Philosophical Hermeneutics: Toward an Alternative View of Adjudication

James J. Hamula
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Adjudication is interpretation: it is the process by which a judge comes to understand a legal text and express its meaning.¹ Two opposing views of adjudication prevail in Anglo-American jurisprudence. The first sees judicial interpretation as being objectively constrained by legal rules and institutional principles that compel a correct determination of textual meaning.² The second sees judicial interpretation as being subjectively determined by personal value preferences that render textual meaning contingent and multiple.³

In a crucial way, these two opposing views of adjudication are mirror images. Both views assume that interpretation is an essentially free and discretionary activity; their disagreement turns on whether freedom and discretion can be effectively constrained. While the first view insists that effective constraints are available, the second view maintains that they are not. As a result, both views focus their discussions largely on the availability of interpretive constraints. In the process, however, their dis-

1. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982). See generally Dworkin, Law as Interpretation, 60 Tex. L. Rev. 527 (1982). In this comment, "text" connotes any written document, including reported judicial decisions, statutory and constitutional law, administrative regulations, and such writings as wills and contracts. In each instance, the writing is an object of interpretation. However, "text" does not connote only written documents. For example, Paul Ricoeur has argued that meaningful social action shares the constitutive features of a written text, and that the methodology of the social sciences is similar to the procedures for the interpretation of written texts. P. Ricoeur, The Model of the Text: Meaningful Action Considered as a Text, in Hermeneutics and the Human Sciences 197-221 (1982). In other words, the interpretation of "text" includes the interpretation of social actions and relationships. See C. Geertz, The Interpretation of Cultures 3-30, 452 (1973) (culture is an "acted document," an "ensemble of texts," whose analysis is similar to reading a manuscript); see also Taylor, Understanding in Human Science, 34 Rev. Metaphysics 25 (1980); Taylor, Interpretation and the Sciences of Man, 25 Rev. Metaphysics 3 (1971).
2. See infra text accompanying notes 6-46.
3. See infra text accompanying notes 47-98.
Discussions fail to examine the validity of the assumption that interpretation is free and discretionary. For this reason, Anglo-American jurisprudence remains irresolvably divided in its views of adjudication.

Philosophical hermeneutics rejects the view of interpretation that is assumed, but never directly examined, in Anglo-American jurisprudence. Philosophical hermeneutics contends that interpretation is not a free and discretionary activity but rather a dialogical interaction between interpreter and text that is made possible through their mutual participation in a common medium of history and language. In other words, neither interpreter nor text independently determines textual meaning; both interpreter and text interdependently contribute to the determination of textual meaning. Thus, contrary to the Anglo-

4. Philosophical hermeneutics was first elaborated by Hans-Georg Gadamer. See H. Gadamer, Truth and Method (1975). It is a general theory of interpretation that was developed as a challenge to interpretive assumptions in social science and literary theory, which are similar to the assumption underlying the opposing views of adjudication in Anglo-American jurisprudence. Philosophical hermeneutics is commanding increased attention as a powerful critique of traditional interpretive theories in these disciplines. See, e.g., Z. Bauman, Hermeneutics and Social Sciences (1978); J. Bleicher, The Hermeneutic Imagination: Outline of a Positive Critique of Scientism and Sociology (1982); J. Bleicher, Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique (1980); H. Gadamer, Philosophical Hermeneutics (1976); R. Howard, Three Faces of Hermeneutics (1982); D. Hoy, The Critical Circle: Literature, History and Philosphical Hermeneutics (1978); R. Palmer, Hermeneutics: Interpretation Theory in Schliefermacher, Dilthey, Heidegger, and Gadamer (1969); P. Ricouer, Hermeneutics and the Human Sciences (1981).

American jurisprudential view, interpretation is a structured process of existential constraints.

Philosophical hermeneutics represents a direct theoretical challenge to Anglo-American jurisprudence because the hermeneutic view of interpretation renders the Anglo-American debate on the availability of constraints for judicial interpretation groundless. For this reason, philosophical hermeneutics deserves attention from the Anglo-American jurisprudential community. At least, attention to philosophical hermeneutics may initiate the critical examination of the nature of interpretation that has heretofore been ignored. At most, attention to philosophical hermeneutics may lead to a transcendence of the opposing views of adjudication that prevail in Anglo-American jurisprudence.

Part I of this comment contends that Anglo-American jurisprudence is riven by opposing views of adjudication and that this opposition is based on a common assumption about the nature of interpretation. Part II maintains that this opposition—the difference of views concerning the availability of interpretive constraints—has captured the attention of Anglo-American jurisprudence and diverted its focus from examining the validity of the assumption about interpretation upon which the opposition rests. Next, it examines the nature of interpretation from the perspective of philosophical hermeneutics. Part III concludes that the theory of interpretation provided by philosophical hermeneutics represents a direct challenge to the Anglo-American assumption about interpretation and that this challenge demands an Anglo-American jurisprudential response.

I. THE OPPOSING VIEWS OF ADJUDICATION: OBJECTIVE AND SUBJECTIVE INTERPRETIVISM

The two opposing views of adjudication found in Anglo-American jurisprudence may be characterized as objective and subjective interpretivism. Objective interpretivism represents an effort to interpret a legal text without the influence of the judicial interpreter’s value-orientation, through the construction of interpretive constraints. Subjective interpretivism represents a countereffort to deconstruct interpretive constraints in the belief that interpretation is unavoidably controlled by personal value preferences. Both views presume that interpretation is a free

5. The existence of an objective-subjective opposition has been recognized in legal scholarship, Tushnet, Legal Scholarship: Its Causes and Cure, 90 Yale L.J. 1205 (1981),
and discretionary activity—free in the sense that the evaluation of the text is normatively standardless, and discretionary in the sense that judgment of the text entails a personal choice based on privately held values. The difference between objective and subjective interpretivism lies in their disagreement about the efficacy of constraints for interpretive activity.

A. Objective Interpretivism: The Construction of Constraints

The basic justification for the effort of objective interpretivism to secure value-free interpretation of a legal text is founded on a fundamental tenet of the Anglo-American administration of justice: rule of law demands that judicial interpretation occur on
a basis other than in accordance with the will of a judge. In pursuit of this ideal, objective interpretivists seek to ensure value-free interpretation in two principal ways. First, they seek to minimize the normative gaps of the legal system to preclude the invitation to rely on subjective values. Second, they seek to maximize the institutional demands on judges to adjudicate in accordance with the general constitutional character of the legal system. In other words, the strategy is to construct constraints on the judicial interpreter in order to ensure his personal detachment from the legal text.

The hope of achieving personal detachment from the object of interpretation is the reason for characterizing this view of adjudication as objective. Essentially, objectivity is a demand that the object of interpretation be allowed to reveal its own meaning independent of the value-laden interests of the interpreter. For instance, in the social and literary sciences objectivity is sought by way of methodologies that proscribe the personal participation of the interpreter in his work. These methodologies preestablish impersonal criteria of evaluation that are characteristic of the object of interpretation itself so that the object may reveal its intrinsic meaning. The assumption is that the interpreter's

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7. A representative definition of objectivity is found in F. Cunningham, Objectivity in Social Science (1973). An inquiry is objective if and only if:
   [a] it is possible for its descriptions and explanations of a subject-matter to reveal the actual nature of that subject-matter, where “actual nature” means “the qualities and relations of a subject-matter as they exist independently of an inquirer’s thoughts and desires regarding them,” and [b] it is not possible for two inquirers holding rival theories about some subject-matter and having complete knowledge of each other’s theories . . . both to be justified in adhering to their theories.

   Id. at 4 (footnote omitted). For other discussions of objectivity, see generally W. Newton-Smith, The Rationality of Science (1981); K. Popper, Objective Knowledge (rev. ed. 1981).

8. One example of such a methodology is found in R. Collingwood, The Idea of History (1946). Collingwood argued that, in order to interpret the action of historical agents, one must take into account the “inside” or “thought-side” of their actions. His assumption was that historical events express the thought of their agents. Thus, understanding historical events required ascertainment of the thoughts of their agents, which could be accomplished through “reenactment.” By reconstructing the circumstances of the historical event, the interpreter could project himself back into the position of the
value-laden interests in the text, if allowed to factor into his interpretation of it, obscures the text's meaning. In jurisprudence, objectivity is sought in the same way for the same reason. The methodology is the deductive application of preexisting legal rules and institutional principles through which the legal text may be understood in impersonal legal terms, not in terms of personal nonlegal values.

Objective interpretivism found its first modern expression in John Austin's construction of a "science of law."9 A basic agent, "reenact" or "rethink" the reasons for the agent's actions, understand the thought behind the deeds, and discern the meaning of the event. The methodology of reenactment is objective in the sense that it presupposes the historical interpreter's capacity to acquaint himself directly with his subject matter (the historical agent) and to derive the subject matter's own special meaning (the thought behind the acts). Reenactment is also objective in the sense that it requires the negation of the personal and historical perspective of the interpreter and demands evaluation of the historical event as the agent himself evaluated it. Because the agent and the interpreter share a common rational humanity, the interpreter is presumably qualified to evaluate the agent (i.e., the "text") on its own terms. For a recent exposition and expansion of Collingwood, see R. MARTIN, HISTORICAL EXPLAINATION: RE-ENACTMENT AND PRACTICAL INFERENCE (1977).

E. D. Hirsch's search for criteria to validate literary interpretations led him to a goal of interpretation similar to Collingwood's: ascertainment of authorial intention. E. HIRSCH, VALIDITY IN INTERPRETATION (1967). "The interpreter's primary task is to reproduce in himself the author's 'logic,' his attitudes, his cultural givens, in short, his world. Even though the process of verification is highly complex and difficult, the ultimate verificative principle is very simple—the imaginative reconstruction of the speaking subject." Id. at 242. Professor Hirsch's position has been accepted in other discussions of the applicability of literary interpretation to judicial interpretation. See, e.g., McIntosh, supra note 4.

Some judicial interpreters have thought that authorial intention is determinative of textual meaning. See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) ("The whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent, of its framers and the people who adopted it."). For an analysis and criticism of this theory of adjudication, see Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204 (1980).

This comment relies upon Hirsch's rival in hermeneutic philosophy, Hans-Georg Gadamer, to critique the prevailing views of interpretation in legal thought. The reason for this reliance is Hirsch's commitment to objectivity and his resultant inability to contribute to the transcendence of the objective-subjective opposition. For a good introduction to the issues of the Hirsch-Gadamer debate, see D. Hoy, supra note 4, at 11-72.

9. See generally J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 62-136 (1964). Admittedly, Austin is not the first in the Anglo-American tradition to advocate objective adjudication. Blackstone wrote "what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament." 1 W. BLACKSTONE, COMMENTARIES 151. Elsewhere, he wrote:

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and the sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law
theme of his legal science was the separation of positive law from transpositive considerations. The purpose of this separation was to allow logical analysis of the positive law in order to ascertain the essential concepts and structures of the legal order reflected in it. Using this legal scheme required one to fix in the mind a map of the law, so that all its acquisitions made empirically in the course of practice, take their appropriate places in a well-conceived system; instead of forming a chaotic aggregate of several unconnected and merely arbitrary rules. It tends to produce the faculty of perceiving at a glance the dependencies of the parts of his system . . . .

With this legal map, Austin believed that, consistent with his rational description of law, the dominant method of judicial in-

and fact . . . which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice.

3 \textit{id.} at 434. Indeed, the notion of legal objectivity is ultimately attributable to the Greeks. Greek mythology portrays the goddess Themis with the sword of justice in her right hand and the scales of justice in her left. She is blindfolded, symbolizing impartiality. The assumption is that justice originates in judgments that are free from the personal prejudices of the legal administrator. Judgment is reached only through the mechanical balancing of evidence that is sorted onto the dishes of the scale by other similarly impartial persons. Reynolds, \textit{supra} note 5, at 2. Interestingly, legal objectivity is not endemic only to Anglo-American jurisprudence; it is the primary paradigm of jurisprudential and judicial analysis in legal systems following the civil law tradition. \textit{See generally J. MERRYMAN, THE CIVIL LAW TRADITION} (1969).

10. Throughout his work, Austin pleaded for a strict separation of law as it is and law as it ought to be:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it . . . .

J. AUSTIN, \textit{THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE} 184 (Library of Ideas ed. 1954). Austin did not dismiss the influence moral opinion had on the development of law, or conversely, the influence the law had on moral standards. He believed, however, that the determination of moral norms upon which law ought to rest was not within the province of jurisprudence but was a subject of the “science of legislation.” \textit{Id.} at 127, 372. The science of jurisprudence concerned itself only with the study of laws once they were posited. \textit{See generally} Hart, \textit{Positivism and the Separation of Law and Morals}, 71 \textit{HARV. L. REV.} 593 (1958); Rumble, \textit{The Legal Positivism of John Austin and The Realist Movement in American Jurisprudence}, 66 \textit{CORNELL L. REV.} 986 (1981).

11. According to Austin, every legal order has the same basic constituent parts. Concepts like duty, right, liberty, injury, punishment, redress, law, sovereignty, and independent political society belong to every legal order because “we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it.” J. AUSTIN, \textit{supra} note 10, at 367.

12. 2 J. AUSTIN, \textit{LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW} 1095 (5th ed. R. Campbell 1885).
terpretation was syllogistic: legal classification of the facts and their subsumption under general rules.13

Nevertheless, Austin acknowledged the existence of "judiciary law."14 In instances of linguistic ambiguity in legal terms, interstices in the body of positive law, and social change rendering law archaic, judges are invited to legislate rules on the basis of their own value-orientations.15 This reality introduced considerable dissymmetry into Austin's rational system of law.16 His response was to conceive of an institutional mechanism that harmonized particular judge-made rules with the general legal order. Reasoning that judicial activity is an extension of the sovereign's power, Austin concluded that the sovereign could legitimate judge-made rules either by express acceptance or by acquiescence to their existence.17 In other words, judges could be institutionally constrained from arbitrarily legislating rules to the extent that they "legislat[e] in subordination to the sovereign."18

Austin's construction of a normatively complete system of law and an institutional constraint on judicial interpretation was prototypical for subsequent jurisprudential efforts to achieve le-

15. Austin saw ambiguous legal terms as "hotbeds of competing analogies. The indefiniteness is incorrigible. A discretion is left to the judge. Questions arising on them . . . are hardly questions of interpretation or induction, for though the rule were explored and known as far as possible, doubt would remain." 2 J. AUSTIN, supra note 12, at 1001 n.20. Austin also contended that judicial legislation was necessary "to make up for the negligence or the incapacity of the avowed legislator." J. AUSTIN, supra note 10, at 191. In this regard, judicial legislation was of "obvious utility" to adapt law to social change. 2 J. AUSTIN, supra note 12, at 612. Austin noted that equity courts were created because of the unwillingness of common law courts to "do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages." Id. at 647.
16. Austin wrote:
   Wherever, therefore, much of the law consists of judiciary law, the entire legal system, or the entire corpus juris, is necessarily a monstrous chaos: partly consisting of judiciary law, introduced bit by bit, and imbedded in a measureless heap of particular judicial decisions, and partly of legislative law stuck by patches on the judiciary law, and imbedded in a measureless heap of occasional and supplemental statutes.
   2 J. AUSTIN, supra note 12, at 660.
17. "For, since the state may reverse the rules which [the judge] makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration." J. AUSTIN, supra note 10, at 31-32.
18. 2 J. AUSTIN, supra note 12, at 510.
gal objectivity. Thus, nineteenth century legal formalism pro-
pounded the view that a legal system is a closed logical system
in which correct decisions are deducible from predetermined le-
gal rules by pure logical operation. This formalist view of law
gained widespread acceptance in legal scholarship and judicial
opinions. Although strict legal formalism has been largely
abandoned, its substance persists in many contemporary theo-
ries of judicial decision. This is especially apparent among the
“new analytical jurists,” who seek to document the theoretic
“fetters,” or the preexisting principles of rational decision, that
constrain judicial interpretation.

One of the leading figures in the new analytical movement
has been H. L. A. Hart. His strategy was to minimize the fre-
quency of the linguistic indeterminacy of rules that invites reli-
ance on subjective values. In his estimation, a legal rule has a
“core of certainty” and a “penumbra of doubt.” In the core of

19. See generally Horwitz, The Rise of Legal Formalism, 19 AM. J. LEGAL
HIST. 251 (1975). Typically, the following five postulates accompany the legal formalist’s position:
[F]irst, that every concrete legal decision is the “application” of an abstract
legal proposition to a “fact situation”; second, that it must be possible in every
concrete case to derive the decision from abstract legal prepositions by means
of legal logic; third, that the law must actually or virtually constitute a
“gapless” system of legal propositions, or must, at least, be treated as if it were
such a gapless system; fourth, that whatever cannot be “construed” legally in
rational terms is also legally irrelevant; and fifth, that every social action of
human beings must always be visualized as either an “application” or “execu-
tion” of legal propositions, or as an “infringement” thereof.

20. See infra notes 47-49.
21. See Kennedy, Legal Formality, 2 J. LEGAL STUD. 351 (1973). Strict legal formal-
ism is the deductive application of preexisting rules. Substituting “rational” and “princi-
ples” for “deductive” and “rules” produces a broader definition of formalism: the ra-
tional application of preexisting principles. In this definition, “principles” may mean
rules as well as propositions of purpose or value. Professor Kennedy argues that purpose-
based reasoning is “no less dependent on rules” and “no less vulnerable to the dilemma
of formality” than is traditional rule formalism. Id. at 396-98; see also Kennedy, Form
and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976) [hereinafter
cited as Kennedy, Form and Substance]. For example, under Kennedy’s analysis, Hart
and Sack’s portrayal of judicial decision as “rational implications of the ‘shared pur-
pose’” implicit in the “social order” ultimately possesses the same structure as rule
(1966).
23. See Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the
The problem of penumbral vagueness is inevitable: “the price to be paid for the use of
general classifying terms in any form of communication concerning matters of fact.” H.
certainly, the applicability of the rule to a factual circumstance is clear. However, in the "fringe of vagueness," the normative guidance of the rule dissipates, thus imposing a "creative function" upon the judge to resolve the dispute.\textsuperscript{26} While syllogistic reasoning may be appropriate in the core of certainty, it cannot be employed in the fringe of vagueness, and resort to subjective values is inevitable.\textsuperscript{26}


26. \textit{Id.} at 122-25. The problem is that linguistic indeterminacy allows multiple meanings, presenting a judge with "a fresh choice between open alternatives" that cannot be decided with formal logic but only with his "discretion." \textit{Id.} Elsewhere Hart wrote:

If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises. . . . [I]t seems true to say that the criterion which makes a decision sound in such cases is some concept of what the law ought to be . . . .

Hart, \textit{supra} note 10, at 606-08. Importantly, Hart contended that normative guidance was not wholly lacking in penumbral areas. Overarching social policies from which legal rules are derived may cover the "penumbra of doubt."

The point must be not merely that a judicial decision to be rational must be made in the light of some conception of what ought to be, but that the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of "law". . . . [I]nstead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only "drawing out" of the rule what, if it is properly understood, is "latent" within it. To call this judicial legislation is to obscure some essential continuity between the clear cases of the rule's application and the penumbral decisions.

\textit{Id.} at 612. To the extent that Hart relies on purpose or value propositions to reach decisions in the penumbra of doubt, his concept of law remains formalistic. See \textit{supra} note 21.
However, Hart argued that "preoccupation with the penum-bra" is a mistake—one that confuses and obstructs the advance of jurisprudence.\textsuperscript{27}

\textbf{[T]}o soften the distinction [between clear and penumbral cases] is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with \textit{all} questions being open to reconsideration in the light of social policy.\textsuperscript{28}

On the contrary, the meaning of rules is normally not in doubt; rules have a core of "settled" meaning.\textsuperscript{29} Proper attention to this fact might reveal an "essential continuity" in clear and unclear case adjudication.\textsuperscript{30} For this reason, Hart's concept of law is heavily rule-oriented, focusing on the normative constraints imposed on adjudication.\textsuperscript{31}

Another of the leading analysts is Ronald Dworkin. Like Hart, Dworkin acknowledges the existence of "hard cases" in which "no settled rule dictates a decision."\textsuperscript{32} However, unlike Hart, Dworkin contends that a judge is not free to interpret from nonlegal values,\textsuperscript{33} but is constrained to interpret in light of the political structure of his community. Hard-case adjudication

\begin{itemize}
\item \textsuperscript{27} Hart, supra note 10, at 614-15.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. at 614.
\item \textsuperscript{30} Id. at 612.
\item \textsuperscript{31} "[T]he life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do not require from them a fresh judgment from case to case." H. Hart, The Concept of Law 132 (1961).
\item \textsuperscript{32} Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, 1060 (1975) [hereinafter cited as Dworkin, Hard Cases]. Presumably, "easy" cases would be cases in which rules with settled meaning do dictate a decision. Dworkin has argued that rules are applicable in an "all-or-nothing fashion," meaning that "[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision." Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 25 (1967). In short, "rules dictate results, come what may." Id. at 36.
\item \textsuperscript{33} Dworkin interpreted Hart as contending that a judge, who possesses no rules to guide his adjudication, exercises "strong discretion," meaning that "he is not bound by any standards from the authority of law . . . ." Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 35 (1967). However, it is questionable whether Hart can be so interpreted. \textit{See supra} note 26; \textit{see also} Raz, Legal Principles and the Limits of Law, 81 Yale L.J. 823, 845 (1972) (Hart uses "rule" in a broad sense that includes principles and standards); Reynolds, \textit{Dworkin as Quixote}, 123 U. Pa. L. Rev. 574, 586-99 (1975) (by "discretion" Hart simply means that a judge must use his best judgment in appealing to public standards in resolving borderline cases).
\end{itemize}
requires reference to the set of principles that, comprising a community’s "constitutional morality," are "presupposed by the laws and institutions of the community" and are therefore inferable from those laws and institutions. By referring to these principles, a judge is capable of adjudicating a hard case in a fashion that preserves the institutional integrity of the political community and achieves the result to which a party is entitled. In short, the legal system is "a seamless web" that provides sufficient normative guidance for the correct judicial resolution of every legal dispute.

34. Dworkin, Hard Cases, supra note 32, at 1105-07.
35. Dworkin’s argument, which he entitles “the rights thesis,” is that judicial decisions in hard cases are characteristically generated by principle not policy. Id. at 1060. Arguments of principle justify a decision by showing that it respects or secures some individual or group right; they are distinguishable from arguments of policy that justify a decision by showing that it advances or protects some collective goal of the community as a whole. Id. at 1059. Dworkin believes that principles are discoverable from the institutional structures that are constitutive and regulative of the context in which the judicial decision must be made. In the case of a game, for example, the adjudication of a hard case by a referee is institutionally constrained to that particular decision which preserves the integrity of the game. Id. at 1078-82. “We do not think that he is free to legislate interstitially within the ‘open texture’ of imprecise rules. If one interpretation of [a] rule will protect the character of the game, and another will not, then the participants have a right to the first interpretation.” Id. at 1080 (footnote omitted). The uniquely correct interpretation of the rule is found when the referee reconstructs the game’s character by posing to himself different theories about the nature of the game. (In this respect, Dworkin’s interpretation theory is notably similar to Collingwood’s “re-enactment” theory. See supra note 8.) When the referee determines which of the theories most appropriately fits the institutional features of the game, then that theory of the game’s character guides his resolution of the dispute. Consequently, only one party has the right to win the dispute, which right is the referee’s obligation to determine in light of the genuine institutional character of the game. The same applies to a judge who must enforce “existing political rights” latent in the combination of the constitutional values and substantive rules of his political community. Dworkin, Hard Cases, supra note 32, at 1063. For a good discussion and critique of this argument, see Note, Dworkin’s “Right Thesis,” 74 Mich. L. Rev. 1167 (1976); see also Soper, Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute, 75 Mich L. Rev. 473 (1977); Greenawalt, Policy, Rights and Judicial Decision, 11 Ga. L. Rev. 991 (1977).

Rolf Sartorius has expressed views that are consistent with Dworkin’s. Sartorius argues that while on occasion “extra-legal” considerations such as policy or value enter judicial reasoning, “legal principles” are always available to govern their use and, accordingly, “the judge is in all cases ultimately guided by legal principles which severely limit, if they do not totally eliminate, his discretion.” Sartorius, Social Policy and Judicial Legislation, 8 Am. Phil. Q. 151 (1971). Moreover, he maintains that “a litigant before a court of law is not in the position of one begging a favor from a potential benefactor, but rather in that of one demanding a particular decision as a matter of right, as something to which the law entitles him.” Id. at 153; see also Sartorius, The Justification of the Judicial Decision, 78 Ethics 171 (1968).

36. Dworkin, Hard Cases, supra note 32, at 1093-96; see also Dworkin, Judicial Discretion, 60 J. Phil. 624, 634 n.7 (1963) (“an arrangement of entitlements”); Note, supra
In a recent clarification of his position, Dworkin analogizes hard-case adjudication to a "chain novel" enterprise.\textsuperscript{37} The task of a writer to contribute one chapter to a novel-in-progress requires him to determine the direction of developments in prior chapters. Then, consistent with the demands of coherency for the entire work, the writer must advance these developments in the same direction through his chapter.\textsuperscript{38} Similarly, the task of a judge to adjudicate a hard case in the common law enterprise requires him to determine the structure of his legal community—from its profound constitutional arrangement to the details of its statutory schemes and judicial opinions. Then, consistent with the demands of coherency for his work, the judge must write his decision "'going on as before' rather than by starting in a new direction as if writing on a clean slate."\textsuperscript{39} Indeed, the

\textsuperscript{37} Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982). The "chain novel" enterprise is described as follows:

Imagine, then, that a group of novelists is engaged for a particular project. They draw lots to determine the order of play. The lowest number writes the opening chapter of a novel, which he then sends to the next number who is given the following assignment. He must add a chapter to that novel, which he must write so as to make the novel being constructed the best novel it can be. When he completes his chapter, he then sends the two chapters to the next novelist, who has the same assignment, and so forth.

\textit{Id.} at 166-67.

\textsuperscript{38} Dworkin wrote:

Now every novelist but the first has the responsibility of interpreting what has gone before . . . . Each novelist must decide what the characters are "really" like; what motives in fact guide them; what the point or theme of the developing novel is; how far some literary device or figure consciously or unconsciously used can be said to contribute to these, and therefore should be extended, refined, trimmed or dropped. He must decide all this in order to send the novel further in one direction rather than another. But all these decisions must be made, in accordance with the directions given, by asking which decisions make the continuing novel better as a novel.

\textit{Id.} at 167. For a more thorough examination of the chain-novel enterprise and its consequences for aesthetic and legal interpretation, see Dworkin, \textit{supra} note 1.

\textsuperscript{39} Dworkin, \textit{supra} note 37, at 168.

Deciding hard cases at law is rather like this strange literary exercise. The similarity is most evident when judges consider and decide "common-law" cases; that is, when no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law "underlie" the related decisions of other judges in the past. Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively done, in
judge is duty-bound by his participation in the common law enterprise to follow the legal history he finds; thus, "the constraint, that [he] must continue the past and not invent a better past, will often have the consequence that [he] cannot reach decisions that he would otherwise, given his own political theory, want to reach."41

The construction of constraints on judicial interpretation has also proceeded outside the analytic movement. This is exemplified in Herbert Wechsler's "neutral principles" and John Hart Ely's "textual determinism" approaches. Herbert Wechsler's neutral principles approach requires judges to decide cases on the basis of general principles that the judges are committed to apply consistently in all similar cases.42 John Hart Ely's textual

the way that each of our novelists formed an opinion about the collective novel so far written. . . . Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.

Dworkin, supra note 1, at 542-43.

40. "A judge's duty is to interpret the legal history he finds, not to invent a better history." Dworkin, supra note 1, at 544.

41. Dworkin, supra note 37, at 169. Dworkin's chain-novel analogy is a valiant attempt to outflank both objective and subjective interpretivism. Chain novel interpretation is neither purely objective, since it allows room for reinterpretation of the prior writings in a way that both unifies and provides new meaning, nor purely subjective, since it prevents the interpreter from proceeding independently of prior institutional writers. In this regard, the chain-novel analogy has much to commend it. Nevertheless, as Professor Stanley Fish has perceptively and correctly argued, "Dworkin repeatedly falls away from his own best insights into a version of the fallacies (of pure objectivity and pure subjectivity) he so forcefully challenges." Fish, supra note 5, at 552. Dworkin "posits for the first novelist a freedom that is equivalent to the freedom assumed by those who believe that judges (and other interpreters) are bound only by their personal preferences and desires . . . ." Id. at 555. Moreover, he views later novelists as "bound by a previous history in a way that would be possible only if the shape and significance of that history were self-evident." Id.


[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved[,] . . . [resting] on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply.] H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 21 (1961); see also Bork,
determinism requires judges to look only to the words of the document and, when faced with opaque terms, to the intent of those who wrote it. In Ely's view, judges "should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution . . . ."43 In essence, both of these theories assert that the proper institutional role of judicial interpreters is to follow the available norms in good faith and to commit to the logical implications of their application.44

The common element in each of the legal theories

Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 6-7 (1971) (advocating a requirement that decisions rest on principles that are neutral in content and application); Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 STAN. L. REV. 1113, 1113-14 (1980) (arguing that the ruling in Harris v. McRae was inconsistent with the operative principle of Roe v. Wade and criticizing the Court for not being principled).

In his criticism of Wechsler, Professor Martin Shapiro observed an essential objectivism in the "neutral principles" approach:

Neutral principles or standards are really the objective and eternal rules embedded in a "Blackstonian" body of law and the Constitution, which the judge discovers and applies to the case before him. When the defenders of neutral principles speak of the judge as motivated by reason, not will, they visualize the common law judge who did not command (make law) but simply discovered by deductive and analogical reasoning which of the great verities of the common law controlled the particular set of facts before him. Since the common law itself was the embodiment of reason and was applied by a purely reasonable process, there was no need of, nor could there be any room for, judicial prejudice, fiat, or preference.


43. J. ELY, DEMOCRACY AND DISTRUST 1, 3, 13-17 (1980). Professor Ely felt secure in asserting that Roe v. Wade was wrongly decided because he found it obvious that the purported right there vindicated was based on no "value inferable from the Constitution" and "lacks connection with any value the Constitution marks as special." Ely, The Wages of Crying Wolf, A Comment on Roe v. Wade, 82 YALE L.J. 920, 933, 949 (1973). Professor Ely's understanding of interpretation resembles Professor Thomas Grey's. See Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843 (1978); Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975).

The term "textual determinism" is adopted from Professor Owen Fiss who appropriately found the term that usually attaches to Ely's work, "interpretivism," to be misdescriptive. Fiss, supra note 1, at 743. As will be shown in part II of this comment, interpretation is in fact much more than that contemplated in Professor Ely's approach.

Professor Ely's "textual determinism" facially resembles Professor George Christie's objectivism. Christie, Objectivity in the Law, 78 YALE L.J. 1311 (1969). Concluding that contemporary legal theorists had failed to "confirm our intuition that judicial decision-making is objective," Professor Christie argued that only "those marks on paper called statutes and cases" could be accepted as the fixed reference points for judicial interpretation. Id. at 1326.

44. See Tushnet, Following the Rules, supra note 6 (arguing that Ely's and Wechsler's theories are inconsistent with liberalism).
presented—Austin’s legal science, Hart’s minimization of penumbral doubt, Dworkin’s hard case argument, Wechsler’s neutral principles, and Ely’s textual determinism—is the effort to ensure that the legal text is interpreted without the influence of the judicial interpreter’s value-orientation. In each case, normative gaps in the body of law are minimized, and institutional demands on the judicial interpreter are maximized, with the design of ensuring that the legal text is interpreted in harmony with the external legal order. However, this common effort makes sense only if the judicial interpreter is viewed as being free to determine the outcome of his interpretation in accordance with personal value preferences. In other words, by constructing interpretive constraints, each theory presumes that interpretation is an activity in need of constraint because it is fundamentally free and discretionary.

This presumption is evidenced in Dworkin’s chain novel analogy. Dworkin maintains that the contributor of a chapter to the novel-in-progress must be seriously committed to continue the work of his predecessors; indeed, he must be duty-bound to “advance the enterprise in hand.” In other words, an awareness on the part of the novelist and the judge of their responsibility to the corporate enterprise will supposedly check a temptation to strike out in some direction of their own. Only with a sense of duty to the enterprise will the novelist and the judge comport themselves as partners in the chain rather than as free and independent agents. In short, the entire account depends on the possibility of novelists and judges (both interpreters) comporting themselves in some fashion that is inconsistent with the chain enterprise; i.e., in a free and discretionary fashion. The question then becomes whether novelists and judges can comport themselves in a fashion inconsistent with the chain enterprise. If one assumes that the answer is yes, then one must see that interpretation as free. If one assumes that the answer is no, then one must see interpretation as something entirely different. As will be argued in parts II and III of this comment, interpretation is something different from that presumed by objective interpretivists.

45. Dworkin, supra note 37, at 167 (“[I]n this case the novelists are expected to take their responsibilities seriously, and to recognize the duty to create, so far as they can, a single unified novel rather than, for example, a series of independent short stories with characters bearing the same names.”).

46. Dworkin, supra note 1, at 543.
Objective interpretivism has not gone without critical response. In the early part of the twentieth century, a growing tendency towards objective formalism in legal education, legal scholarship, and judicial opinions sparked the vigorous countermovement of legal realism. Legal realism had many dis-

47. In legal education, Christopher C. Langdell’s case-method approach to the study of law was gaining widespread acceptance in the law schools. Professor Rumble has suggested that this was the “signal event” in the emergence of legal realism. Rumble, supra note 10, at 996.

Langdell’s case method presumed that the law consisted of certain principles and rules that could be distilled out of selected cases because legal doctrines evolved slowly and traceably in relatively few key cases. He argued that the number of legal principles and rules is “much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.”

C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii-ix (2d ed. 1879). Consequently, “[t]he vast majority [of cases] are useless, and worse than useless, for any purpose of systematic study.” Id. at vii. In order to find the rules of law, a jurist need only analyze the key cases in the evolution of a legal doctrine. Once in possession of these rules, the “true lawyer” would apply them “with constant facility and certainty to the ever-tangled skein of human affairs.” Id.

48. In legal scholarship, the American Law Institute undertook its first attempt to restate the law in order to clarify the fundamental principles behind the “swamp of decisions.” Address of Elihu Root in Presenting the Report of the Committee, 1 A.L.I. Proc. pt. 2, 48, 52 (1923). The ALI was established because of the growing recognition that the law is uncertain. “[T]he confusion, the uncertainty, [is] growing worse from year to year. . . . [W]hatever authority might be found for one view of the law upon any topic, other authorities could be found for a different view. . . . [T]he law [is] becoming guesswork.” Id. at 48-49.

Similarly, legal scholars such as Joseph Beale and Samuel Williston asserted that the varied issues in their fields, conflicts of law and contracts respectively, were governed by unified bodies of legal doctrine. See 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 92-94 (1935) (determination of domicile has certain automatic legal consequences that apply regardless of circumstance). See generally S. WILLISTON, THE LAW OF CONTRACTS (1920) (deriving the law of contracts from few general principles of universal applicability).

49. In federal and state judicial opinions, social legislation was invalidated partly on the “logic” of general constitutional concepts such as liberty of contract and substantive due process. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); see also Allaire v. St. Luke’s Hosp., 184 Ill. 359, 56 N.E. 638 (1900).


Langdell’s case method approach was criticized for its exclusive focus on the operation of rules in judicial decisions. According to William O. Douglas, such a focus grossly oversimplifies and distorts the nature of law. After all, law is neither more nor less than a prediction of what a governmental agency or other agency of control will do under a given situation. A study of the legal literature exem-
sonant voices; however, these voices achieved harmony in the belief that a legal text has any number of possible meanings, that interpretation consists of choosing one of those meanings, and that selecting a particular meaning forces the judge to express his own values. In short, legal realism contended that interpretation is an uncontrollably subjective value-based activity. Legal realism is thus the basic expression of subjective interpretivism in Anglo-American jurisprudence.

Legal realism originates with distrust of "the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions." This "rule-skepti-

plified by judicial opinions supplies part, but only part, of the material necessary to make such a prediction. The other psychological, political, economic, business, social factors necessary to complete that prediction are innumerable. The weakness of the old system was that all of these more general and imponderable factors were eliminated from consideration. It was for that reason that the nonconformists in legal education began to raise disconcerting notes.


Williston's scholarship in contracts was criticized, for example, for presupposing the unity of the legal universe, a notion impossible to reconcile with the totality of judicial decisions. The "legal universe," wrote Walter Wheeler Cook, "is far more complex than that visualized by the more orthodox writers of whom Professor Williston is an example." Cook, Williston on Contracts, 33 ILL. L. REV. 497, 514 (1939). Cook argued that a unified body of legal doctrines could be maintained only if one completely ignored some judicial decisions or failed to distinguish consistently between actual holdings and dicta. According to Cook, Williston's treatise on contracts illustrated both these vices. Id. at 499, 514. For a contemporary critique of recently perceived formalizations of law, see Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 STAN. L. REV. 387 (1981).

Oliver Wendell Holmes and Roscoe Pound were vigorous in their condemnation of judges who decided cases solely in a formally deductive manner from legal generalizations. See Pound, Law in Books and Law in Action, 44 AM. L. REV. 12, 16 (1910); Pound, Liberty of Contract, 18 YALE L.J. 454, 457, 478-80 (1909). Holmes, for instance, criticized analysis that relied on the logical compulsion of legal generalizations to reach particular conclusions. "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Holmes insisted upon the role of unconscious factors in reaching decisions. "The decision will depend on a judgment or intuition more subtle than any articulate major premise." Id. This skepticism towards general rules as a means of compelling particular decisions and this insistence on the role of unconscious factors in the adjudicatory process found resonance in the realist movement as two of its central themes. See W. RUMBLE, supra, at 39-40.

51. K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 56 (1962). "[T]he theory that rules decide cases seems for a century to have fooled not only library-ridden recluses, but judges. More, to have fooled even those skillful and hard-bitten first-hand observers of judicial work: the practitioners." Llewellyn, The Constitution as an Institution, 34 COLUM. L. REV. 1, 7 (1934).
cism" was motivated by the interpretive malleability and normative ambiguity of legal materials. For example, Karl Llewellyn observed two judicial techniques of case construction that permit either an extremely narrow or an extremely wide application of precedent. With the "strict" or "orthodox" technique, a judge can, "through examination of the facts or of the procedural issue, narrow the picture of what was actually before the court and can hold that the ruling made requires it to be understood as thus restricted." In other words, a judge can, if he desires, limit the authoritative value of an "unwelcome precedent" by so narrowly confining it to its particular facts that its ruling could be made to apply only to "red-headed Walpoles in pale magenta Buick cars." By contrast, the "loose view of precedent" holds that once "a court has decided . . . any point or all points on which it chose to rest a case," then "[n]o matter how broad the statement, no matter how unnecessary on the facts or the procedural issues, if that was the rule the court laid down, then that the court has held." The judge can, if he chooses, capitalize on "welcome precedents" for the purpose of authoritatively supporting any proposition he desires. Essentially, the same judicial techniques were thought to be available for statutory construction.

This range of interpretive possibilities for case and statutory materials decreased their normative value for the realists.

52. This term appears to have been coined by Jerome Frank. See J. FRANK, LAW AND THE MODERN MIND (1949). Professor Rumble treats this term as being descriptive of the main currents of the realist movement. See W. RUMBLE, supra note 50, at 48-106. But for an argument distinguishing influential realist Karl Llewellyn's work from "rule-skepticism," see W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 408 n.22 (1973). In any event, rule-skepticism for the realists did not mean that judges completely disregarded rules in adjudication but only that rules were one factor among many, including social, moral and psychological factors, which influenced judicial decisions. W. RUMBLE, supra note 50, at 189-90.


55. Id. at 67.

56. Id. at 67-68.

57. Id. at 68.

58. "[A]gain and again . . . I have had to insist that the range of techniques correctly available in dealing with statutes is roughly equivalent to the range correctly available in dealing with case law materials." K. LLEWELLYN, TRADITION, supra note 53, at 371. Llewellyn listed 47 examples of contradictory, yet legally acceptable, canons of statutory construction, id. at 522-35, to illustrate that "there are two opposing canons on almost every point." Id. at 521.
But the realists maintained that such normative ambiguity was inconsequential in comparison to the equivocity resulting from the plethora of squarely conflicting judicial decisions. For example, Benjamin Cardozo believed that every legal precedent could be matched by another reaching an opposite conclusion. Consequently, a judge could find precedential authority for any proposition on nearly any issue.

The absence of consistent normative guidance from legal materials had two important consequences for the realists’ picture of judicial interpretation. First, the normative void necessitated judicial choice; it “disposes of all questions of ‘control’ or dictation by precedent.” With conflict among precedential authorities, a judge was compelled to choose from among them the authority that best assisted him in resolving his case. The authority he chose to rely upon was solely within his control; he possessed “sovereign prerogative of choice.” As Herman Oliphant pictured the necessity of judicial choice, every case considered by judge or student “rests at the center of a vast and empty stadium. The angle and distance from which that case is viewed involves the choice of a seat. Which shall be chosen? Neither judge nor student can escape the fact that he can and


60. Belief in the plurality of judicial authority on any issue was virtually universal among the realists. See, e.g., Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (Justice Holmes portrayed judicial decision as a balancing of opposed principles); B. Cardozo, supra note 59, at 40 (one principle or precedent often is matched by another pointing to an opposite conclusion); J. Frank, supra note 52, at 111 n.2 (“You will almost always find plenty of cases to cite in your favor.”); K. Llewellyn, supra note 51, at 339 (“Our whole body of authoritatively accepted ways of dealing with authorities . . . is a body which allows the court to select among anywhere from two to ten ‘correct’ alternatives in something like eight or nine appealed cases out of ten.”); Cohen, The Problems of a Functional Jurisprudence, 1 MOD. L. REV. 5, 11 (1937) (cases often present “a plaintiff principle and a defendant principle,” each opposing the other); Corbin, The Law and the Judges, 3 YALE REV. 234, 246 (1914) (prior judicial decisions “are not harmonious; in them can be found authority for both sides of almost any question”); Dickinson, The Law Behind Law: II, 29 COLUM. L. REV. 285, 298 (1929) (broad general principles of the law have a significant habit of traveling in pairs of opposites); Douglas, Stare Decisis, in Essays on Jurisprudence from the Columbia Law Review 18, 19 (1963) (“[T]here are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions.”).

61. K. Llewellyn, Tradition, supra note 53, at 76.

must choose." In sum, judges, not rules, possessed the critical function in case adjudication.

The second consequence of the normative void for the realists' picture of adjudication was that judicial choice could be made and justified only on extralegal grounds. Llewellyn reasoned that if conflicting legal premises are available, then "there is a choice in the case; a choice to be justified; a choice which can be justified only as a question of policy—for the authoritative tradition speaks with a forked tongue." In other words, without the authority of dispositive rules, judges could only resort to nonlegal values to resolve disputes. Some realists hoped that the extralegal grounds the judge used to justify his decision would be considerations of the social consequences of his intended decision as weighed against possible alternative decisions. In the balancing of possible social consequences resulting from his decision, the judge became, for the realists, a kind of social engineer, and the law became his instrument to facilitate social progress and justice.

64. K. Llewellyn, supra note 51, at 70. Felix Cohen made a similar statement: "[N]o one of these rules [of prior cases] has any logical priority; courts and lawyers choose among competing propositions on extra-logical grounds." F. Cohen, Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism 35 n.47 (1959).
65. This instrumental aspect of legal realism was the result of the influence of William James's and John Dewey's philosophical pragmatism. See generally W. Rumble, supra note 50, at 4-20, 72-78; R. Summers, supra note 50, at 22-35. The pragmatists were antiformalist thinkers. William James stressed that theorists should turn "away from abstraction . . . , from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins." W. James, What Pragmatism Means, in The Writings of William James 376, 379 (J. McDermott ed. 1968). Instead, theorists should adopt a "pragmatic" orientation, by "looking away from first things, principles, 'categories,' supposed necessities; and . . . looking towards last things, fruits, consequences, facts." Id. at 380 (emphasis omitted). This "pragmatic method," or result-orientation, was concerned with the "ways in which existing realities may be changed." Id. Similarly, John Dewey argued that theoretical decision-making should be result-oriented. "The problem is not to draw a conclusion from given premises; that can best be done by a piece of inanimate machinery by fingering a keyboard. The problem is to find statements of general principle and of particular fact which are worthy to serve as premises." J. Dewey, Philosophy and Civilization 134 (1931). Thus, the "logic of rigid demonstration" must be replaced by a "logic of search and discovery," a "logic relative to consequences rather than to antecedents," a "logic of inquiry into probable consequences." Id. at 138-39; see also J. Dewey, Logic: The Theory of Inquiry (1938); J. Dewey, Essays in Experimental Logic (1916).

This result-orientation was picked up by the realists. Llewellyn wrote that realistic jurisprudence "fits into the pragmatic and instrumental developments in logic." K. Llewellyn, supra note 51, at 28. With society in a constant state of flux, "and in flux typically faster than the law, . . . the probability is always given that any portion of law
But other realists believed that the justification of the judicial decision would not be socially instrumental, but subjectively intuitive. Psychology teaches, wrote Jerome Frank, that "the process of judging" does not begin at a premise and proceed to a conclusion.66 "Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it."67 Frank argued that the same must apply to judges.

Now, since the judge is a human being and since no human being in his normal thinking processes arrives at decisions (except in dealing with a limited number of simple situations) by the route of . . . syllogistic reasoning, it is fair to assume that the judge, merely by putting on the judicial ermine, will not acquire so artificial a method of reasoning. Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.68

Frank believed the formulation of the conclusion, whether done vaguely, tentatively, or expressly was an expression of the "subjective sense of justice inherent in the judge."69

Other realists also believed that judicial intuitions about the particular justice of a case motivated judges to resolve that case in a particular way. Llewellyn wrote that the judicial mind is driven by a sense of "Justice-for-All-of-Us."70 Benjamin Cardozo argued that a judge's decision in choosing between alternative standards is based on the "conviction in the judicial mind" that the standard selected leads to "justice."71 Finally, according to Judge Frank Hutcheson, judicial decisions are reached by an in-
tuitive "hunch."\textsuperscript{72} "[T]he judge really decides by feeling, and not by judgment; by 'hunching' and not by ratiocination . . . ."\textsuperscript{73} For Judge Hutcheson, "the vital, motivating impulse for the [judicial] decision is an intuitive sense of what is right or wrong for that cause."\textsuperscript{74}

For some legal realists, judicial intuitionism was simply inadequate for a theory of adjudication.\textsuperscript{75} Having raised profound skepticism in the objective formalist model of adjudication, some realists felt compelled to provide some hope for legal consistency and certainty. Oliver Wendell Holmes articulated the principle of hope: predictionism.

People want to know under what circumstances and how far they will run the risk of coming up against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.\textsuperscript{76}


\textsuperscript{73} Hutcheson, supra note 72, at 285.

\textsuperscript{74} Id. John Rawls has written the following in contrasting systematic theories of justice with the intuitionist-pluralist perspective:

Intuitionist theories, then, have two features: first, they consist of a plurality of first principles which may conflict to give contrary directives in particular types of cases; and second, they include no explicit method, no priority rules, for weighing these principles against one another: we are simply to strike a balance by intuition, by what seems to us most nearly right.

J. RAWLS, A THEORY OF JUSTICE 34 (1971). This is an apt description of the ground of legal realism's judicial intuitionism.

\textsuperscript{75} This inadequacy was observed from without the ranks of legal realism: They have assured us of the immense range of irrational considerations entering into the judicial process, the subjectivity necessarily inherent in judicial determinations, the dominating influence of prejudices, idiosyncrasies, and preconceived social theories in the disposition of lawsuits . . . without presenting us with an embracive theory of the constructive elements necessary for the building of a serviceable science of legal methodology.

Bodenheimer, Analytical Positivism, Legal Realism, and the Future of Legal Method, 44 VA. L. REV. 365, 376 (1958). One reason for this inadequacy may be that realists were intent on destroying, rather than constructing, theory. See Rumble, The Paradox of American Legal Realism, 75 ETHICS 166, 173-76 (1965).

\textsuperscript{76} Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897); see also K. Llewellyn, THE BRAMBLE BUSH 13 (1960) ("[T]he main thing is seeing what officials do . . . and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow.")
However, realists who were committed to predictionism could not agree on those factors from which accurate predictions could be made. The only agreement was that one had to look beyond the "paper" rules, or the formal legal rules enunciated in judicial decisions, and discover the "real" rules, or the psychological, political, economic, business, and social factors that accounted for judicial behavior in a particular case.

77. Fred Rodell argued that one could look at the "vast complex of personal factors—temperament, background, education, economic status, pre-Court career" and make predictions based on these factors "with a surprising degree of accuracy." Rodell, For Every Justice, Judicial Deference is a Sometime Thing, 50 Geo. L.J 700, 700-01 (1962). Llewellyn cited 14 "steadying factors" upon which predictions could be based. K. Llewellyn, Tradition, supra note 53, at 19-51. Herman Oliphant argued that the predictable element in judicial decisions is the judges' "response to the stimuli of the facts of the concrete cases before them . . . . The response of their intuition of experience to the stimulus of human situations is the subject-matter having the constancy and objectivity necessary for truly scientific study." Oliphant, supra note 63, at 159.

78. In other words the "real" rules of the judicial process are the regularities of judicial behavior. The paper-real rule distinction is found in both J. Frank, Courts on Trial: Myth and Reality in American Justice 336-37 (1949), and K. Llewellyn, supra note 51, at 21-27.

This emphasis on studying and describing actual judicial behavior led some realists to attempt to create a precise science of judicial behavior through empirical research. This largely inspired the foundation of the Institute of Law at the John Hopkins University in 1928. The aim of the school was "the development of the scientific study of law. All else [was] incidental." Cook, Scientific Method and the Law, 13 A.B.A. J. 303, 309 (1927). Achievement of this objective required research of an empirical nature. Walter Wheeler Cook emphasized that the only way to find out what anything does is to observe it in action and not to read supposedly authoritative books about it, or to attempt by reasoning to deduce it from fundamental principles assumed to be fixed and given. The consequence of this assumption is that only a small part of the work of the staff of the Institute will be with books in libraries; by far the larger part will be concerned with the difficult, time-consuming, and expensive task of gathering and interpreting the facts concerning the operation of our legal system.


One interpretation of the realist movement is that it was not a critical reaction to Langdellian and formalist model of law. See G. Gilmore, supra note 50. Gilmore believes that the adepts of the new jurisprudence—Legal Realists or whatever they should be called—no more proposed to abandon the basic tenets of Langdellian jurisprudence than the Protestant reformers of the fifteenth and sixteenth centuries proposed to abandon the basic tenets of Christian theology. These were the ideas that "law is a science" and that there is such a thing as "the one True rule of law."

Id. at 87. Gilmore therefore maintains that "[r]ealist jurisprudence proposed a change of course, not a change of goal." Id. at 100. Although this interpretation is defensible, it does not represent the whole movement. Some realists doubted that a science of law was possible at all. See, e.g., Frank, What Courts Do in Fact, 26 Ill. L. Rev. 761, 773 (1932); Llewellyn, The Theory of Legal "Science," 20 N.C.L. Rev. 1, 10-22 (1941). For a good
Jerome Frank rejected the search for “real” rules. In Frank’s estimation, “the major cause of legal uncertainty is fact-uncertainty—the unknowability, before the decision, of what the trial court will ‘find’ as the facts, and the unknowability after the decision of the way in which it ‘found’ those facts.”79 Thus, Frank concluded that “it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) lawsuits.”80 Fact-uncertainty arises for two reasons. First, in addition to possessing discretion in rule-applying, a judge possesses discretion in fact-finding. “When the oral testimony is in conflict as to a pivotal fact-issue, the trial judge is at liberty to choose to believe one witness rather than another.”81 This discretionary fact-finding is “almost boundless” since appellate courts rarely interfere with such determinations.82 Second, judges react to facts very subjectively. These judicial subjectivities include “unique, idiosyncratic, sub-threshold biases and predilections” which are impossible to precisely define.83 Similarly, jurors reach their fact-determinations on “emotional responses to the lawyers and witnesses.”84 Because of these una-

79. J. FRANK, supra note 52, at xiv. Frank characterized his argument as “fact-skepticism.” It marks one of the major divisions in the realist movement. See generally W. RUMBLE, supra note 50, at 107-36. Frank classified the realists into two groups: ruleskeptics and fact-skeptics. Rule-skeptics, of whom Llewellyn was “the outstanding representative,” focus on appellate courts and strive for greater legal certainty. Fact-skeptics focus on trial courts and deny the possibility of accurate formulations of real rules. J. FRANK, supra note 78, at 73-75.

80. J. FRANK, supra note 78, at 74 (“the pursuit of greatly increased legal certainty is, for the most part, futile—and . . . its pursuit, indeed may well work injustice”).

81. Id. at 57.

82. Id.

83. J. FRANK, supra note 52, at xxvi. “The reactions of trial judges or juries to the testimony are shot through with subjectivity.” J. FRANK, supra note 78, at 22. Elsewhere, Frank called these subjectivities “prejudices of judges . . . [that] have no ‘large scale social’ character, and lack uniformity. They are distinctly individual, unconscious, unget-at-able.” They are “concealed, publicly unscrutinized, uncommunicated . . . secret, unconscious, private, idiosyncratic.” Frank, “Short of Sickness and Death”: A Study of Moral Responsibility in Legal Criticism, 26 N.Y.U. L. Rev. 545, 573, 582 (1951).

84. J. FRANK, supra note 78, at 130. Frank continues, “they like or dislike, not any legal rule, but they do like an artful lawyer for the plaintiff, the poor widow, the brunette with the soulful eyes, and they do dislike the big corporation, the Italian with a thick,
voidable subjectivities in the judicial process and the impossibility of rationalizing them, Frank concluded that "real" rules could never be formulated concerning the probable outcome of cases.\footnote{86}

Although the energy of legal realism was largely spent by midcentury,\footnote{86} its legacy remains. The critical legal studies movement is one example of the contemporary continuation of the legal realist attack on objective legal analysis.\footnote{87} Critical legal scholars agree with the realists' contention that legal analysis is nothing more than a veneer covering deeper motives for judicial decisions. But critical legal scholars depart from the realists by providing a neo-Marxist, materialist explanation, rather than a psychoanalytic account of judicial decisions.\footnote{88} They undertake this explanation in two principal ways. First, they show legal

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foreign accent." \textit{Id.} Elsewhere, Frank contended that "adequate fact-finding . . . requires devoted attention, skill in analysis, and, above all, high powers of resistance to a multitude of personal biases. But these qualities are obviously not possessed by juries. They are notoriously gullible and impressionable." J. Frank, supra note 52, at 192.

85. Any attempt to increase the capacity of "real" rules to scientifically accurate predictions about judicial behavior, Frank believed, was impossible:

[S]ince most persons consider that a true science makes predictions possible, we ought to put an end to notions of a "legal science" or a "science of law," unless we so define "legal" or "law" as to exclude much of what must be included in the judicial administration of justice, because no formula for predicting most trial-court decisions can be devised which does not contain hopelessly numerous variables that cannot be pinned down or correlated.

J. Frank, supra note 78, at 190 (footnote omitted).

86. See generally W. Rumble, supra note 50, at 238-39.


doctrines to be historically contingent by demonstrating their change over time in response to judicial class biases and judicial perceptions of the material needs of capitalist society. Second, they show legal reasoning to be fundamentally incoherent by elaborating the logical contradictions or "opposing principles" underlying private law, particularly the law of the marketplace, contract law. Thus, they view legal analysis as ideological, non-rational argumentation that is used to legitimize existing social practices.

89. See M. Horwitz, The Transformation of American Law (1977). Professor Horwitz argues that precapitalist, communitarian doctrines of private law made way for nineteenth century capitalist-oriented doctrines because of the class sympathies of judges and their historically limited perceptions of social needs. However, this account of legal development is disputed. See, e.g., Simpson, The Horwitz Thesis and the History of Contracts, 46 U. Chi. L. Rev. 533 (1979) (demonstrating that no such shift occurred in contract law during the period Horwitz describes); White, The Intellectual Origins of Torts in America, 86 Yale L.J. 671 (1977) (providing a fundamentally different account of the development of tort theory).

90. See Kennedy, Form and Substance, supra note 21. Professor Kennedy argues that "there are two opposed rhetorical modes for dealing with substantive issues [found in American private law opinions, articles, and treatises] which I call individualism and altruism." Id. at 1685; see also Feinman, Critical Approaches to Contract Law, 30 UCLA L. Rev. 829 (1983); Unger, supra note 87.

91. See Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591 (1981). Professor Kelman depicts legal argument as involving "interpretive construction," or the conscious and unconscious reduction of factual situations to substantive legal controversies, and "rational rhetoricism," or "the process of presenting the legal conclusions that result when interpretive constructs are applied to the 'facts.'" Id. at 592. In Kelman's view, the necessary imposition of interpretive constructs prior to the employment of rational rhetoricism radically undercuts the rationality of legal argument:

[Interpretive constructs . . . are . . . simply inexplicably unpatterned mediators of experience, the inevitably nonrational filters we need to be able to perceive or talk at all. . . . When the unwarranted conceptualist garbage is cleared away, dominant legal thought is nothing but some more or less plausible common-wisdom banalities, superficialities, and generalities, little more on close analysis than a tiresome, repetitive assertion of complacency that 'we do pretty well, all considered, when you think of all the tough concerns we've got to balance.' Legal thought does have its rigorous moments, but these are largely grounded
Other less organized remnants of legal realism can be found in other contemporary writings. In his leading law school primer on judicial reasoning, E. H. Levi portrays adjudication in terms of organic growth in the law whereby the "concepts" that express the law change in response to changed conditions in society. His model implies that judicial "intuition" is the vehicle by which a judge registers and implements into law the changed "concepts" of society. In contrast, Sanford Levinson, maintaining that the unavailability of determinate meaning in literary interpretation applies equally to judicial interpretation, argues that every judicial interpreter is radically impaired in his ability to confidently express the meaning of the text or to reject the meaning proposed by another. The "contingency of percep-

in weak and shifting sands. There is some substance, but we tend to run for cover when it appears.

Id. at 671-72; see also Kelman, Trashing, 36 Stan. L. Rev. 293 (1984); Kairys, supra note 88, at 3 ("There is no legal reasoning in the sense of legal methodology or process for reaching particular, correct results." Law is "only a wide and conflicting variety of stylized rationalizations from which courts pick and choose."); Trubek, Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law, 11 Law & Soc'y Rev. 529, 561 (1977) ("I see the [legal] system as partially open and flexible, and therefore as offering support for moral and political 'entrepreneurs' who can take advantage of the pressures of ideals and the legitimation needs of the system to effect changes that can further genuine equality, individuality, and community.").

92. See Gabel, supra note 89, at 602 (traditional legal theory produces fictions by hypostatizing phenomena into facts); Kennedy, Cost-Reduction Theory as Legitimation, 90 Yale L.J. 1275, 1276 (1981) (traditional legal scholarship contributes to legitimation of oppressive social order); Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 209 (1979) (the Commentaries legitimated existing social practices in Blackstone's England through the creation of artificial legal categories that gradually assumed an appearance of necessity).

93. E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).

94. Id. at 6-9.

95. In Levi's model of reasoning, "concepts" (such as consideration and trespass), not legal rules, are the main vehicles of the law. See Levi, The Natural Law, Precedent and Thurman Arnold, 24 Va. L. Rev. 587, 604 (1938). His model follows Max Radin's portrayal of judicial reasoning as a selection between "several categories [that] struggle . . . for the privilege of framing the situation before [the judges]." Radin, The Theory of Judicial Decision: Or How Judges Think, 11 A.B.A. J. 357, 359 (1925). Radin argues that "'principles' are not principles at all but aggregations of type transactions, schematized to make them easier to carry in one's memory." Id. at 360; see also K. LLEWELLYN, TRADITION, supra note 53 (conceptions such as "type situation" and "situation-sense" are basic to judicial reasoning). However, these pictures of judicial reasoning provide no normative guidance for weighing the "concepts" or "categories." See J. RAWLS, supra note 74, at 34.

96. Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982). For a criticism of this position, see Fish, Interpretation and the Pluralist Vision, 60 Tex. L. Rev. 495 (1982).
tion” results in “fractured and fragmented discourse,” leaving the interpreter with only a mere “hope that some future conjunction of author and reader will provide a common language of [judicial] discourse.”

In sum, legal realism and its heirs basically argue that judicial interpretation is an unavoidable expression of privately held values because of the unavailability of effective interpretive constraints. They see normative guidance as being unavailable because it is not self-evident: a variety of meanings is attributable to the same precedent or statute and contradictory meanings exist among different precedents and statutes. Therefore, judicial interpreters are compelled to choose from among the available meanings—a choice that can be made only on extralegal bases that include the privately held values of the judicial interpreter. Similarly, institutional demands that a judicial interpreter perform in a certain fashion are ineffective. The irrepressible subjective motivations of the judicial interpreter make it impossible to ensure the judicial interpretation of a text within any objective constraint.

II. PHILOSOPHICAL HERMENEUTICS: TRANSCENDING THE OPPOSING VIEWS OF ADJUDICATION

The Anglo-American jurisprudential traditions of objective and subjective interpretivism both presume that judicial interpretation is a free and discretionary activity. The principal difference between these two traditions lies in the extent to which they believe that the judicial interpreter can be controlled in exercising his freedom and discretion. On one hand, the objective interpretivist tradition constructs normative and institutional constraints that supposedly prevent the responsible judicial interpreter from freely resorting to personal, value-laden considerations. On the other hand, the subjective interpretivist tradition denies the authority and efficacy of such constraints, concluding that judicial interpretation is an activity motivated by nonrational subjective interests.

Unfortunately, both traditions have failed to examine critically their common presumption that interpretation is by nature free and discretionary. Rather, each tradition has directed its efforts at contesting the availability of interpretive constraints.

97. Levinson, supra note 96, at 402-03.
98. Id.
The result has been the incapacity of both jurisprudential traditions to transcend their opposition. Thus, while objective interpretivism's preoccupation with constructing normative and institutional constraints has prevented it from investigating the possible structure of interpretation, subjective interpretivism's primary interest in deconstructing these constraints has diverted its attention away from the need to explain the otherwise "mysterious" act of interpretation.\textsuperscript{99}

The objective-subjective opposition can be transcended by denying the common presumption about the nature of interpretation. In other words, if interpretation is shown not to be free

\textsuperscript{99} Professor Edgar Bodenheimer once argued that the divergent ideological commitments of analytical positivism and legal realism prevented them from providing "a well-considered theory of the non-formal (i.e., non-positive) sources of the law." Bodenheimer, \textit{supra} note 75, at 375. Responding to H.L.A. Hart's "open texture" characterization of legal rules, Bodenheimer maintained that Hart's continuing commitment to the analytical positivist ideal of judicial objectivity inhibited him (and would inhibit all other analytical positivists) from investigating the possible structure of judicial discretion. On the other hand, the legal realists' continued assurance to jurists "of the immense range of irrational considerations entering into the judicial process, the subjectivity necessarily inherent in judicial determinations, [and] the dominating influence of prejudices, idiosyncrasies, and preconceived social theories in the disposition of lawsuits" diverted his focus from "presenting us with an embracive theory of the constructive elements necessary for the building of a serviceable science of legal methodology." \textit{Id.} at 376. In short, the ideological commitments of analytical positivism and legal realism were "leading the science of law into a blind alley from which it can extricate itself only by an extensive and serious re-investigation of the entire realm of legal methodology." \textit{Id.} at 376; \textit{see also} R. UNGER, \textit{KNOWLEDGE AND POLITICS} 3, 104-42 (1975) (characterizing conceptions of reason intrinsic to Western thought in the sciences, humanities, and jurisprudence as dichotomous, which results in a "prison house" for thought from which escape is possible only with a "total criticism" of the "deep structures" of our thought and a transcendence of the dichotomies with a "holistic consciousness"); Gross, \textit{supra} note 5 (outlining jurisprudential "patterns of evasion" of the rule-value dichotomy); Reynolds, \textit{supra} note 5 (following Bodenheimer's analysis).

Charles A. Miller's description of judicial interpretation is one example of the "blind alley" or "prison house" effect flowing from objective-subjective dichotomous views of adjudication:

The three sources of decision—values, rules, and facts—combine to focus on the mysterious "act of deciding." While the sources of decision are rationally comprehensible, the act of deciding is not. But after that act, adjudication becomes understandable once more when the opinion of the court, the explanation of decision, is handed down.

C. MILLER, \textit{THE SUPREME COURT AND THE USES OF HISTORY} 11 (1969) (footnote omitted). This description vacillates helplessly between objective and subjective accounts without hope of any synthesis. For this reason, the act of judicial interpretation remains mysterious. A similar vacillation is evident within legal realism between its scientific and intuitionist wings. \textit{See supra} text accompanying notes 61-78. More recently, Professor Dworkin's position has been characterized as a vacillation between objectivity and subjectivity. \textit{See} Fish, \textit{supra} note 5.
and discretionary, then the disagreement between objective and subjective interpretivism over the availability of effective constraints for interpretation disappears. No ground exists to support the disagreement. Jurisprudential discussion of adjudication is then necessarily transformed to reflect the new view of interpretation.100

Philosophical hermeneutics rejects the notion that interpretation is free and discretionary.101 Interpretation is a dialogical

100. Generally, advocates of the resolution of the objective-subjective opposition in jurisprudence have sought to construct a method of reasoning that integrates the objective and subjective dimensions of human experience. For instance, see Roberto Unger's argument, supra note 99. In Unger's estimation, an "order of mind" must be constructed that exists "between" the particularity of events in human experience and the generality of concepts and symbols constituting the content of human thought. Id. at 107-11. Further, this "order of mind" must employ neither the subjective valuations associated with the particularity of events nor the logic and causality associated with the generality of thought, but rather a "symbolic interpretation" that merges these two. Id. Examples of this interpretation are found in the aesthetic experience of finding universal meaning and concrete particularity in a great work of art or the religious experience of finding Christ as an embodiment of both the universal, infinite God and the particular, finite man. Id. at 144; see also Gross, supra note 5.

In contrast, Professor Noel Reynolds contended that the escape from Bodenheimer's "blind alley" should begin with a complete reformulation of the classical ideal of legal objectivity into a notion of objectivity that more fully "squares . . . with actual human experience." Reynolds, supra note 5, at 27. In his estimation, this could be achieved by seeing legal generalizations as publicly corrigeable; see also Fiss, supra note 1.

101. The term "hermeneutics" can be traced to the Greek noun, hermeneia, meaning interpretation. See R. PALMER, supra note 4, at 12-32. The term hermeneia appears to be derived from the name of the Greek god Hermes. Essentially, Hermes' task was to translate, or bring into a form intellectually accessible to human understanding, the transcendent knowledge of the gods. Analysis of Hermes' divine function of mediation between the world of gods and the world of men reveals a three-fold dimensionality that hermeneia, or interpretation, had for the early Greeks. First, Hermes was to reveal and proclaim the will of the gods to men. Thus, interpretation connoted an announcing of what was previously unrevealed. Id. at 15-20. Second, Hermes was to elucidate what was revealed by relating it to the listeners' own projects and intentions. Thus, interpretation to the Greeks carried with it the implication of a context in which the receivers of the message found themselves. The problem of interpretation was making clear the message in terms of the receivers' anticipations of meaning. Id. at 20-26. Third, Hermes was to bring the unintelligible into intelligibility through the medium of the people's own language. He was a translator who sought to mediate man's own understanding with the gods' understanding. For the Greeks, interpretation meant a mediation of world views, a fusion of different understandings in which interpreter and object both operated. Id. at 26-32.

Hermeneutics did not begin to assume the form of a theory of interpretation until the Reformation. Arguing that the Bible could be understood independently and validly without the dogmatic interpretation of the Catholic Church, the Reformers sought a theory of biblical exegesis that would allow their interpretation to stand on its own. See J. BLEICHER, supra note 4, at 12-13; see also H. GADAMER, TRUTH AND METHOD 153-55 (1975). The Reformers argued that any textual passage, the sense of which is not clear, could be understood through the reciprocal relationship between the whole text and its
interaction between interpreter and text that occurs within an a priori relationship that is mediated by their common history and language. In this interaction, neither interpreter nor text determines textual meaning independently of the other; both interpreter and text contribute interdependently to the determination of textual meaning. In essence, philosophical

particular passages. While the whole scriptural text guided the interpretation of the particular passages, the meaning of the whole could be reached only through the cumulative understanding of individual passages. From sacred texts, it was only a small step to apply the same insight to profane texts.

Until Friedrich Schleiermacher, "special" hermeneutics existed in the various disciplines, depending upon the kind of text involved and the theoretical problems peculiar to the discipline. Schleiermacher sought to establish a "general" hermeneutic underlying all specialized hermeneutics—the act of understanding itself. Arguing that understanding occurs primarily through a comparing of the unintelligible to the already intelligible, he schematized the act of understanding as a circle. Just as the unclear meaning of a particular textual passage is made clear by reference to the general meaning of the whole text, so is any particular experience made intelligible by reference to what has already been understood. But what has already been understood is only the accumulation of the meaning of particular experiences. This schema of understanding—the general informing the particular and the particular informing the general—became known as the "hermeneutical circle." See J. BLEICHER, supra note 4, at 13-16; H. GADAMER, supra, at 162-74; R. PALMER, supra note 4, at 75-97.

Following Schleiermacher's attempt to generalize hermeneutics, Wilhelm Dilthey sought to make hermeneutics the foundation for all the human sciences by providing a universally valid methodological basis for the interpretation of all human expressions. Dilthey believed that employment of the hermeneutical circle could lead to a knowledge of the human world resembling the natural sciences' knowledge of nature. Asserting that the meaning of all human action lay in the subjective intention of the actor, Dilthey reasoned that the task of understanding was to reconstruct the actor's original "life-experience" by way of the hermeneutical circle in order to understand the actor as he understood himself. See J. BLEICHER, supra note 4, at 19-26; H. GADAMER, supra, at 192-234; R. PALMER, supra note 4, at 98-123. In this respect, Dilthey presages Collingwood's objective reenactment theory of interpretation. See supra note 8.

Dilthey's notion of understanding marked a decisive turn in hermeneutic theory—a turn that Hans-Georg Gadamer viewed as wrong. In Gadamer's view, Dilthey's hermeneutics implied that the inquirer's present situation had a negative value. Understanding the actor as he understood himself required "essentially a self-transposition or imaginal projection whereby the [inquirer] negates the temporal distance that separates him from the object and becomes contemporaneous with it." Linge, Introduction to H. GADAMER, PHILOSOPHICAL HERMENEUTICS, at xiv (1976). In other words, temporal distance between the inquirer and the object of his inquiry is a source of prejudice that hinders valid understanding and that must be transcended. To the extent that Dilthey's notion of understanding demands negation of the inquirer's present and extrication from his immediate historical situation, Gadamer believed Dilthey's hermeneutic theory must be rehabilitated. Gadamer argued that the interpreter can never extricate himself from the entanglements of his history and the prejudices that come with those entanglements. The interpreter's history is always constitutively involved in his process of understanding. Id.
hermeneutics sees interpretation as an activity of mutual constraint between the interpreter and the text.

A. The Historicity of Interpretation

Philosophical hermeneutics' rejection of the free and discretionary view of interpretation begins with an argument for the fundamental historicality of interpretation. Philosophical hermeneutics contends that every interpreter is historically situated. To be historically situated means to be inextricably located within a relational context that bears the stamp of the past. An interpreter's historical situatedness implies both that the interpreter cannot encounter the present without a direction to his project and a perspective of his text that are dictated to him from his past and, equally important, that there are parameters to his project and boundaries to his perspective. In other words, the interpreter's past not only provides certain possibilities for seeing the present, it also limits what can possibly be seen.

Both the possibilities and the limitations of the interpreter's present are a manifestation of the interpreter's "effective-history." The effective-history of an interpreter "determines in advance both what seems to [him] worth enquiring about and what will appear [to him] as an object of investigation." Put another way, it is the interpreter's "horizon," or "range of vision[,] that includes everything that can be seen from a particu-

102. See H. GADAMER, supra note 101, at 225-74. Gadamer is deeply indebted to Martin Heidegger for this view of the interpreter. In his phenomenology of man, Heidegger contended that man's being is "Dasein" (There-Being). M. HEIDEGGER, BEING AND TIME (1962). In other words, man is always located temporally and spatially. However, man does not exist solipsistically; his being is "Being-in-the-world." Id. at 78-90. By "world," Heidegger means not just the natural environment of entities, but the relational context in which man always finds himself immersed and in terms of which each entity is pregrasped and preunderstood. Id. at 91-145. The existential structures of "Being-in-the-world" are man's primordial "being-with" objects of experience, his "being-in" situations, and his "being-towards" (caring for) objects of experience. Id. at 149-273. Each of these structures presumes that man "grasps in advance" the objects of his experience because of his primordial relation to them. Id. at 188-95. Consequently, human understanding has a prestructure which comes into play in all interpretation. For this reason, "[i]nterpretation is never a presuppositionless apprehending of something presented to us" in advance. Id. at 191-92. Gadamer seized upon these basic insights about man and interpretation. "Heidegger's temporal analytics of human existence (Dasein) has, I think, shown convincingly that understanding is not just one of the various possible behaviours of the subject, but the mode of being of [man] itself." H. GADAMER, supra note 101, at xviii; see also J. BLEICHER, supra note 4, at 98-103; R. PALMER, supra note 4, at 124-61.


104. Id. at 267-68.
lar vantage point." Moreover, the effective-history of an interpreter infuses him with pre-judgments that he cannot possibly dispossess himself. Because he sees the present only in terms of judgments that he has drawn in the past, the interpreter's past judgments predispose him to judge the present in the same way. The interpreter always approaches the text with certain expectations that reflect his past experience.

Not only is the interpreter historically situated, but so is his text. The effective-history of the text is manifest in the manner in which it has been previously understood. Its "horizon" is the range of its prior interpretations; its pre-judgment is how it has come to be judged by others. Importantly, it is the text's grounding in history that makes its present interpretation possible. The interpreter's and the text's sharing of history allows the interpreter to have access to the text, to find relation with it, or to have a basis for understanding it at all. In other words, a common history provides the medium for interpreting the text and determining its meaning.

Given the historicality of both interpreter and text, philosophical hermeneutics maintains that interpretation and meaning are possible only because of the interpreter's historically based pre-judgments of the text. This claim is illustrated by re-

105. Id. at 269.


[T]he historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world. They are simply conditions whereby we experience something—whereby what we encounter says something to us.

Id. Certainly, one of the most controversial aspects of philosophical hermeneutics is the notion that pre-judgment has positive, rather than negative value for interpretation. Gadamer attributes the negative connotation of pre-judgment to the Enlightenment. H. GADAMER, supra note 101, at 239-45. The Enlightenment idealized reason as the autonomous determiner of judgments. Pre-judgments were seen as being remnants of an unenlightened mentality that impedes rational self-determination. Truth was obtained by rejecting pre-judgments and establishing an impartial system of rules and methodological principles. Gadamer seeks to rehabilitate the concept of pre-judgment. Given man's historicality, pre-judgments are an ontological fact.

107. In the case of an interpreter's original reading of a text, the horizon of the text is not so much evident in its historicality as it is in its linguisticality. In this case, the text is intellectually accessible to the interpreter primarily because of their sharing of a common language. As will be shown in section C, language has an horizon too; it is the peculiar world view of the community that possesses the language. See infra text accompanying notes 134-41. For this reason, the interpreter will always have certain expectations of meaning from the language in which he is immersed.
flecting on the common interpretation of any written text. When an interpreter encounters a written text, he performs an act of projection. He projects onto the text the meaning that he anticipates the text as a whole may have for him; his "effective-history" disposes him to pre-judge the possible meaning of the text. However, in projecting the "fore-meaning"\textsuperscript{108} of the text, the interpreter may encounter passages that call into question its suitability and adequacy as an account. Most likely, the interpreter will be "pulled up short by the text," signifying that the projected meaning of the text "does not yield any meaning or [the text's] meaning is not compatible with what [the interpreter] had expected."\textsuperscript{109} Consequently, the interpreter is compelled to account for the unsettling passage in his understanding of the text and to revise his fore-meaning accordingly. The revised fore-meaning then becomes the newly projected meaning, and the process of projection from fore-meaning to particular textual passages and back to fore-meaning continues as before. "The working out of this fore-project, which is constantly revised in terms of what emerges as [the interpreter] penetrates into the meaning, is understanding what is there."\textsuperscript{110}

In this illustration, the interpreter's pre-judgments "constitute the initial directedness of [his] whole ability to experience [the text] at all."\textsuperscript{111} His pre-judgments direct him to the text as an object worthy of inquiry; they are the ground for his initial interest in reading the text. Moreover, his pre-judgments direct him along a particular course of inquiry; they are the fore-meanings that he projects for the text as a whole and that are revised as they become challenged by the text itself. Although the interpreter's pre-judgments constitute his initial direction, they do not necessarily constitute solely his understanding of the text. His pre-judgments may turn out to be legitimate, and thus pro-

\textsuperscript{108} H. Gadamer, supra note 101, at 237.

\textsuperscript{109} Id. For a brief discussion of what philosophical hermeneutics intends in the word "meaning," see supra note 122 and authorities cited therein.

\textsuperscript{110} H. Gadamer, supra note 101, at 236. The constant movement from the interpreter's pre-judgment of the text to a particular passage of the text and back to pre-judgment, with both informing each other, illustrates the basic epistemological model of philosophical hermeneutics known as the "hermeneutical circle." See supra note 101. The "hermeneutical circle" should not be understood to be viciously inescapable. For a cogent clarification of this commonly misunderstood aspect of philosophical hermeneutic theory, see D. Hoy, supra note 4, at 2-6.

ductive for understanding, if they are confirmed in being “worked out” with the passages of the text. But his pre-judgments may also turn out to be illegitimate, and thus unproductive for understanding, if they “come to nothing in the working out.”112 In either case, however, it is only in terms of the interpreter’s pre-judgments that judgments of the text can be reached. The crucial point is that pre-judgments become legitimate or illegitimate only if the interpreter allows them to be challenged and questioned by the object of his inquiry. Otherwise, the interpreter’s pre-judgments become definitive and prescribe how he will understand the text.

An interpreter prevents his pre-judgments from prescribing his understanding of the text by being “effective-history conscious.”113 Such consciousness entails awareness of his pre-judgments and suspension of the effects of his effective-history. Admittedly, suspension of effective-history is impossible in any absolute sense. “The prejudices and fore-meanings in the mind of the interpreter are not at his free disposal. He is not able to separate in advance the productive prejudices that make understanding possible from the prejudices that hinder understanding and lead to misunderstandings.”114 But latent pre-judgments can be teased into the foreground of awareness through an open and direct confrontation with the text. In confronting the text, the interpreter encounters its “otherness” which throws his pre-judgments into contrasting relief and thereby casts them into the foreground of awareness for his critical scrutiny.115

Although the text is historically related to the interpreter, it is nonetheless “an historically intended separate object.”116 In other words, it is not only physically separate but also temporally distant in its creation from the interpreter’s present. Im-

112. H. Gadamer, supra note 101, at 237.
113. Id. at 268-71.
114. Id. at 263.
115. Linge, supra note 101, at xx-xxi. Linge illustrates this phenomenon in the history of cultures:

[It is in times of intense contact with other cultures (Greece with Persia or Latin Europe with Islam) that a people becomes most acutely aware of the limits and questionableness of its deepest assumptions. Collision with the other’s horizons makes us aware of assumptions so deep-seated that they would otherwise remain unnoticed. This awareness of our own historicity and finitude—our consciousness of effective history—brings with it an openness to new possibilities that is the precondition of genuine understanding.

Id. at xxi.
116. H. Gadamer, supra note 101, at 263.
portantly, every interpreter, even the creator of the text, must accomplish his interpretation across some temporal distance that is never “a closed dimension, but is itself undergoing constant movement and extension.” This means that the interpreter always occupies a new present in relation to the text, giving him a new perspective (or pre-judgment) of the text that is shaped by concerns and expectations inherited from his constantly extending past. For this reason, a text is always endowed with a sense of “otherness,” or “strangeness.” To be sure, the text retains its sense of “familiarity” as well, because of its presence in the interpreter’s history (and, as will be shown later, language); this familiarity is manifest in the interpreter’s capacity to pre-judge the text.

Thus, the interpreter’s open and direct confrontation with the text reveals a “polarity of familiarity and strangeness.” This polarity creates a contrast between what the interpreter presently expects to understand from the text and what the text historically has to say.

If a person is trying to understand something, he will not be able to rely from the start on his own chance previous ideas, missing as logically and stubbornly as possible the actual meaning of the text until the latter becomes so persistently audible that it breaks through the imagined understanding of it. Rather, a person trying to understand a text is prepared for it to tell him something. That is why a hermeneutically trained mind must be, from the start, sensitive to the text’s quality of newness. But this kind of sensitivity involves neither ‘neutrality’ in the matter of the object not the extinction of one’s self, but the conscious assimilation of one’s own foremeanings and prejudices. The important thing is to be aware of one’s own bias, so that the text may present itself in all its newness and thus be able to assert its own truth against one’s own foremeanings.

In other words, if the interpreter is open to the text, meaning that he is genuinely prepared to receive its message, then the text may expose his pre-judgments by way of establishing a contrast between itself and those pre-judgments. In this way, the

117. Id. at 266.
118. Id. at 262.
119. Id.
120. Id. at 262-63.
121. Id. at 238.
interpreter becomes aware of his pre-judgments and avoids the prescriptive effect they would have on his understanding of the text were they to remain latent in his consciousness.

This open confrontation between the interpreter's pre-judgments and the text is the process by which the true meaning of the text emerges. In allowing constantly emerging pre-judgments to be contrasted and tested against the text, the interpreter is in the position to discard pre-judgments that obscure textual understanding and to retain pre-judgments that are confirmed by the text. In short, temporal distance between interpreter and text does not obstruct understanding, but actually produces it. Temporal distance acts as a "filtering process;" it "not only lets those prejudices that are of a particular and limited nature die away, but causes those that bring about genuine understanding to emerge clearly as such." For this reason, interpretation and the determination of meaning are never a completed task, but are "an infinite process."

In sum, the view of interpretation that emerges from a dis-

122. In the parlance of philosophical hermeneutics, meaning is something that neither inheres in an object nor attaches to it as an arbitrary projection of thought. Meaning is contextual, occurring only in relationships with the interpreter. Meaning is seen as always being "for us;" it is found in making the unintelligible intelligible in terms of our present concerns and expectations, just as Hermes made the unintelligible world of the gods intelligible to man through the medium of man's own language. See R. Palmer, supra note 4, at 118-21, 184.

This determination of meaning is thus dependent on the interpreter making the text "applicable" to him. Application is a crucial dimension of interpretation. See D. Hoy, supra note 4, at 51-61. Gadamer believed that interpretation in theological and judicial contexts is particularly exemplary of this dimension:

In both legal and theological hermeneutics there is the essential tension between the text set down—of the Law or of the proclamation—on the one hand and, on the other, the sense arrived at by its application in the particular moment of interpretation, either in judgment or in preaching. A law is not there to be understood historically, but to be made concretely valid through being interpreted. Similarly, a religious proclamation is not there to be understood as a merely historical document, but to be taken in a way in which it exercises its saving effect. This includes the fact that the text, whether law or gospel, if it is to be understood properly, i.e., according to the claim it makes, must be understood at every moment, in a particular situation, in a new and different way. Understanding here is always application.

H. Gadamer, supra note 101, at 275, 289-305. Both judicial and theological interpretation see the task as an effort to mediate the temporal distance between the historic text and the present situation. Thus, interpretation is not the objective reconstruction of another world in its own terms, nor the subjective determination of the world in terms of the interpreter's own vision and thoughts.

124. Id. at 265.
cussion of its historicality is fundamentally different from objective and subjective interpretivism. Interpretation is a dynamic interaction, between the interpreter (his pre-judgments) and the text (its historical meaning), from which meaning is determined. The interpreter's pre-judgments contribute to the determination of meaning by providing the basis on which the text is made intelligible to the interpreter. But these pre-judgments do not prescribe meaning. So long as the text is allowed to have expression and to challenge the interpreter's pre-judgments, the text contributes to the determination of meaning by compelling revised understandings of it. As a result, interpretation is *neither free nor constrained, but is free and constrained*. It is free in the sense that the interpreter approaches the text in accordance with his pre-judgments concerning it. But it is also constrained in the sense that these pre-judgments, shared by both interpreter and text in their common historical medium, are subject to modification and revision in the interaction between the interpreter and the text.

**B. The Dialogical Structure of Interpretation**

As maintained in section A, interpretation requires openness to the text, meaning that the interpreter lays open the possibility that the text may have something to say different from the interpreter's expectation of its meaning. But in so doing, the interpreter assumes the risk that the suitability of his pre-judgments for understanding the text may be called into question by the claims of the text itself. Indeed, the laying open of possibilities for other meanings of the text is the "essence of the question."\(^\text{125}\) For this reason, interpretation is said to have the structure of questioning.\(^\text{126}\) The text asserts its claims, calling into question the interpreter's pre-judgments; the interpreter answers with revised judgments of the text that are drawn in terms of his prior understandings and the message of the text, but

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125. *Id.* at 266. Gadamer indicates elsewhere that the openness that is “questioning” is not intermittent, but continuous and infinite:

> Dialectic, as the art of asking questions, proves itself only because the person who knows how to ask questions is able to persist in his questioning, which involves being able to preserve his orientation towards openness. The art of questioning is that of being able to go on asking questions, [i.e.,] the art of thinking. It is called “dialectic”, for it is the art of conducting a real conversation.

*Id.* at 330.

126. *Id.* at 266.
which may be called into question again by other textual passages.

This question-answer-question structure suggests that the interpretive interaction between the interpreter and the text is dialogical. Indeed, dialogue is precisely the relationship the interpreter achieves with the text. The dialogues of Plato are paradigmatic of the character of the dialogue that occurs in interpretation.\textsuperscript{127} The purpose of the Platonic dialogues is for the interlocutors to reach a transcendent understanding about an issue of common concern. Importantly, the individuality of each interlocutor is not to be neutralized but is significant in achieving of this understanding. For instance, the confrontation between Socrates, the man of contemplation, and Callicles, the man of action, in the \textit{Gorgias}\textsuperscript{128} casts their peculiar pre-judgments into contrasting relief for their mutual scrutiny. The result of their confrontation is thus more likely to be true understanding because it is accomplished in terms of each others’ pre-judgments and transcends each one’s purely subjective perspective.

The interlocutors of a Platonic dialogue move beyond their subjective perspectives when they inquire into the subject matter of the dialogue. In other words, the more an interlocutor opens himself to the subject matter, the more his personal opinions cease to prescribe his understanding. An interlocutor becomes engaged in an inquiry \textit{with} the other interlocutors and falls out of an interrogation \textit{of} them.\textsuperscript{129} He gets “caught up” in

\begin{enumerate}
\item\textsuperscript{127} \textit{Id.} at 325-41.
\item\textsuperscript{128} \textit{THE COLLECTED DIALOGUES OF PLATO} 299-307 (E. Hamilton and H. Cairns ed. 1961).
\item\textsuperscript{129} The distinction is crucial. Genuine dialogue is a focus on some subject matter, not on the particular interlocutors. To conduct a conversation “requires that one does not try to out-argue the other person, but that one really considers the weight of the other’s opinion.” H. Gadamer, \textit{supra} note 101, at 330. The effort to “out-argue” is an undertaking that presupposes the validity of one’s own position and focuses on changing another person’s views to conform with one’s own. However, this kind of dialogue is inconsistent with the requirement of openness that leads to understanding because it is so uninterested in the other. Genuine dialogue is openness to another person’s views, which changes the tenor of the undertaking into a common inquiry about some issue of common concern.

Just as there are legitimate and illegitimate pre-judgments, see \textit{supra} text accompanying notes 111-12, so there are legitimate and illegitimate inquiries (or questionings). Legitimate (or “true”) questioning is an inquiry with the answers still undetermined. Illegitimate (or “false”) questioning is an inquiry with predetermined answers; it is concerned with hearing only what it has already decided is worthwhile to hear. This kind of questioning is illegitimate because it is so one-sided. H. Gadamer, \textit{supra} note 101, at 326-27.
\end{enumerate}
the conversation; he becomes engaged or possessed by the back-and-forth movement of the dialogue. At this point, the dialogue takes on a life of its own that is filled with unanticipated developments that carry the interlocutor beyond his present perspective. Although we frequently say that one may "conduct" a conversation, or dialogue, "the more fundamental a conversation is, the less its conduct lies within the will of [the parties]. . . .

Philosophical hermeneutics rejects illegitimate questioning in all its forms, including methods of prescribed inquiry. Methods are rejected as illegitimate because of their prescription of a correct answer to their inquiries:

Strictly speaking, method is incapable of revealing new truth; it only renders explicit the kind of truth already implicit in the method. The discovery of the method itself was not arrived at through method but dialectically, that is, through a questioning responsiveness to the matter being encountered. In method the inquiring subject leads and controls and manipulates; in dialectic the matter encountered poses the question to which he responds.

R. Palmer, supra note 4, at 165. The philosophical roots for the rejection of methods are found in M. Heidegger, Question, supra note 5, at 3; M. Heidegger, Age, supra note 5, at 115.

130. "What emerges in its truth is the logos, which is neither mine nor yours and hence so far transcends the subjective opinion of the partners to the dialogue that even the person leading the conversation is always ignorant." H. Gadamer, supra note 101, at 331. Later, Gadamer argues that the phenomenon of "hearing" illustrates the impossibility of subjectivity in genuine dialogue. Id. at 419-21.

Unlike seeing, where one can look away, one cannot "hear away" but must listen, unless the language is an alien one or is mere chatter. Even idle chatter has a way of captivating the listener against his will. Hearing implies already belonging together in such a manner that one is claimed by what is being said.

D. Hoy, supra note 4, at 66.

The notion of being carried by the dialogue is illuminated by a second phenomenon used to support the hermeneutic view of interpretation—the phenomenon of a game (or "playing"). H. Gadamer, supra note 101, at 91-114. The fundamental characteristic of the phenomenon of playing is the total absorption of the player in the back-and-forth movement of the game. In genuine playing, a player does not hold himself back in self-awareness, reflecting on the game as an object of definable procedures and rules. A player who cannot lose himself in earnest in the playing is a "spoilsport"—one who cannot play. Id. at 91-92. Similarly, playing "cannot be taken as an action of subjectivity . . . and self-possession. The real subject of playing is the game itself." Linge, supra note 101, at xxiii. The playing possesses the players; it has primacy over the players engaged in it. Moreover,

[t]he movement of playing has no goal in which it ceases but constantly renews itself. That is, what is essential to the phenomenon of play is not so much the particular goal it involves but the dynamic back-and-forth movement in which the players are caught up—the movement that itself specifies how the goal will be reached.

Id. In other words, playing has its own momentum and carries its players along with it. The point is that interpretation involves the same kind of absorption of the interpreter in the question-answer-question movement between himself and the text.
[T]he people conversing are far less the leaders of it than the led. No one knows what will ‘come out’ in a conversation.”

This phenomenon of dialogue illustrates the nature of the relationship to be achieved between the interpreter and the text. Like dialogue, interpretation is an inquiry into a subject matter that concerns both the interpreter and the text. Like dialogue, interpretation also requires an openness to the particular viewpoint of another, meaning “acknowledgment that [the interpreter] must accept some things that are against [himself].” Only in this way do both the interlocutor and the interpreter permit themselves to be engaged by the dialogical interaction and carried by it beyond their present perspectives. In short,

both [dialogue and interpretation] are concerned with an object that is placed before them. Just as one person seeks to reach agreement with his partner concerning an object, so the interpreter understands the object of which the text speaks.

... [In] the successful conversation they both come under the influence of the truth of the object and are thus bound to one another in a new community ... [it is] a transformation into a communion, in which we do not remain what we were.

Again, this dimension of the philosophical hermeneutic characterization of interpretation differs fundamentally from the presumption of objective and subjective interpretivism. Interpretation is not an essentially free and discretionary activity for which the existence of constraints is in dispute. Because interpretation does not occur independently of the dialogical relation between the interpreter and the text, it makes no sense to view the interpreter as essentially free to construe the text according to his subjective values. Interpretation is not a manipulative action of the interpreter's subjectivity, but is rather his placing of himself in dialogue with the text so that both the interpreter and the text move into a new understanding.

C. The Linguisticality of Interpretation

In sections A and B, interpretation has been shown to be a
transsubjective event. Both the interpreter and the text are absorbed in a dialogical interaction from which new understandings arise. But the peculiar perspective of neither the interpreter nor the text is to be extinguished. The confrontation of these perspectives initiates the dialogical movement towards understanding because of their contrast. In previous sections of this comment, the medium in which the dialogical interaction of interpretation occurs has been referred to simply as the common history of the interpreter and the text. However, this historical relation is not to be construed as something vague and intangible; it has its concrete manifestation in language. For this reason, language is seen as being the "concretion of effective-historical consciousness."\textsuperscript{134}

The history of both the interpreter and the text makes itself known in the present by way of language. Language is the concrete means by which the judgments and understandings of the past are carried into the present. Thus, the interpreter's effective-history that provides his present pre-judgments exists in the language he employs.

To say that the horizons of the present are not formed at all without the past is to say that our language bears the stamp of the past and is the life of the past in the present. Thus the prejudices [that philosophical hermeneutics] identifies as more constitutive of our being than our reflective judgments can now be seen as embedded and passed on in the language we use. Since our horizons are given to us prereflectively in our language, we always possess our world linguistically. Word and subject matter, language and reality, are inseparable, and the limits of our understanding coincide with the limits of our common language.\textsuperscript{135}

Thus, the mediation that occurs between an interpreter and the text, as in the dialogue between interlocutors, can be seen as "the full realisation of conversation, in which something is expressed that is not only [the interpreter's] or [his text's], but common."\textsuperscript{136}

The linguisticality of effective-history means that interpretation can occur neither prelinguistically nor extralinguistically. Not only does the text appear to the interpreter in terms of lan-

\textsuperscript{134} Id. at 351.
\textsuperscript{135} Linge, \textit{supra} note 101, at xxviii.
\textsuperscript{136} H. GADAMER, \textit{supra} note 101, at 350.
guage, but the interpreter can approach the text only in terms of language. There is no world outside language.¹³⁷

[T]he linguistic quality of our experience of the world is prior, as contrasted with everything that is recognised and addressed as being. The fundamental relation of language and world does not, then, mean that world becomes the object of language. Rather, the object of knowledge and of statements is already enclosed within the world horizon of language. The linguistic nature of the human experience of the world does not include making the world into an object.¹³⁸

In other words, there is no world outside its presence as the subject matter of some language community. One cannot experience language prior to experiencing the world, nor the world prior to experiencing language. “We cannot see a linguistic world from above in this way, for there is no point of view outside the experience of the world in language from which it could itself become an object.”¹³⁹

Consequently, language is not simply an optional function that the interpreter engages in or does not engage in at will.¹⁴⁰

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¹³⁷. The idea of “world” has peculiar significance in philosophical hermeneutics. The idea has its origins in Martin Heidegger’s phenomenology of man. See supra note 102. World is not the environment, the sum total of all objects; it is rather the entire relational context in terms of which every object is pregrasped. Therefore, the world is never separate from man; it is prior to any separation from the objects of the world. M. HEIDEGGER, supra note 102, at 91-148. Philosophical hermeneutics carries forward Heidegger’s notion of world by making explicit that the human experience of world is linguistic. H. GADAMER, supra note 101, at 397-414.

¹³⁸. H. GADAMER, supra note 101, at 408.

¹³⁹. Id. at 410. The peculiar world of a language community is known to any person who has mastered a foreign language. The language is a repository of cultural-historical experience. Consequently, many of its words and phrases have a richness of meaning that reflects that experience and, therefore, can be fully understood only by total immersion in the culture of the language community. Not surprisingly, translation of such words and phrases requires much more than mechanical synonym finding; it requires explanation of the foreign context of understanding. However, even with such an explanation there is always a sense of the loss of the dimensions of the language. See id. at 345-51.

¹⁴⁰. The fact that the world cannot be grasped prelinguistically or extralinguistically is illustrated by our complete possession by language in even thinking about language:

[A]ll thinking about language is already once again drawn back into language.

We can only think in a language . . . .

Language is not one of the means by which consciousness is mediated with the world. . . . Language is by no means simply an instrument, a tool. For it is in the nature of the tool that we master its use, which is to say we take it in hand and lay it aside when it has done its service. That is not the same as when we take the words of a language, lying ready in the mouth, and with their
Language is beyond the interpreter's manipulative control because it is between him and the text, making possible his very relating to it. The interpreter cannot first have an extralinguistic contact with the text and then put the text into the instrumentation of language. "Language is not just one of man's possessions in the world, but on it depends the fact that man has a world at all."141 Language is the very relational context in terms of which any text is pregrasped. Indeed, because language is presupposed in every act of interpretation of any text, it is prior to any separation of the interpreter and the text. Language is, therefore, prior to all objectivity and subjectivity since both are conceived within a schema that separates subject from object.

III. THE IMPLICATION OF PHILOSOPHICAL HERMENEUTICS FOR THE ANGLO-AMERICAN VIEW OF ADJUDICATION

Philosophical hermeneutics is a theory of interpretation that directly conflicts with the view of interpretation assumed in Anglo-American jurisprudence. The assumption is that interpretation is free and discretionary, meaning that no common standards exist between the interpreter and the text to provide guidance for evaluating and judging the text. In a fundamental sense, the interpreter and text are assumed to be independent of each other. This assumption yields two approaches to adjudication. The objective interpretivist approach constructs preestablished norms for inquiry that reflect the characteristics of the text itself so that the interpreter's judgment identifies with the text. The subjective interpretivist approach insists that judgments of the text will be drawn only in terms of the interpreter's preconceptions of the text. In other words, while the objectivist sees an independent text as determining understanding, the subjectivist sees an independent interpreter as determining understanding.

The hermeneutic theory of interpretation, on the other hand, views interpretation as a dialogical interaction of inter-

141. H. GADAMER, supra note 101, at 401.
preter and text that is mediated by their common history and language. As a result, neither interpreter nor text is sufficiently independent to be determinative of meaning. The text prevents the interpreter from being the sole determiner of meaning by providing a contrasting relief against which the interpreter's pre-judgments are brought to awareness for critical scrutiny. Likewise, the interpreter prevents the text from being the sole determiner of meaning since the text is intelligible only in terms of the interpreter's pre-judgments. In these fundamental ways, the determination of meaning is beyond the control of either interpreter or text; indeed, both contribute to the determination of meaning interdependently.

In contrast to Anglo-American jurisprudence, philosophical hermeneutics concludes that interpretation is never an activity in need of constraints because it is a structure of existential constraints. These existential constraints are the interrelations that exist between the interpreter and the text prior to interpretation. The interpreter's access to the text is made possible only because of the a priori mediation provided by their shared historical and linguistic context. This contextual interrelatedness provides both the possibilities and the limitations of the interpretation. Moreover, the interpreter and text stand in a dialogical relation without which interpretation cannot possibly occur. The dialogical relation is prior to interpretation in the sense

142. A similar idea has been expressed by Professor Stanley Fish in a critical response to Dworkin's "chain novel" analogy for adjudication. Fish criticizes Dworkin for presuming the interpretive freedom of the first author in the chain. See supra note 41.

['The first author has surrendered his freedom (although, as we shall see, surrender is exactly the wrong word) as soon as he commits himself to writing a novel . . . . He must decide, for example, how to begin the novel, but the decision is not "free" because the very notion "beginning a novel" exists only in the context of a set of practices that at once enable and limit the act of beginning. One cannot think of beginning a novel without thinking within, as opposed to thinking "of," these established practices, and even if one "decides" to "ignore" them or "violate" them or "set them aside," the actions of ignoring and violating and setting aside will themselves have a shape that is constrained by the preexisting shape of those practices. This does not mean that the decisions of the first author are wholly determined, but that the choices available to him are "novel writing choices," choices that depend on a prior understanding of what it means to write a novel, even when he "chooses" to alter that understanding. In short he is neither free nor constrained (if those words are understood as referring to absolute states), but free and constrained. He is free to begin whatever kind of novel he decides to write, but he is constrained by the finite (although not unchanging) possibilities that are subsumed in the notions "kind of novel" and "beginning a novel."']

Fish, supra note 5, at 553.
that interpretation cannot be undertaken without the open dialogical interaction of interpreter and text. Importantly, these interrelations are said to be existential because they constitute the very manner of the interpreter's existence with the text.\textsuperscript{143} Again, the implication is that interpretation is so fundamental to the interpreter's means of knowing the text that the act of interpretation cannot be manipulatively controlled by the interpreter.

The view of interpretation provided by philosophical hermeneutics represents a direct theoretical challenge to Anglo-American jurisprudence. Because Anglo-American jurisprudence presumes that interpretation is an essentially unrestrained activity, the jurisprudential debate has focused on the availability of constraints for interpretation. Unfortunately, this debate has proceeded without a specific and systematic examination of the nature of interpretation upon which the entire debate rests. Philosophical hermeneutics is challenging because its examination of the nature of interpretation concludes that interpretation is not what traditional Anglo-American jurisprudence has blindly presupposed. Therefore, the ground upon which the objective and subjective interpretivist debate stands is gone.

This theoretical challenge deserves careful attention from the Anglo-American jurisprudential community.\textsuperscript{144} Anglo-Amer-
can jurisprudence can only stand to benefit by directing its attention to the theory of interpretation provided by philosophical hermeneutics. In the very least, attention to the hermeneutic theory of interpretation, even if it were ultimately rejected, could induce the critical and systematic jurisprudential study of the nature of interpretation that has heretofore been assumed but never studied. However, careful attention to the hermeneutic theory of interpretation will more than likely lead to an abandonment of the prevailing jurisprudential assumption about the nature of interpretation and a transcendence of the objective and subjective interpretivist debate that preoccupies Anglo-American jurisprudence.

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to mediate these conflicting historically-based expectations, including his own pre-judgments that may come into play with the interests of the present case. See supra note 122.

Second, the idea that this mediation occurs in language is relevant to the judicial context. Law is language-bound because all the materials of the law have their existence in language. Any use of these materials in any context, including negotiation, litigation, and adjudication, occurs in language as well. In a very important sense then, the judicial interpreter is a necessarily obligated participant in language. The consequence of his participation is that his resolution of the litigants' claims is regulated by the same terms and conditions of language that regulated the linguistic articulation of those claims.

Third, and perhaps most important, the idea of the dialogical structure of interpretation is relevant to the judicial context. In the adjudicative process, the judicial interpreter is obligated to hear claims that he might not otherwise want to hear, to listen to all persons who will be directly affected by his resolution of their claims, and to respond specifically to these claims by resolving them and assuming responsibility for that resolution. In other words, the adjudicative process institutionally compels the judicial interpreter to confront openly and directly the interests and expectations of others. Philosophical hermeneutics indicates the significance of this confrontation for the judicial interpreter. The judicial interpreter's pre-judgments are brought to awareness (for him as well as for others) only when cast into contrasting relief against judgments that are different from his own. Once his pre-judgments are illuminated, they are more easily subject to critical evaluation (by him as well as by others) for their suitability in the resolution of the dispute. In sum, the judicial interpreter is restrained by the very nature of his undertaking from interpreting in a free and discretionary manner.