that is informed by truly fundamental values, and not just those values that happen to be articulated in the text. It also, though, captured something central to their understanding of constitutionalism broadly understood, and that was their conviction that constitutional law is about the relations between power holders in the state, citizens, and the values expressed in governance, and not fundamentally about a document—or its meaning—at all. It is about, the noninterpretivists thought, the way we constitute ourselves, not just about our constitution. As such, practicing in the area of constitutional law is not, at a quite basic level, about interpreting a document at all. It requires attorneys who practice in that area to

34. See generally Grey, supra note 7.
35. See generally Interpretation Symposium, supra note 4.
36. They were called interpretivists because of their shared insistence that constitutional law must be about interpreting (and then applying) the constitutional text. See Grey, supra note 7, at 1-2. For examples of “interpretivists,” see Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971); Hans A. Linde, Judges, Critics, and the Realist Tradition, 82 YALE L.J. 227 (1972).
37. They were called noninterpretivists because of their shared insistence that constitutional law is not only what can be drawn from the text, but is also about enforcing values drawn from somewhere other than the document. See Brest, supra note 16; Grey, Unwritten Constitution, supra note 20; Ira C. Lupu, Constitutional Theory and the Search for a Workable Premise, 8 U. DAYTON L. REV. 579, 583 (1983).
appreciate, discern, articulate, and possibly enforce society's most fundamental political values. As such, it calls upon practitioners in the area of constitutional law to use more than their interpretive prowess. It requires moral wisdom, not interpretive facility. It is a fundamentally moral, rather than a fundamentally interpretive, enterprise—hence the label "noninterpretivists."

Gadamer changed all that. In one of the less remarked on but surely most remarkable evolutions in the history of scholarly conventions, noninterpretivists became interpretivists—an evolution very much owing to Hans-Georg Gadamer's hermeneutical insights. When Tom Grey—who had ten years earlier written one of the most cited and elegant pieces in legal literature, entitled *Do We Have an Unwritten Constitution?*—declared in an early eighties piece on hermeneutics that "we are all interpretivists," what he meant, was decidedly not that intentionalists had seen the errors of their ways and were now happy to embrace a less rigid, reader-friendly, and more hermeneutic approach to constitutional questions. Rather, what he meant was that intentionalism's *critics*—those who had called themselves noninterpretivists and had done so in order to signal their departure from the text—were now happy to join intentionalists under the textual, constitutional, "interpretivist" umbrella. With a sufficiently elastic understanding of interpretation—an understanding that accepts, indeed insists on, an active role of the reader in the creation of constitutional meaning—and a sufficiently elastic understanding of the constitutional text—an understanding that includes all sorts of constitutional practices, top to bottom, as well as constitutional phrases—noninterpretivists could drop the "non" and could reclaim their ties to the "constitution." The phrase, "we are all interpretivists" now meant, essentially, that those advocating the articulation and enforcement of fundamental values through the vehicle of constitutional adjudication could and should recast their argument within the familiar contours of constitutional interpretation. Interpretation, after all—properly understood in a Gadamerian, hermeneutical fashion, rather than the discarded and discredited intentionalism of *Brown* and *Roe*’s critics—virtually

---

42. See id.
43. Id.
44. Id. at 3.
required what the noninterpretivists had been doing all along: reading and applying texts, and doing so even by bringing to the text the “fundamental” values, prejudices, and precommitments of present readers, and not just their historical acumen.45

What have we gained, and what has been lost, by this interpretive turn away from noninterpretivism, and to an ecumenical, catholic, open understanding of the elasticity of interpretive enterprises? First, take the gains. There was indeed, as at least some of the architects of the turn surely hoped and assumed there would be, a reclaiming of some measure of legitimacy and indeed relevance for the advocates of “fundamental values” adjudication that had been lost in their meanderings in the unmoored noninterpretivist territories.46 The high-water mark of this reclamation may well have been the Bork nomination proceedings, during which the once-styled noninterpretivists and now refashioned interpretivists turned the political tables quite decisively and characterized Judge Bork—pejoratively but no doubt correctly—as a radical intentionalist, who, precisely because of that orientation, was beyond the pale of acceptable constitutional practice.47 It is not clear, though, that even from a narrowly political perspective this tables-turning has stuck, so to speak: Supreme Court nominees in the post-Bork era now speak routinely of strictly construing the Constitution according to its letter.48 They absolutely never speak of either the necessity or the desirability of fundamental values adjudication, do not even pay lip service to hermeneutical understandings of constitutionalism, and routinely express a view of what it means to practice constitutional law that is in broad outline indistinguishable from Bork’s own—and, so long as they refrain from declaring their intentions one way or the

45. See Brest, supra note 38; Owen Fiss, Objectivity and Interpolation, 34 STAN. L. REV. 739 (1982).
46. Valauri neatly describes this phenomenon. See Valauri, supra note 9, at 1097-98.
other with regard to Roe, they get confirmed. A potential nominee who professed a Gadamerian understanding of the work of constitutional interpretation, needless to say, would have considerably more difficulty, and one who openly advocated the enforcement of fundamental values not discoverable in the text of the Constitution would be dead-in-the-water.

Whatever might have been the political fallout, however, it seems to me there was a loss of a needed perspective that followed the happy return of the prodigal, noninterpretive sons to the paternal fold of constitutional interpretivism. Noninterpretivism as originally conceived really was different: it turned our attention away from all texts—with a considerable risk of sacrificing the virtues of legalism in the process—and toward social reality, as a source of constitutional understanding. Let me try to explain what I think we have lost through an example. Think for a moment of Roe, surely the most controversial and despised of the fundamental values cases—but also the crown jewel, at least to some of us, of noninterpretivist adjudication. In Roe the Court basically found an unwritten right to an abortion in the first two trimesters of a pregnancy—at first blush, as noninterpretivist a decision as could possibly be imagined.

Or was it? Let me contrast, in an admittedly simplistic way, first a Gadamerian account, which brings even Roe into the interpretivist fold, and then a non-Gadamerian and noninterpretivist understanding, or explanation, for how Roe came to be, again toward the end of highlighting not what we have gained, but possibly what we have lost by foregoing noninterpretivist understandings of constitutionalism. First the Gadamerian reconstruction: it may be that, contrary to the characterization of Roe I gave above as the paradigmatically noninterpretivist case, the result in Roe came about much like any other outcome: an "interpretive community" of constitutional scholars, judges, lawyers, and litigants, read, interpreted, and understood the texts of various state laws criminalizing abortion, and then read, interpreted, and understood the text of the Fourteenth Amendment, and then read, interpreted, and understood the text of Griswold v. Connecticut, Poe v. Ullman, and Eisenstadt

49. Souter Hearings, supra note 48, at 54 (statement of David H. Souter); Thomas Hearings, supra note 48, at 127 (statement of Clarence Thomas); Breyer Hearings, supra note 48, at 138 (statement of Steven G. Breyer).
51. 381 U.S. 479 (1965).
v. Baird, all earlier cases interpreting that amendment. This “community of interpreters” then reached the hermeneutical, community and reader-informed judgment that the latter texts contained evidence of constitutional traditions and commitments, even if penumbral, that were starkly violated by the former texts, so the former texts had to go. On this telling, Roe is largely and properly justified by a Gadamerian but nevertheless quite conventional understanding of what constitutional law is all about. One text—the state law text—is trumped by another text, hermeneutically understood—the Constitution—and the latter prevails over the former. In other words, the state law criminalizing abortion is trumped by the United States Constitution. It is all about texts. It is all about law. It is all about interpreting texts, hence law. It is all about finding the relevant, controlling law; Roe is not odd, it is no different from any other decision. If so, then the sizeable gap between the “fundamental values” approach and intentionalism shrinks to nothing. If Roe is an interpretive case, rather than a noninterpretive case, then “fundamental values” adjudication is not all that different from what had gone before or after, and if so, then Roe is not even arguably “illegitimate” or “illegal,” as Bork and other critics of Roe have long claimed.

The interpretive, Gadamerian understanding of Roe and how it came to be does, then, restore Roe’s legitimacy. But for better or worse, there is another way of thinking about how Roe came to be. Maybe Roe came down the way it did because a group of citizens, activists, social critics, feminists, abortion providers, lawmakers, scholars, and judges appraised a social reality: Too many women and girls dead or maimed from illegal abortions. Thousands of women and girls trapped by unwanted and nonconsensual pregnancies. Many more smothered by the weight of the near impossibility of mothering unwanted children in impoverished circumstances. Rampant criminality on the part of major sectors of the medical community; a thriving but terribly dangerous underground of abortion providers. This group, then, intuited, in a variety of ways, and some of them eventually argued, that this social reality just cannot be a part of the way we constitute ourselves; it violates too many of our fundamental values. That moral intuition, then, grasped from an appraisal of

community life and value, formed the basis of a radically transformed
constitution. On this accounting of Roe, it came to be, because some
people in positions of power and responsibility looked to the world,
and asked what it "said" about the way we constitute ourselves—not
because, as Ronald Dworkin now routinely describes the Gadamerian
heart of constitutional dialogue. They looked to the Constitution to
see what it "said" about a state's law.55

What this social world of illegal abortion, unwanted pregnancies,
and criminal providers "said" about our Constitution—and event-
tually, through constitutional adjudication, about our constitutional
text—was that we had to incorporate a woman's reproductive choice
into our social constitution. The "fusing," then, was of a horizon
composed of judgments based on moral sense and a perception of a
worldly injustice with a horizon composed of legal possibilities, all
culminating in a constitutional crisis. It was not, fundamentally, a
fusing of conflicting interpretations of texts, themselves constituted
by tradition and prejudice. All of the texts—the text of the
substantive Due Process Clause, the texts of arguments about the
meaning of Griswold, the texts contesting the coherence of the
demarcation of trimesters, the texts regarding the use or abuse of
other texts on which Roe relied, and libraries full of texts with
supporting arguments—came later. The constitutional judgment was
forged by the fusing of an apprehension of a moral and social evil,
with a constitutional obligation to do justice.

I suspect that this latter description, simplified no doubt, is a
little closer to what actually happened in Roe, and that it is a morally
justifiable route to take toward a constitutional verdict. I also suspect
that it is close to what was originally meant by some of the advocates
of "fundamental values" adjudication, and that it was what noninter-
pretivists in some way were defending, when they defended "non-
interpretive" approaches to constitutionalism. If so, it seems clear
that the happy embrace of hermeneutical, or Gadamerian inter-
pretivism, the turn taken by our one-time noninterpretivist constitu-
tional scholars and theorists and activists against their own earlier self-
description, has sacrificed this decidedly noninterpretivist and socially
oriented way of thinking about what it means to have a Constitution,
and what it means to practice in the area of constitutional law. And if
so, we have lost as well as gained from this interpretive turn. There
may or may not be points to be won—politically—from insisting that

55. See DWORKIN, supra note 3, at 62.
it is possible to read our constitutional texts in a sufficiently subtle and supple way so as to permit most of the results reached on at-the-time noninterpretivist grounds. But to reap the benefit of this gain, we have had to refocus constitutional attention on the very text—albeit a more ecumenical, less constricting, more modernized text, but still, nevertheless, a text—that those same noninterpretivists initially found too constraining. With the text as our relentless focus—no matter how hermeneutical our interpretive method with respect to it—we risk losing our sense of the Constitution as imposing upon us, fundamentally, an ethical duty to respond morally to injustice in the world, rather than to inconsistencies in our traditions, texts, and prejudicial pre-commitments. We lose the possibility that the Constitution is at bottom a mandate to do justice and hence what it means to have a Constitution—to engage in the work of reconstituting—through moral interaction with our social world, rather than through cogitative, interpretive moves through texts.

III. THE TURN AWAY FROM CONSTITUTIONAL UNIQUENESS

Justice Marshall, in *Marbury v. Madison*56 and again in *McCulloch v. Maryland*,57 as well as Justice Warren, in *Brown v. Board of Education*, both found it illuminating that they were interpreting a Constitution, and both gathered from that fact that they had some measure of interpretive power in deciding the cases before them that otherwise might be legitimately denied them.58 Both grounded their vividly hermeneutical reading of the Constitution, in other words, at least partly, on the Constitution’s uniqueness or singularity or, just, peculiarity—it is a law, but not an ordinary law.59 One of the turns inspired by Gadamer’s elucidation of hermeneutical interpretation, I think, is a turn away from this Marshall-Warren tradition. If Gadamer is right, then Marshall and Warren were both wrong to think that their necessary participation in the construction of the Constitution’s meaning was in any way dependent upon the

56. 5 U.S. (1 Cranch) 137 (1803).
57. 17 U.S. (4 Wheat.) 316 (1819).
59. *See McCulloch*, 17 U.S. (4 Wheat.) at 407 (“It is a Constitution we are expounding.”).
Constitution's uniqueness. All texts, not just the constitutional ones, require the hermeneutical reading Marshall and Warren bestowed on the Constitution. Interpretive agility in the constitutional context is required by the Constitution's textualism—a trait it shares with every other law and every other verbal formulation imaginable—not by the Constitution's uniqueness. The openness of the Constitution to hermeneutic interpretation is what it shares universally with all other texts. There is nothing unique about it.

The Gadamerian interpretive turn has turned us, then, among much else, away from the possibility that Warren and Marshall might have had it right. If they were right, we have a slight paradox: it may be that Gadamer's account of hermeneutical interpretation so perfectly matches the hermeneutic of constitutional law, not because of the Constitution's universal qualities—its textualism—but rather because of the Constitution's uniqueness: it may be only because it was a constitution they were interpreting that their method of reading it so nicely fits Gadamerian accounts of interpretation. And, it may also be the case (contra Warren and Marshall) that what the Constitution has, uniquely and peculiarly, that other legal texts do not, are nontextual qualities.

The Constitution has a lot in common with other legal texts—like other legal texts, it is composed of words that command, with sanctions, and so on. But unlike those texts, it is also, in some ways, much like some things that are not texts at all, at least in any sort of obvious way: it is sort of like Mount Rushmore or the Vietnam War Memorial. It may be that Gadamerian interpretation sounds so much like constitutional interpretation, not because the Constitution is a text and Gadamer has correctly described what it means to interpret a text, but, rather, because in some ways the Constitution is not a text at all, and Gadamer has correctly described what it means to interpret texts that also have the peculiar property of having nontextual attributes that also are generative of meaning, such as national memorials or monuments.  

National monuments, such as the Vietnam War Memorial, do indeed invite communicative, communitarian, dialogic, open discourse on its meaning. For example, "Is the monument a testament to our shame, or our courage?" "Does the monument symbolize a

60. Gadamer himself does not explicitly extend his hermeneutic method to monuments; he does, though, extend it to "absolute music" and "abstract art." GADAMER, supra note 5, at 91-92.
historical disaster?” “Is the meaning of the names engraved upon the monument found in the acts of courage and sacrifice they represent, or in the names not included, who also died as a result of the war?” “Is the Memorial an ugly, nihilistic slash in the ground, as its critics complained at the time of its proposal, or an elegant tribute to the loss of life and the families’ terrible and terrifying grief?” Obviously, the monument doesn’t say. Furthermore, the sculptor, Maya Li, also does not say. It would be wildly inappropriate for Li to just tell us what the monument “means.” Intentionalism, here, would clearly be misplaced—and it would be misplaced even though the sculptor is living, capable of communicating, singular, and no doubt had intentions regarding the monument and its meaning. We—every generation, every visitor to Washington—say what it means. And we say it, in some way, collectively; we do, as a nation, give the Vietnam War Memorial an evolving meaning. The monument is there, after all, in part, to inspire a conversation about its meaning—and the meaning of the war that prompted its creation.

Debates over the Constitution’s meaning are sometimes, in some ways, and toward some ends, debates about the meaning of the Constitution-as-text and the Constitution-as-law. But debates over the Constitution’s meaning at other times, in other ways, and toward other ends, might be more like the debates about the meaning of the Vietnam War Memorial than they are like debates over the meaning of a contract, a statute, a precedent, or Moby Dick. The debates about the meaning of the Vietnam War Memorial have a distinctly audience-participation flavor, but it has that flavor, perhaps, because of its status as a national memorial, rather than its status as a “text.” It is entirely appropriate and desirable, and perhaps inevitable, that the debate over the Memorial’s meaning be a consultative conversation involving the community that receives the monument—rather than a directive from sculptor to audience. Likewise, some of the debates about the Constitution’s meaning might be on a par: consultative dialogic conversations involving the community that received the document memorializing an ambiguous moment in national history, with a meaning that cries out for constant reinterpretation. If that is right, then the Gadamerian, collaborative, dialogic, argumentative, and above all anti-intentionalist quality of our constitutional conversations owe as much to the nontextual and nonlegal attributes of the Constitution, as to its textual and legal functions and contours. We should not falsely generalize from those conversations to the conclusion that what is true of constitutional
interpretative dialogue must be true of the interpretive debates over the meaning of all laws—from contracts to ordinances to statutes, and even less over the meaning of all texts, from advertising slogans to *Moby Dick*. The Constitution has distinctive features, and one of those distinctions might be its nontextual “monumentalism.” We might engage in Gadamerian conversations about the Constitution’s meaning, not because it is a “text,” but because in important respects, it is not.

IV. THE TURN AWAY FROM CONSEQUENTIALIST CRITICISM OF LAW

What does it mean to criticize a law? One possible meaning is that the critic assesses the world after the law is enacted, compares it with the world before the law was enacted, and then evaluates the law’s consequences. Is the world a better or a worse place because of newly enacted caps on punitive damages in tort actions? Is the social world improved, post-*Roe*, *Brown*, or *Casey*? Should we have more shareholder liability than we have? What would be the consequences of abolishing limited liability? One sees not a trace of this sort of critical activity in Gadamer’s writings on law, as far as I know. One of the surest signs of Gadamer’s influence is that one sees almost none of it in the writings of critical scholars who have been most influenced by him. One of the turns unambiguously occasioned by the reception of Gadamerian thought in critical legal theory, in other words—perhaps the most obvious and perhaps for that reason the least remarked upon—is the turn away from consequentialist criticism of law.

There is no mystery here explaining why—indeed, in the search for reasons, there is an embarrassment of riches. The sort of consequentialist criticism described above is almost a parody of the neo-Kantian model of social thought and criticism that Gadamer (and Habermas, and Foucault, and Derrida—this is the shared ground between them) first criticized, somewhat vilified, and then, in Gadamer’s case, sought to supplant with a hermeneutical approach to understanding and criticism. Straightforward, consequentialist

64. This is the subject of Wickham's enlightening article *Foucault and Gadamer: Like Apples and Oranges Passing in the Night*, which reluctantly concludes that this overlapping area is small. See Gary Wickham, *Foucault and Gadamer: Like Apples and Oranges Passing in the*
criticism of the sort suggested above is precisely the target—the wrong-headed approach—of Gadamerian thought, in its critical mode: it is what interpretation seeks to dethrone.\textsuperscript{65} It has, bluntly, every pre-postmodern sin in the book: it assumes a subject—the critic—apart from and over the object of knowledge and criticism—the law.\textsuperscript{66} More specifically, it assumes a disinterested subject potentially free of his or her own prejudices when engaged in the work of characterizing and evaluating consequences.\textsuperscript{67} It employs an unpleasant method of criticism no different from methods employed by technological, bureaucratic manipulators. It assumes a law unambiguous in meaning and impact.\textsuperscript{68} It rests on a naive, and false, if “enlightened,” commitment to the transparency and availability of social “facts.” More fundamentally, and I think for Gadamerians most fatally, it relies on a distinction—an ontological boundary, so to speak—between the legal text and its worldly consequences: to evaluate the consequences of a law we are going to have to separate consequences from text and then use the former to critique the latter. This separation, for Gadamer and Gadamerians, is an untenable one, and undesirable as well. One cannot separate “worldly consequences” from “law” because one cannot separate the “world” from the “text.” The “world,” both natural and social, is not apart from the descriptions and regulations of it that occur through texts, including legal texts. Criticism of law, in short, has to be interpretive, not consequentialist, if it is to occur at all.

What should we make of this interpretive turn—a turn that carries the substantial risk, I will suggest in a moment, of turning the critic’s attention away from the social world? First of all, as a number of commentators in this Symposium make clear, the conservative implications of this turn are both clear and worrisome to anyone, including Gadamerians, concerned with the state of contemporary critical theory: if the sort of consequentialist criticism suggested above is just not possible, and if it is not possible (in part) because of the critic’s necessary “embeddedness” in the social milieu he or she is criticizing, then it is not clear that any sort of deep criticism of law, consequentialist or otherwise, is possible at all. There is no vantage point apart from the facilitative prejudices and social under-
standings—prejudices shared by the critic and legislator both—from which those prejudices and social understandings might themselves be judged, and it may well be that criticism of law without the deeper critique is going to be worse than useless. This is the troubling Burkean implication of Gadamerian thought that Gadamerian critical theorists, such as Jay Mootz, Stephen Feldman and even Allan Hutchinson, so energetically seek to rebut in their articles for this Symposium. If interpretation is facilitated by shared communal prejudice and precommitment, and if interpretation is virtually all there is, then it really is hard to see how criticism ever occurs. It may well be flatly impossible. Worse yet, this might be just what the relatively conservative Gadamer believed—in which case he is an odd hero for radical legal critics.

On the other side of the critical ledger, so to speak, Gadamerian critical scholars point out that hermeneutical forms of understanding, initial appearances to the contrary notwithstanding, do make possible (or, show why it is possible to have) a certain form of “inside-the-loop,” situated critical stance. The genuinely hermeneutical stance toward any text is distinctively and necessarily open, and what that openness allows is a shifting of the critic's framework, or horizons, so as to make sense of the text with which he or she is in dialogue. The result is a transformation of the critic: the critic might now view his or her own facilitating prejudices, or pre-commitments, in a new light—the light made possible by the fusion of text's and reader's horizons. The critical, hermeneutical reader, then, will emerge from the experience with a transformed and potentially more critical stance toward his or her own enabling pre-conceptions—as well as a transformed and potentially more critical stance toward the community that shares those pre-conceptions. What the hermeneuticist cannot do is the sort of consequentialist assessments so treasured by pre-postmodernists. What he or she can do, though, is constantly open himself or herself to the possibility of reforming and transforming his or her own critical horizons. That is the bargain.

69. See Mootz, supra note 7, at 925-27.
70. See Feldman, How to Be Critical, supra note 7, at 893-96.
71. See Hutchinson, supra note 1, at 1016-19.
72. The most eloquent short description of this is possibly Fiss, supra note 45. Dworkin's Law's Empire is a standard book-length attempt to defend Gadamerian adjudication. See DWORKIN, supra note 3.
73. See GADAMER, supra note 5, at 302-07.
To be blunt, I am not sure it is a good bargain. Look at some of the not-so-hidden terms. First, the transformation—the growth of critical capacity; the changed being—all occur in the critic. The result of radical critical thought, hermeneutically styled, is a transformed critic. It is the critic that is transformed by the sort of reading the interpretive turn illuminates; not the world. Second, the world is pretty thoroughly abandoned in this hermeneutical revolution. What Gadamer provides us, after all, is an understanding of the relations between author, reader, and text—and the striking suggestion that emerges from it is a redistribution of responsibility and participation between those three entities, for the creation of meaning. The reader's role is highlighted and expanded, along with his or her preconceptions and horizons, in the creation of the text's meaning. But what is pretty clearly left out of this "triad" is the world.

The Gadamerian bargain, in other words, gives us an understanding of how a text's meaning and a text's reader can both be transformed through the same hermeneutic event. But that is clearly not adequate to the task of explaining how, or whether, we can criticize the effect of law on our social world. It is nice—I suppose—that reading a text of a law might transform an open reader, and that the reader might have an impact on the text's received meaning at the same time. And—surely—if that sort of reading is the only possible kind of reading worth bothering with, then it is also clear that courts, when doing the work of figuring out what a law means, ought to acknowledge their own participation in the process. But none of that gets anywhere near addressing the question of a law's social value. To do the latter work—to decide whether a legal "text," in its much belittled, positivistic, command-with-consequences mode, is one worth having or one we ought to chuck—we have to look elsewhere than the tripartite Bermuda triangle of reader, text, and author. We have to look at the world and somehow ascertain whether it is for good or bad. In its more extreme modes, the emphasis by Gadamerians on the critic-as-reader, and the reader's transformed consciousness—all the talk of fused horizons—after a hermeneutic encounter with a text, and particularly the construction of that consciousness as the exemplar and measure of all things critical, seems precious, even fetishistic, and to be very old-fashioned, it also seems downright bourgeois. There is surely something to the Marxist

74. Id.
75. Valauri, supra note 9, at 1090.
complaint that the world cries out for change, not just understanding.\textsuperscript{76}

There are two further problems, however, with the provocative attempts by Gadamer's radical followers to reap from Gadamer's writings a prescription for radical change, even assuming the change in question is one limited to the changed consciousness of the critic and the changed meaning of the text. The first is that although Gadamer has given us a powerful—indeed in some sense unsailable—account of what it means to glean meaning from a text,\textsuperscript{77} he gives us no way to assess whether the transformation of meaning affected in either the text or the reader by the hermeneutical encounter is a desirable one. The Afghanistan Taliban,\textsuperscript{78} for example, is a radical return to tradition from a secularized culture, and one brought about through the mechanisms of textual reinterpretations as well as armed combat, but perhaps one that humane proponents of either radicalism or traditionalism, or proponents of the desirability of fusing the two, would not want to endorse. Likewise, and more modestly, the transformation in consciousness that might be occasioned by a Western reader's open and accepting reading of, for example, the marital rape exemption in the criminal codes of our fifty states, might not be a transformation we ought to desire. Even the transformation in consciousness occasioned by \textit{Brown} and its aftermath—the crossing of literal, political, spiritual, psychic, and racial boundaries, which in some ways, I think, is a transformation of consciousness that is almost perfectly exemplary of the sort of Gadamerian, horizontal movement toward justice arguably facilitated by open and honest cross-boundary dialogue—was not entirely laudatory. Derrick Bell reminds us, for example, that one consequence of the decision was the newfound consciousness among the black intelligentsia, committed to integration, that blackness is just not good enough—the same message, differently delivered, that the architects of \textit{Brown} sought to bury.\textsuperscript{79}

Second, however, and perhaps more important, even if the transformation in consciousness and in textual meaning occasioned by

\textsuperscript{76} See Karl Marx, \textit{Theses on Feuerbach} (10th Thesis), \textit{in Marx and Engels: Basic Writings on Politics and Philosophy} 243, 245 (Lewis Feuer ed., 1959).

\textsuperscript{77} See \textit{Gadamer}, supra note 5, at xxi, xxv.

\textsuperscript{78} On the Taliban generally, and its dubious connections to Islamic fundamentalism, see William T. Vollman, \textit{Across the Divide}, \textit{New Yorker}, May 15, 2000, at 58.

\textsuperscript{79} See Derrick Bell, \textit{And We Are Not Saved: The Elusive Quest for Racial Justice} (1987).
the hermeneutic encounter is in some sense desirable, as well as radical and liberating, that transformation still tells us nothing of the law's worldly affects. Consider, for example, the reader, as well as legislator, whose consciousness has been transformed in a good way, perhaps even raised, by texts, describing, say, the harms occasioned by marital rape. Perhaps that reader has then been moved to reform or abolish rape exemptions, thereby creating a new and improved legal text. There may have been a quite happy and transformative fusing of feminist, reformist, legislative, and criminological horizons, resulting in a transformed legal text, a rape law without any exemptions for married people, or the Violence Against Women Act ("VAWA"). But shouldn't these transformed readers and critics know and care about whether or not there have been any successful prosecutions under these reformed criminal texts? Isn't the bottom line value of the transformation of consciousness occasioned by horizon-fusing texts somewhat diminished if there has been no correlative real world change? This is not to deny that the effect on consciousness of something like VAWA is a consequence that matters—for better or worse. But the change in consciousness is surely one consequence among others that matter—the others that matter here are the number of rapes, arrests, and convictions before and after these laws are changed, what happens to the victims before and after, what happens to the defendants, what happens to the overburdened penal system, the impact of the law on various subcommunities, and so on. The consequences of a law—a marital rape exemption, or the repeal of a marital rape exemption, or VAWA, or a court decision finding VAWA unconstitutional—and not just its interpretive and transformative potency, matter, and the assessment of those consequences depends mightily on our ability to acquire those facts, assess them, and respond appropriately—meaning justly. To do that at all we have to redirect the critic's gaze away from the text, no matter how construed, and toward the world the text affects.

V. THE TURN AWAY FROM NONTEXTUAL SOCIAL CRITICISM

The greatest danger, by far, of the interpretive turn in critical legal scholarship is that the turn toward hermeneutic understanding

has turned critical attention not only away from the consequences of a law but, more broadly, away from social injustice. Like the turn from consequentialist criticism of law, the turn away from social criticism, if it has occurred, is a consequence of the Bermuda triangle-like effect of the hermeneutic subject of inquiry: text, reader, and author exhaust the world. The central Gadamerian insight, after all, concerns that triangle, not the world: the reader participates in the creation of a text’s meaning, Gadamer teaches us, albeit not in a manner that strips either the text or the author of their importance. The trouble arises when we overgeneralize from this interpretive insight. If the text we are interpreting turns out to be everywhere and everything—if all understanding is hermeneutic—then criticism as well as understanding proceeds by this hermeneutic path. When we fuse these universalizing insights, I fear, what we are left with might be Alice going down the rabbit hole: she is in a virtual whirlwind of texts, authors, and horizons that shift and fuse with every passing second; all of which she greets, in those first chapters anyway, with an enchanting openness—an openness to mind-expanding texts, interpretations of texts, and language-, text-, and story-spouting authors, tellers, and writers (to say nothing of mind-expanding drugs, to which she is also quite open)—but she’s left the real world, with all of its anxieties and troubles, pretty far behind.

As have, I am afraid, at least if appearances do not deceive, the authors in this Symposium. What is missing from this Symposium on Gadamer and critical legal theory is any social criticism, whether meta or not. We do have some social problems in this world. But there is nothing in this Symposium on the state of critical theory about the staggering gap between rich and poor, or black and white, in this country, or of the shameful global poverty suffered by most of the world’s inhabitants, or of the imminent ecological disaster our excessive lifestyles court, or of the slaughter of innocents in points abroad; or of a world still terrified of nuclear devices of our own making. There is, to be sure, criticism, and discussion of criticism, of various texts: criticism of hate speech, of Supreme Court decisions,

82. See GADAMER, supra note 5, at 340.

83. The only article in this Symposium to apply Gadamerian interpretive insights to a concrete legal problem is R. George Wright, Traces of Violence: Gadamer, Habermas, and the Hate Speech Problem, 76 CHI.-KENT L. REV. 991 (2000). I think the argument in that article is successful, and indeed, it suggests a larger project: any number of First Amendment issues and problems might be elucidated through a Gadamerian analysis. My concern is not with this article or its scope, but with the fact that it is the only one of the sort in the Symposium. I also wonder how a Gadamerian analysis of race relations more generally might proceed. Dallmayr's
of constitutional doctrine (although not even as much of that as one might have anticipated). But there is virtually no criticism of the social conditions themselves, particularly of social conditions which cannot in some way be funneled into the textual paradigm. There is no criticism, in this Symposium on legal criticism, that has as its object anything other than a text. But the society that needs criticizing—our own—is not exhausted by its texts.

Now of course, the absence of social criticism may be in part a function of the subject of this Symposium, which is not “Gadamer and Social Criticism,” but rather, “Gadamer and Legal Criticism,” and laws, after all, are texts, or at least it is a plausible enough sounding claim that they are. But that is not a fully satisfying reply, for two reasons. First, the topic is chosen for a reason, and the reason may be that even Gadamerians might suspect that while Gadamerian thought can arguably provide a basis for legal criticism (although perhaps not radical legal criticism) it just cannot provide a basis for radical social critique. Forging Gadamer with critical legal thought requires some massaging, but providing a Gadamerian account of social criticism would be a little more like forcing the proverbial square peg into the round hole, as Habermas argued some time ago. Habermas’s complaint—that the Gadamerian reader is so beholden to cultural tradition as to render criticism of one’s culture impossible, thus giving hermeneutics an inescapably conservative tilt—is a considerably greater threat to the possibility of social criticism than legal criticism. Legal criticism, after all, at least in its everyday, work-a-world, ordinary variety, just is beholden to social tradition; nobody really expects much else of it. We criticize laws, when we do so, routinely, by reference to shared moral beliefs, traditions, intuitions, or other laws that are more deeply embedded in the social fabric. The challenge, for legal criticism, is to show how this sort of ordinary criticism can ever be radical—can go to the root and critique the traditions, shared beliefs, and so forth, that otherwise form the foundation for ordinary legal reform. Much more is expected, though, of social criticism, and if Habermas is right that the piece on boundaries and borders presents some provocative suggestions, but that is not its primary focus. Dallmayr, supra note 9.

84. See Hutchinson, supra note 1, at 1020-31; Taylor, supra note 6, at 1110-15.

85. See Dallmayr, supra note 9, at 839-43; Feldman, How to Be Critical, supra note 7, at 901-06.

86. See Dallmayr, supra note 9, at 839-43; Feldman, How to Be Critical, supra note 7, at 901-06.
implications of Gadamerian thought is that the much more that's required is impossible,\textsuperscript{87} that does not leave much room for a radical reinterpretation of Gadamer, even for purposes of radical-critical approaches to law.

The second reason, though, that this response—that one should not, after all, expect to find social criticism in a symposium on the topic of Gadamer and legal criticism—does not satisfy, is that it unduly cribs the role of the legal critic. Legal criticism might of course mean criticism of law, which might then mean criticism of legal texts, which might in turn require understanding of those texts, which might then require Gadamerian hermeneutics. But it should not mean only that. Legal criticism might also refer to criticism of social reality from the distinctive perspective of a lawyer, someone with a legalist commitment, someone committed to law. The "legal critic" could mean, in other words, not just the critic of law, but also the critic of society who is, simply, a lawyer: "legal" might modify the word "critic," rather than designate the subject of critique. The lawyer-critic, the social critic trained in law, might have something distinctive to offer by way of criticism of social reality, by virtue of his or her legal horizons. Might not it be the case, for example, that wealth disparities, both national and global, violate moral norms of justice encoded in our constitutional commitment to the equal protection of the law? Might not the flagrant culpability of tobacco executives in perpetuating addiction to a product known by them to be lethal, violate a legally honed sense of retributive justice? Might there be forms of social interaction—such as, for example, in homes or on schoolyards—that are presently in some fundamental way lawless, as well as atextual, and thus cry out for social critique from just those community members who are in some way committed to legal ideals? Legal training and legal intuitions, and the sort of judgment to which that training gives rise, could conceivably contribute to social critique, where the subject of the critique is in some way a form of injustice facilitated by a failing or absence of lawfulness. Once encountered, and confronted, an encounter between a lawyer-critic and such a site of social injustice might yield a socially and morally profitable fusing, or blending, of horizons. But to see such a world first requires the critic to look beyond texts, to the worlds that exist in texts' shadows.

87. See Dallmayr, supra note 9, at 840-41.
VI. THE TURN AWAY FROM SYMPATHY

Is our capacity for moral judgment and action—and hence for criticism—literally produced by our language? Is it linguistically constructed? Or, is our capacity for language—and for criticism—a product of a more basic mutual trust; a trust established early in life, which lays the foundation for sympathy, and hence for moral judgment and language?

The interpretive turn has directed critical legal scholars quite emphatically toward an affirmative response to the first question and a negative response to the second, and therefore to a particular view of what it means to engage in moral, and hence critical, inquiry. The moral critic criticizes, basically, by pitting text against text. Interpretation, after all, is the foundational activity, of which criticism, like understanding, is a certain sort. To criticize, then, just is to criticize a text, and to criticize a text, in turn, is to test it by holding it up to the light or darkness cast by other and perhaps conflicting texts—texts composed of traditions, of learnings, of beliefs, and of contrasting or conflicting interpretations of the text being criticized. The “critical moment,” for the hermeneuticist, is the moment when a text is woven into a preexisting fabric of texts: this is what it is, not only to interpret, but also to converse, to judge, to grow, and to criticize. The same, then, holds for criticism of law, as well as the radical critical enterprise described by Feldman: to criticize legal texts is to hold one text—say, the Court’s decision in *Dred Scott*—against the fabric of some other set of texts—say the journalistic, political, or philosophical writings of the abolitionist natural lawyers, or their particular reading of the Constitution. The former might then be found wanting—as lacking a decent interpretive foundation, or at least, as not as strongly supported by some tradition’s basic texts, as might have been a decision going the other way. *Dred Scott*, on this view, was a moral disaster, because it was an interpretive disaster—as evidenced, perhaps, in part, by the fact that it took an extended period of violence rather than interpretive evolution to rectify.

Thus, the interpretive turn has turned critical legal scholars not only toward one type of criticism—interpretive criticism—but more basically, toward a view of what it is to make moral judgments, and

89. *Id.*
even what it is to be moral. Moral criticism is a form of interpretive activity. To criticize, from a moral perspective, is to interpret, and to interpret texts is to do so from the perspective of a tapestry of one’s community’s cultural sources—traditions, beliefs, prejudices, texts.

How to assess this interpretive turn? Well, as I have now noted obsessively, there is an obvious and much remarked upon conservative tilt to the turn toward this description of our moral capacity. If we criticize everything—including legal texts like *Dred Scott* or *Morrison*—on the basis of other texts, themselves a product of the very traditions that render the texts being criticized intelligible, then our criticism is obviously going to be no deeper, or better, than our traditions: far more texts, and traditions, suggested the constitutionality of slavery and the constitutionality of the Fugitive Slave Act than otherwise, and likewise, “traditions” dating to Biblical times exert a gravitational pull suggesting the unconstitutionality of VAWA. The Gadamerian account of moral criticism, and indeed, the Gadamerian account of the moral point of view, as so utterly beholden to the interpreter’s and the interpreter’s community’s traditions, seems to carry all the pitfalls of the worst sort of moral relativism: if we criticize texts and practices on the basis of traditions, how do we criticize the traditions? As noted above, the same concern is reflected in the Habermas-Gadamer debate: Gadamerian hermeneutics, Habermas argued, can never serve as a basis for radical criticism of a society’s texts, because hermeneutical interpretation is itself dependent upon the very traditions that render the text being criticized intelligible.91 More recently Richard Wolin, writing in the *New Republic*, puts basically the same critique in a harsher light: the reliance on the community’s Zeitgeist as both the enabler and limit of criticism, the muting of the individual voice and the amplification of the community, tradition, and history as constitutive of individual voice, Wolin charges, have sinister, fascistic, perhaps Naziistic, overtones.92 In this Symposium, the same worry has prompted Stephen Feldman to be concerned that the hermeneuticist who seeks to be critical is hindered by his own traditions, blinders, and biases;93 Hutchinson to worry that Gadamer has closer affinities to Justice Scalia who after all quite explicitly refers to tradition as the measure

of unconstitutionality under the Due Process Clause— or to Dworkin, whose conception of evolutionary, reformatory adjudication bears a strong resemblance and owes an explicit debt to Gadamerian hermeneutics, than to any sort of radical tradition; Wickham to worry that Gadamer and Foucault have little or no overlapping ground; and all of them to search for a reading of Gadamer that is facilitative of radical, rather than ameliorative, reform.

I do not know whether any of the authors here have successfully rendered a radical re-reading of Gadamer's *Truth and Method*. Again, what I want to highlight instead is that this turn toward an understanding of the moral point of view as necessarily embedded in text, tradition, and natural language—and hence, of criticism as a form of interpretation—is a turning away from other possible ways of understanding the moral point of view, from where it emanates, and how it might facilitate legal criticism. The contributors in this Symposium occasionally write as though the only alternative understanding of the moral point of view to have emerged from the Western cultural tradition, to the Gadamerian approach they are here advocating, is the austere, categorical, Kantian imperative, with its harsh splits between reason and faith, passion and rationality, human feeling and moral judgment. But that is clearly not so.

Specifically, the turn to interpretive understandings of moral judgement constitutes not only a turn away from Kantian conceptions of Right, but also constitutes a turn away from what might be called, following Adam Smith, “sentimental” conceptions of the human good, as well. To react morally to a human situation may be, at bottom, a sentimental response, grounded in sympathetic reactions to the physical or psychic suffering or well-being of fellow sentient creatures, and then informed and cultivated by reason. Such a sentimental, Smithian understanding of moral judgment, I think, has close affinities with the hermeneutic one—it too is profoundly non-Kantian; it too envisions moral judgment as an interactive, even communal response derived from and situated within our social being; and it too relies upon rather than rejects what Martha Nussbaum and other neo-Smithians refer to as the “moral emotions”.

94. See Hutchinson, supra note 1, at 1025-26.
95. Id. at 1024.
96. See Wickham, supra note 64, at 943.
97. See, e.g., Dallmayr, supra note 9, at 825.
98. See ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 3-5 (1759).
99. MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC
rather than reason narrowly conceived. But for modern sentimentalists, it is sentiment and sympathy for the suffering of others—the human capacities, universally shared, not a categorical imperative, but also not a culture's traditions, texts, prejudices, or shared beliefs—that constitutes the heart of the moral response, a response which is then refined by, or distorted by, or crushed by, or perverted by, a community's shared, taught, disseminated beliefs. The sympathetic response to the pain or suffering of others, is, for sentimentalists, what does and should guide our critical responses to our own community's shared texts, as well as its laws, prejudices, beliefs, and practices. It is also what guides, and what should guide, our day-to-day moral judgements, and thus our day-to-day criticisms of law as well.

Once one is aware of the sentimentalist alternative to text-bound hermeneutical understandings of morality on the one hand, and community-denying, categorical, austere Kantianism on the other, one sees it everywhere. First of all, its history as a philosophical tradition is not negligible: moral sentimentality was at the heart of the "Scottish Enlightenment," of which Smith was himself a member. It is also this view of the moral capacity that animated Mill's famously non-Benthamic utilitarianism, as well as the contemporary noneconomic utilitarianism of Amartya Sen and Martha Nussbaum. We also hear echoes of it in the teachings of some developmental psychologists, who have long insisted that the foundation for a moral point of view is laid in the early years, and possibly the first few months of life—well before the acquisition of a natural language: a well-tended baby learns that when he cries, his hunger is satiated, his thirst quenched, his diaper changed, his discomfort alleviated, and thereby learns trust. T. Berry Brazelton—the popular and accomplished Harvard pediatrician—has commented that he can judge by his interactions with three month olds whether they are at risk of serious sociopathology as adults—perhaps an exaggerated claim,

\[ \text{\textsuperscript{100}} \text{ See id.} \]
\[ \text{\textsuperscript{101}} \text{ See \textit{8 Routledge, Encyclopedia of Philosophy} 815 (Edward Craig ed., 1998).} \]
\[ \text{\textsuperscript{102}} \text{ See \textit{John Stuart Mill, Utilitarianism} (Prometheus Books 1987) (1863).} \]
\[ \text{\textsuperscript{103}} \text{ See \textit{Martha Nussbaum, supra note 99; Martha Nussbaum, Love's Knowledge: Essays on Philosophy and Literature} (1990); \textit{Martha Nussbaum, Sex and Social Justice} (1999); \textit{Amartya Sen, Development As Freedom} (1999); \textit{Amartya Sen, On Ethics and Economics} (1987); \textit{The Quality of Life} (Amartya Sen & Martha Nussbaum eds., 1993); \textit{Amartya Sen, Utilitarianism and Beyond} (1982).} \]
\[ \text{\textsuperscript{104}} \text{ Dr. Brazelton has reported:} \]
\[ \text{In addition, when a mother is undernourished, she is more likely to be depressed, have} \]
but not one to dismiss lightly. But more to the point, our daily moral interactions—the tenor of our responses to the suffering of others—feel more basic, more physical, and I would say more universalist, than they feel textual, or traditional, and the multitude of critical judgments, whether of others, of laws, of beliefs, or of traditions, that we routinely render, on small and large matters, likewise feels more like the mortar from which traditions are formed, than vice versa. The moral response feels more and perhaps is more humane, sympathetic, sentimental, and bodily, than is allowed by either the textualism of the hermeneuticist, or the super-rationalism of Kant.

Finally, it may well be sentimentality, rather than either text or categorical imperatives, that prompts genuine, and radical, moral growth. If we are going to come to accept an ethical imperative not to eat animals, for example, it may well be that we come to accept that imperative not through either Kantian logic or through reinterpretations of our community’s texts (although neither could hurt), but rather, through abrupt confrontations with the violence we are visiting upon sentient creatures—a violence that the South African writer J.M. Coetzee has recently compared to the Holocaust. In a book review of Coetzee’s work concerning the inner lives of animals, Ian Hacking remarks upon a passage in a novel by the same author, in which a farm boy is confronted with the violence of animal husbandry. In the novel, the boy is shocked by the obvious similarity—theretofore unnoticed by him—between the animal’s entrails and his own, a sudden awareness that sickens him. One might, of course, read the passage as about a boy’s interpretations of the “text” provided by the animal’s entrails. But Hacking does not read it that way. He reads it as conveying a description of a boy’s experience not of conflicting rights traditions—a hermeneutic experience of shifting textual horizons—and even less of a boy’s reasoned

a poor self-image, and a feeling of hopelessness, all of which is conveyed in her interactions with her child. In “face to face” research I have done on babies’ responses to their mothers’ depression, effects can be seen as early as 3 to 6 months of age. Baby girls tend to react in an apathetic manner while boys respond to their depressed mother with increased energy that can be characterized as violent.

Better Nutrition and Health for Children Act of 1993: Hearing on S. 1614 Before the Senate Subcomm. on Nutrition and Investigations, Senate Comm. on Agric., Nutrition and Forestry, 103d Cong. 236 (1994) (testimony of Dr. T. Berry Brazelton). Dr. Brazelton is a professor at Harvard Medical School and has authored several popular books on infant care.


107. See id. (quoting J.M. COETZEE, BOYHOOD (1997)).

108. See id.
deduction from a categorical imperative, but rather, of the boy’s shock of recognition, and the sentiment that shock engendered: the boy realizes his commonality with the slaughtered animal and quite directly sympathizes with the animal’s pain. That is, simply, a different sort of experience and leads, I think, to a different sort of critical judgment than the hermeneutical experience of meshing conflicting traditions or texts. I see no reason to conflate them by subsuming all mental processes under the rubric of “interpretation” and all experience under the umbrella of text.

VII. THE TURN TOWARD INTERPRETATION AS THE TELOS OF HUMAN LIFE

The most puzzling turn, to my mind, taken by hermeneuticists is toward an insistence on interpretation as the universal, ever present, always engaged in, end, means, activity, goal, and condition of human life. We are not only “all interpretivists,” as Tom Grey opined twenty years ago, but apparently we are all interpretivists all of the time, maybe even when we sleep. We are simply always interpreting, no matter what else we think we are doing. When we are conversing, arguing, reading, adjudicating, or criticizing, we are interpreting. We are also interpreting when we are nowhere near written or oral texts: we are interpreting when we are throwing a baseball, apparently because throwing the baseball has meaning for us, otherwise, Stephen Feldman asks, why else would we do it, and if it has meaning, then we must be interpreting as we do it. We are interpreting when we are laboring, working, experiencing the natural world, eating, and presumably when we are making love, giving birth, caring for children, or dying, as well. The human animal is not essentially political, as Aristotle thought. The human animal is essentially and always and universally, interpretive. It is pretty much all we do.

How should one assess this turn toward the interpretive telos? It may or may not be that everything is one thing—maybe everything is interpretation or maybe everything is water or maybe everything is power or maybe all sex is rape—but if so, we have to start differentiating between the interpretations or the waters or the

109. See id.
110. See Grey, supra note 7, at 1.
111. See Feldman, How to Be Critical, supra note 7, at 904-05.
112. See ARISTOTLE, NICOMACHEAN ETHICS (D. Chase trans., 1911).
113. The philosopher was Thales, discussed in 9 ROUTLEDGE, supra note 101, at 322.
powers, or the rapes; it is not clear what these totalizing claims are doing. But there is another cost as well. What we have turned our back on, once we have made this sort of totalizing claim, is not only competing, but similarly universalist or essentialist sounding depictions of the human being—e.g., human beings are essentially political, essentially rational, essential brutish, and so forth. We also turn our back on a pluralistic, multiple understanding of the ends of human life and enterprise—meaning not that every individual makes up his or her own, but that human life exhibits several ends. This interpretive turn is in the end just reductionism.

One thing that is always sacrificed, when all is reduced to one, is the common usage of words. It seems to me just odd to say that Stephen Feldman is interpreting, when he is throwing a softball around the back yard with his daughter, and equally odd to insist that baseball throwing is an interpretive exercise because otherwise it lacks meaning, and if it lacked meaning we would not do it. Giving and interpreting instructions is surely part of the exercise of learning to throw a ball. But when I watch my husband throw a lacrosse ball with my sons, I am struck by the distinctively noninterpretive aspects of the activity. After they get over the “put your opposite foot forward” part, the activity of playing catch, it seems to me, is as noninterpretive—mindless is not too strong a word—as could be: its rhythmic, monotonous, hypnotic, unending, physical. I do not think it is done toward the end of extracting meaning, even less, toward the end of extracting a meaning in turn facilitated by the prejudices they share, in turn informed by the Maryland tradition of playing lacrosse. When they play backyard catch, it is toward the end of feeling the ball arch as a result of one’s physical motions and catching it in a net, which is a pretty cool sensation, and having some success doing all of that. It is toward the multiple ends of being, doing, moving, growing, playing, and loving. It seems as noninterpretive to me as breast-feeding—which can also be done right or not right, which also requires following directions, but which is also toward a noninterpretive goal.

When my ten-year-old son plays the piano, he exhibits some measure of technical proficiency, I think. But as proud of him as I am, and for all of his recital experience, I have yet to hear him actually interpret a piece of music. He will slavishly abide by dynamic markings when he is reminded to, but for the most part he just races through everything, the sooner to have it over with. He ought to interpret the music, for sure, but he does not; at least not yet.
I knit sweaters with intricate designs, and follow instructions to do so. But I do not “interpret” the instructions and I certainly do not want to interpret the instructions; if I have to interpret them, then the instructions are not well done. In all three of my homey examples, directions are being followed. In the first—throwing a lacrosse ball or breast-feeding a baby—the directions require interpretation, but toward ends that are not at all interpretive—playing catch or breast-feeding are not activities directed toward the end of interpreting anything. In the second, interpretation is most assuredly part of the ideal—music, even very simple music, *ought* to be interpreted, rather than played—but often is not. And in the third example, interpretation is positively undesirable—the need for it evidences a failure of communication rather than success.

Sometimes, of course, we interpret, and Gadamer has given us a beautiful account of what it means to do so. We interpret *Brown v. Board of Education*; we interpret *Billy Budd, Sailor* or *Moby Dick*; we might interpret election returns—at least, we might interpret them if we think voters are sending a message. Some interpretations of law or literature or a musical score or an advertisement are indeed better than others, and some are quite wonderful: when an interpretation is wonderful, it is so I think because it has occasioned just the fusing of horizons that Gadamerians applaud. Peter Goodrich’s\(^{114}\) and Christopher Smith’s\(^{115}\) contributions to this Symposium, I think, are examples of wonderful interpretations: they exemplify Gadamerian hermeneutics at its very best. Goodrich’s interpretation of medieval texts is potentially transformative, and even radical, precisely because he has “fused horizons”: his piece challenges modern rationalist sensibilities about what it means to “judge” by juxtaposing it with the medievalist’s amorous judge deciding cases of love and flirtatiousness and doing so lovingly and flirtatiously. Smith’s interpretation of the Homeric texts on which Gadamer himself relied inspires a reacquaintance with a collaborative, conversational, and oral tradition of judgment, lost to us from antiquity, and puts in sharp relief the adversative traditions of our own culture. When did judging, these articles jointly ask, lose this lovely capaciousness? What happened to amorousness, flirtatiousness, and collabora-

---


tiveness, as desirable features of humane adjudication? Both of these interpretive pieces are surely critical—Goodrich of rationalism, and Smith of adversativeness.\(^{116}\) Both suggest authors who have ethically opened themselves to dialogue with past texts, and both authors invite readers to do the same. Both of these interpretations of texts exhibit the virtues—openness, collaborativeness, a sensitivity to all things human, a simultaneous use of and detachment from one’s own prejudices, a curiosity about and even a limited submission to the authority of the past—of Gadamerian hermeneutics.

But those virtues are obviously trivialized, if they are everywhere on display, in every act, in every thought, in every communicative exchange. We sometimes interpret, and when we do so, we sometimes do so well or not so well. But we also do not always interpret. Even when faced with marks that look like “meaningful” human utterances, we do not always interpret: as Walter Benn Michaels has argued, if we see a word written in the sand on the beach, we might try to make out what it says and what it means, unless we are told that the marks were caused by the tides, in which case we would typically stop doing that.\(^{117}\) Sometimes, though, I would add, we do not interpret even when faced with human-produced utterances or writings: sometimes we just obey. Sometimes we would rather follow than interpret. Some laws might be of that sort—although one is sorely tempted to hope not, particularly in constitutional law. And it is just odd to speak of interpretation when engaged in activities that appear to be aimed at a different end altogether: swimming, bathing, hoeing the ground, giving birth, dying. Sometimes, of course, we engage in activities that require interpretation, among much else. Interpretation, when we do it, should be done well. Like water, interpretation is important enough—even crucial to our survival—that we should be wary of trivializing it with the insistence that it is everywhere.

**CONCLUSION**

Where does adjudication fit in? Sometimes judges interpret, as do critics, but judging requires more than the interpretation of text, as does legal criticism. Judges must both interpret legal texts and make judgments; critics must both interpret legal texts and criticize. Both

---

116. See generally Goodrich, supra note 114; Smith, supra note 115.
117. Steven Knapp & Walter Benn Michaels, Against Theory, 8 CRITICAL INQUIRY 723 (1982).
making judgments and criticizing texts, practices, or social worlds require the exercise of our moral capacity—although different moral capacities—as well as our understanding of the meaning of texts. The acts of judging and of criticizing have some commonalities, some of which are in turn shared by the act of interpreting. But it is hard to see what is to be gained by insisting on their sameness, by insisting that the area of overlap is total.