FOUCAULT AND GADAMER: LIKE APPLES AND ORANGES PASSING IN THE NIGHT

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INTRODUCTION

In introducing their book, *Michel Foucault: Beyond Structuralism and Hermeneutics*, (first published in 1982, one of the earliest attempts in English at a book-length exposition of the direction and nuances of Foucault’s work—one which has stood the test of time), Hubert Dreyfus and Paul Rabinow tell us that philosophical hermeneutics “gives up the phenomenologists’ attempt to understand man as a meaning-giving subject, but attempts to preserve meaning by locating it in the social practices and literary texts which man produces.”¹ They go on to identify two types of hermeneutics which emerged from Heidegger’s *Being and Time*.

The first involves “the way Dasein interprets itself in this everyday activity. This ‘primordial understanding’ in our everyday practices and discourse, which is overlooked by the practitioners but which they would recognize if it were pointed out to them, is the subject of much recent hermeneutic investigation.”² This school of Heideggerian hermeneutics³ “claims to find that the deep truth hidden by the everyday practices is the unsettling groundlessness of a way of being which is, so to speak, interpretation all the way down.”⁴ They suggest that this school can be characterized as “the hermeneutics of suspicion.”⁵

The second type of hermeneutics is that developed by Hans-Georg Gadamer. It “gives deep hermeneutics a more positive

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2. Id. at xvii.
3. See id. at xvii-xviii. They cite Harold Garfinkel, Charles Taylor, Clifford Geertz, and Thomas Kuhn as examples.
4. Id. at xviii.
5. Id.
direction as a method for reappropriating a profound understanding of Being preserved in traditional linguistic practices.” Dreyfus and Rabinow argue that Foucault does not belong in either of these groupings of hermeneutists. They express their argument with a great deal of vigor in regard to the second possibility:

Foucault is not interested in recovering man’s unnoticed everyday self-interpretation . . . . Foucault does not believe that a hidden deep truth is the cause of the misinterpretation embodied in our everyday self-understanding. He [Foucault] captures all such positions . . . [especially] Gadamer’s[1] at an appropriate level of abstraction when he defines what he calls commentary “as the re-apprehension through the manifest meaning of discourse of another meaning at once secondary and primary, that is, more hidden but also more fundamental” [The Order of Things]. Such an account of interpretation, he claims, “dooms us to an endless task . . . rest[ing] on the postulate that speech is an act of ‘translation’ . . . an exegesis, which listens . . . to the Word of God, ever secret, ever beyond itself” [Birth of the Clinic]. Foucault dismisses this approach with the remark, “For centuries we have waited in vain for the decision of the word [Birth of the Clinic].”

Charged, as I am, with exploring the possibility that Gadamerian philosophical hermeneutics, especially as it has been taken up as a framework for furthering critical sociolegal investigations, may have some things in common with some recent developments in Foucaultian thinking—the “governmentality” approach—which has also recently started being used to guide some excursions into sociolegal studies, I would like to say that things have changed since Dreyfus and Rabinow penned the above sentiments. I would like to, but I cannot. While certain Gadamerian moves seem at first glance to speak directly to the Foucaultian “governmentality” way of going about particular studies, including sociolegal studies, on closer examination the similarities evaporate. While I do my best to sound a positive “let’s get together again soon” note, I confess at the outset that most of my argument here suggests that Foucaultian sociolegal studies and Gadamerian sociolegal studies will remain no more than nodding acquaintances.

I am not particularly concerned here with promoting the Foucaultian governmentality approach, or even explicating it, though I readily acknowledge that I am very much a Foucaultian governmentality thinker in the Gadamerians’ den.8

6. Id. at xix.
7. Id.
8. "Being a Foucaultian" is, as far as I can tell, my only "area of expertise" (a tragic
In the first Part of this Article, I provide both a brief summary of the governmentality approach and a few indications of its applicability to sociolegal studies, but I do so more by way of allowing the reader to see the position from which I pose my gloomy assessment of potential relations between the Gadamerians and Foucaultian governmentality scholars than by way of serious explication. In the second Part, I go on with my opening gambit—examining some basic differences between the main direction of Foucault’s work and philosophical hermeneutics. Third, I explore a small sample of Gadamerian literature to show how the pieces examined in fact support the proposition that useful links between Gadamerians and Foucaultians are unlikely. Finally, I discuss just a few possible exceptions to this trend, taking us more firmly onto the ground of the sociolegal (a ground which is glimpsed at various points in the earlier parts).

Please allow me a point of terminology before I proceed. I appreciate that the focus of this Symposium is “critical legal studies,” and I appreciate that this is a very definite movement within North American sociolegal scholarship as well as a definite way of approaching such scholarship. I beg the reader’s indulgence here: the term has no such currency in Australia. As such, I prefer, as is already clear, the Anglo-Australian term “sociolegal studies,” and I use it or some variant of it throughout.

I. SUMMARIZING THE FOUCAULTIAN GOVERNMENTALITY APPROACH AND ITS POTENTIAL FOR SOCIOLEGAL SCHOLARS

In a recent, comprehensive book-length survey of the notion of governmentality, Mitchell Dean acknowledges that the “study of governmentality is continuous with” some aspects of theories of the state (particularly in that it too “regards the exercise of power and confession in itself). I assume I have been invited to participate in this delightful Symposium—an invitation for which I am most grateful—in order provide a view from a Foucaultian perspective, not in spite of it.

9. I pretend to make no exegesis in this Part. I pointedly use a hybrid Gadamer/Gadamerian, constructed from parts presented to me by only a few scholarly writings, including some of a sociolegal nature. Even when the signatures on these resources include that of Hans-Georg Gadamer I do not claim to approach any “essence of Gadamer.” I make this move not just out of a commitment to a theoretical stance that denies the possibility of pinning down any authorial core, but more by way of realistic appraisal of what a short article such as this can achieve. I cannot offer anything approaching a comprehensive view or review, so I do not try (I do not insult Gadamerian scholarship by attempting to claim membership without the necessary qualifications). I can offer an argument, and that I do try; if my argument falls because my tiny sample of Gadamerian literature turns out to be an unrepresentative sample, then so be it.
authority as anything but self-evident”), notes that it “does, however, break with many of the characteristic assumptions of theories of the state,”\(^{10}\) and outlines Foucault’s understanding of the basic notion of government as “the conduct of conduct,” especially as it involves thinking about the very act of governing.\(^{11}\) He moves on to a definition of the term “governmentality”:

It is possible to distinguish two broad meanings of this term in the literature. The second is a historically specific version of the first\ldots In this first sense, the term “governmentality” suggests what we have just noted. It deals with how we think about governing, with the different mentalities of government\ldots The notions of collective mentalities and the idea of a historians of mentalities have long been used by sociologists (such as Emile Durkheim and Marcel Mauss) and by the *Annales* school of history in France\ldots For such thinkers, a mentality is a collective, relatively bounded unity, and is not readily examined by those who inhabit it\ldots The idea of mentalities of government, then, emphasizes the way in which the thought involved in practices of government is collective and relatively taken for granted\ldots [This] is to say that the way we think about exercising authority draws upon the theories, ideas, philosophies and forms of knowledge that are part of our social and cultural products.\(^{12}\)

Dean elaborates the second meaning (the one that is “a historically specific version of the first”) as follows:

Here, “governmentality” marks the emergence of a distinctly new form of thinking about and exercising of power in certain societies\ldots This form of power is bound up with the discovery of a new reality, the economy, and concerned with a new object, the population. Governmentality emerges in Western European societies in the “early modern period” when the art of government of the state becomes a distinct activity, and when the forms and knowledge and techniques of the human and social sciences become integral to it.\(^{13}\)

Such a complex approach obviously could not have come from just one schematic essay produced by Foucault in the late 1970s—*On Governmentality*.\(^{14}\) Rather, this approach is the culmination of a particular reading of Foucault’s *oeuvre* coupled with a rejection of standard sociological and political scientific accounts of power. There have been quite a few attempts by those who have followed Foucault

11. *Id.* at 10-16.
12. *Id.* at 16.
13. *Id.* at 19.
to explicate and defend this approach. I have already said this is not my task here, but before I move on to my main tasks, I present a couple of other introductions to the approach written directly for sociolegal audiences.

In a recent piece in a North American law journal, the noted Foucaultian sociolegal scholar Pat O’Malley goes about the task of introducing governmentality scholarship to an audience he assumes to be unfamiliar with it:

There is a considerable literature exploring and developing this approach... Such work has been influenced strongly by the thinking of Michel Foucault... but has been advanced primarily in recent years by British and Australian scholars. The journal Economy and Society has been a principal site for the development of this approach, which is frequently referred to as the “governmentality” literature. While “governmentality” refers to a particular technology of government that emerges in the eighteenth century, the term is more generally used to refer to the approach adopted in its study. The approach is characterized by two primary characteristics. The first is a stress on the dispersal of “government,” that is, on the idea that government is not a preserve of “the state” but is carried out at all level and sites in societies—including the self government of individuals.... The second is the deployment of an analytic stance that favors “how” questions over “why” questions. In other words it favors accounts in terms of how government of a certain kind becomes possible: in what manner it is thought up by planners, using what concepts; how it is intended to be translated into practice, using what combination of means? Only secondarily is it concerned with accounts that seek to explain government—in the sense of understanding the nature of government as the effect of other events.

In Foucault and Law, a book I published with Alan Hunt in 1994, governmentality is tackled thusly:

The Foucault who inspires this part of our book is the Foucault who is interested in government alongside power, the Foucault who uses the neologism “governmentality” to capture the dramatic changes in techniques of government developed in the western world from the eighteenth century onwards. This may not be the most popular

15. DEAN, supra note 10, is excellent. See also FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT (Andrew Barry et al. eds., 1996); GAVIN KENDALL & GARY WICKHAM, USING FOUCAULT’S METHODS (1999); GOVERNING AUSTRALIA (Mitchell Dean & Barry Hindess eds., 1998); NIKOLAS ROSE, GOVERNING THE SOUL (1989); THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY (Graham Burchell et al. eds., 1991); Peter Miller & Nikolas Rose, Governing Economic Life, 19 ECON. & SOC’Y 1 (1990); Nikolas Rose & Peter Miller, Political Power Beyond the State: Problematics of Government, 43 BRIT. J. SOC. 173 (1992).

Foucault, but we take it to be the most rewarding Foucault for those, like ourselves, interested in new directions for the sociology of law. We are inspired not just by Foucault's direct discussion of governmentality . . . but also and more importantly by the work of others heavily influenced by Foucault's work on this notion which is contributing to a distinctive approach . . . . We offer a sketch of governmentality here . . . such that we allow the reader some insight into the richness of the Foucaultian work in the area . . . . In simple terms, governmentality is the dramatic expansion in the scope of government, featuring an increase in the number and size of the governmental calculation mechanisms, which began about the middle of the eighteenth century and is still continuing. In this way, governmentality is about the growth of modern government and the growth of modern bureaucracies . . . the moment where Foucault meets Weber . . . . This simple definition is useful up to a point, but it does not capture enough of the subtlety of Foucault's concept. It does not, for example, allow us to follow closely Foucault's periodisation. While government and its mechanisms have indeed boomed from the eighteenth century onwards, this period is hardly unique in the history of widespread, sophisticated governmental techniques. Ancient Egypt, ancient Greece, ancient Rome and many examples from both the Western and Eastern worlds in the period from the fall of Rome to the middle of the eighteenth century all mark boom times for just such government; all these examples could be regarded as instances of governmentality were we to use only this simple definition . . . . To enhance this simple definition such that the nuances of Foucault's governmentality are more easily recognized, we suggest a series of interconnected definitions around the following themes: the emergence of the reason of state; the emergence of the problem of population; the birth of modern political economy; the move towards liberal securitisation; and the emergence of the human sciences as new mechanisms of calculation.  

All this adds up, I suggest, to a position whereby law is treated as another means of and site of government, a position which refuses the idea of law as some special area that influences government as an external force. Law, by this way of thinking, cannot possibly be reduced to a text or set of texts, to something that needs interpretation, or indeed to anything. As with other objects studied under governmentality, legal objects must be studied simply as discrete practices of government, in the broad sense Foucault understands it— "Practices of government . . . do not form those types of totalities in which the parts are expressions or instances of the whole. Rather,

they should be approached as composed of heterogeneous elements having diverse historical trajectories . . . .

II. FOUCAULT'S WORK IS NOT HERMENEUTICS

Dreyfus and Rabinow offer a particularly strong indication of Foucault's distance from hermeneutics by starting with "his earliest published work, the introduction to an essay by Binswanger" (a Heideggerian analyst). In this piece, they tell us, "Foucault clearly identified himself with the tradition of hermeneutic ontology which originated in Heidegger's Being and Time. As his interests in the social effects rather than the implicit meaning of everyday practices developed, however, Foucault simply left the concerns of the hermeneutic position behind." 19

Dreyfus and Rabinow back this up with other points against the proposition that Foucault might be read as sympathetic to, or in the tradition of, hermeneutics:

He has sought . . . to avoid the attempt of commentary as read off the implicit meaning of social practices as well as the hermeneutic unearthing of a different and deeper meaning of which social actors are only dimly aware. 20

We think Foucault is implying . . . that we cannot simply assume that there are deep meanings to investigate just because our culture tells us there are. This is just another way of saying that the notion of deep meaning is a cultural construction. 21

Dreyfus and Rabinow add to this last point in saying that Foucault is thereby showing us that "man as object and subject" is produced "in our objectified, meaning-obsessed society." 22

François Wahl, in exploring the possibility that Foucault is beyond philosophy, even goes so far as to suggest that Foucault is much more concerned to study philosophy as an "archaeological" object than to be a philosopher. 23 He suggests that Foucault's archaeological approach is certainly not philosophy in the way that

18. DEAN, supra note 10, at 29. For an indication of the direction of, and a bibliography for, the emerging governmentality sociolegal literature, see Nikolas Rose & Mariana Valverde, Governed by Law?, 7 SOC. & LEGAL STUD. 541 (1998).
19. DREYFUS & RABINOW, supra note 1, at xxiii.
20. Id. at xix-xx.
21. Id. at xxi.
22. Id. Graham Thompson also captures the Foucaultian opposition to "deep" meanings well. See Grahame Thompson, Causality in Economics: Rhetorical Ethic or Positivist Empiric?, 27 QUALITY & QUANTITY 47, 65-66 (1993).
hermeneutics is philosophy—"held in place by the chain of meaning"—though he goes on to propose that Foucault is a philosopher within a very definite view of the history of philosophy.24

Of course, in relying on Dreyfus and Rabinow's argument to the extent I am, I am duty-bound to point out that they are equally adamant that Foucault should not be seen as a structuralist or as a phenomenologist either (two strong possibilities for those twentieth-century thinkers who are tempted by hermeneutics but reject it). In saying that Foucault was always beyond hermeneutics, Dreyfus and Rabinow argue that Foucault was never a structuralist (even though he was tempted by structuralism) because he never totalized discourse: "Foucault never posited a universal theory of discourse, but rather sought to describe the historical forms taken by discursive practices."25

Not a discourse theorist, not a structuralist, not a phenomenologist, and certainly not a practitioner of hermeneutics. So, the question leaps out, how can Foucault's work be characterized? It is obviously a tough question. Dreyfus and Rabinow set out to answer it in a way many have sought to follow: Foucault builds his own distinctive approach. They tell us that in doing this, Foucault takes structuralism and hermeneutics as steppingstones of sorts: "Foucault is able to show how in our culture human beings have become the sort of objects and subjects structuralism and hermeneutics discover and analyze."26 In adding to this, Dreyfus and Rabinow assert that hermeneutics, along with structuralism and phenomenology, has failed to live up to its promise as a means of learning from the study of human beings. "Foucault offers, in our opinion, elements of a coherent and powerful alternative means of understanding."27

In discussing what Foucault actually does in getting away from structuralism and hermeneutics, Dreyfus and Rabinow are adamant that he "never gives up his earlier position that social institutions influence discursive practices," though he does modify it to a certain extent in The Archaeology of Knowledge. Via his archaeological method, they argue, Foucault "proposes to treat all that is said in the human sciences as a 'discourse-object.'"28 This method "must remain neutral as to the truth and meaning of the discursive systems it

24. Id. at 76-77.
25. DREYFUS & RABINOW, supra note 1, at vii-viii.
26. Id. at viii.
27. Id. at xiii.
28. Id. at xx.
studies, [it] is not another theory about the relation of words and things.  

Dreyfus and Rabinow admit to seeing flaws in Foucault's archaeological method, but they show how he rescues much from that method:

Foucault abandons only the attempt to work out a theory of rule-governed systems of discursive practices. As a technique, archaeology serves genealogy. As a method of isolating discourse objects, it serves to distance and defamiliarize the serious discourse of the human sciences. This, in turn, enables Foucault to raise the genealogical questions: How are these discourses used? What role do they play in society?

Dreyfus and Rabinow see Foucault's *History of Sexuality Volume One* as a further instance of archaeology and genealogy working together and pulling further away from hermeneutics. In this book, they say, "Foucault challenges the hermeneutic belief in deep meaning by tracing the emergence of sexual confession and relating it to practices of social domination."

Dreyfus and Rabinow say that Foucault's alternative direction "preserves the distancing effect of structuralism" and that it uses a key aspect of hermeneutics—"that the investigator is always situated and must understand the meaning of his cultural practices from within them." They add, noting that Foucault was trained in both Husserl's transcendental phenomenology and the "existential counter-movement led by Heidegger in Germany and Maurice Merleau-Ponty in France," that Foucault's new direction, like both structuralism and hermeneutics, is also a reaction to phenomenology and an attempt to "transcend the Kantian subject/object division" and to "eliminate the Husserlian conception of a meaning-giving transcendental subject."

So, Foucault's "new direction" owes a debt to at least some aspects of that which he is rejecting, yet this direction is markedly different than the other positions that grew from that which he is rejecting, especially, as I am at pains to show, Gadamerian

29. *Id.*
30. *Id.* at xx-xxi.
31. *Id.* at xxi. For other attempts to show the links between archaeology and genealogy, see *Kendall & Wickham, supra* note 15, at 24-34; Phil Bevis et al., *Archaeologizing Genealogy: Michel Foucault and the Economy of Austerity, in Foucault's New Domains*, at xxi (Mike Gane & Terry Johnson eds., 1993).
32. *Dreyfus & Rabinow, supra* note 1, at xxi.
33. *Id.* at vii.
34. *Id.* at xvii.
35. *Id.* at xv.
philosophical hermeneutics. I suggest the key to understanding this might be the fact that Foucault's reading of Heidegger is vastly different from Gadamer's reading. As such, we should bear in mind that while Foucaultian thinking and Gadamerian thinking both have a Heideggerian flavor, this does not suggest a back-door link between Foucaultians and Gadamerians. Let's explore the "Heideggerian flavor" in Foucault a little further.

The theme of a Heideggerian influence on Foucault, as summarized by Dreyfus and Rabinow, is taken much further by Dreyfus alone in a later piece. In that essay, Dreyfus sets out to see how far he can push a comparison between Heidegger's *Dasein* and Foucault's power.\(^{36}\) He offers a quote from Foucault's final interview: "For me Heidegger has always been the essential philosopher . . . . My entire philosophical development was determined by my reading of Heidegger."\(^{37}\) Dreyfus also quotes this interview to show that Foucault's heavy debt to Nietzsche is also a debt to Heidegger: "It is possible that if I had not read Heidegger, I would not have read Nietzsche. I had tried to read Nietzsche in the fifties but Nietzsche alone did not appeal to me—whereas Nietzsche and Heidegger, that was a philosophical shock!"\(^{38}\)

In presenting his understanding of Being, Heidegger, Dreyfus says, is interested in our understanding of Being, up to the point that this understanding,

is embodied in the tools, language and institutions of a society and in each person growing up in that society. These shared practices into which we are socialized provide a background understanding of what counts as real, on the basis of which we can direct our actions towards particular things and people. Thus the understanding of Being creates what Heidegger calls a clearing . . . . Heidegger calls the unnoticed way that the clearing both limits and opens up what can be done, its "unobtrusive governance."\(^{39}\)

Dreyfus reads much of Foucault's account of power "to be getting at a similar social clearing with an emphasis on the way embodied, everyday practices produce, perpetuate and delimit what


\(^{37}\) *Id.*

\(^{38}\) *Id.* at 80-81.

\(^{39}\) *Id.* at 81. This point coincides with some of those contained in the pointedly Foucaultian account of governance I have developed with Jeff Malpas. *See* Jeff Malpas & Gary Wickham, *Governance and the World: From Joe DiMaggio to Michel Foucault*, 3 UTS REV. 91 (1998); Jeff Malpas & Gary Wickham, *Governance and Failure: On the Limits of Sociology*, 31 AUST. & N.Z. J. SOC. 37 (1995).
people can think and do." Dreyfus also notes here that "power" is perhaps a misnomer for this phenomenon. He adds: "For Foucault, as for Heidegger on Being, power is neither a fixed entity nor an institution."42

Continuing this point, Dreyfus quotes Foucault (in an essay called *The Subject and Power*) thus:

"Power, with or without a capital letter, which is assumed to exist universally in a concentrated or diffused form, does not exist. Power exists only when it is put into action. . . . It is a total structure of actions brought to bear on possible actions. . . . Basically power is less a confrontation between two adversaries or the linking of one to the other than a question of government. . . . To govern, in this sense, is to structure the possible field of action of others."43

Dreyfus, I argue, is on to something here—the Heideggerian Foucault he is carefully drawing out is a Foucault not at all happy with standard treatments of the notion of power, a thinker seeking more to account for the complexities of governing (in its broadest sense) than to expound yet another account of power-as-repression. This is a Foucault heading in a very different direction than that chosen by Gadamer and the Gadamerians, a direction that eventually became, among other things, the governmentality approach.

Dreyfus argues that Foucault speaks of power in the *History of Sexuality Volume One* in "Heideggerian terms"—especially in saying that we need to "define the conditions in which human beings 'problematize' what they are, what they do, and the world in which they live." In attempting to establish the point that Foucault is very Heideggerian in thinking about "a receptivity to being," Dreyfus turns to a quote from Foucault's *The Use of Pleasure*: "analyzing not behaviors or ideas, nor societies and their 'ideologies,' but the problematizations through which beings offers itself as having to be thought—and the practices on the basis of which these problematizations are formed."45

40. Dreyfus, supra note 36, at 81.
41. This coincides with some of the objections/qualifications I have presented with each of Alan Hunt and Gavin Kendall to Foucault's handling of power. See Hunt & Wickham, supra note 17, at 80-87; Kendall & Wickham, supra note 15, at 47-56.
42. Dreyfus, supra note 36, at 81.
43. Id. at 82.
44. Id.
45. Id.
Note that here power has become problematizations of governing, that is, it is now also covering the thinking necessary to govern.

As well, Dreyfus traces Foucault’s and Heidegger’s common starting point in pre-Socratic Greece. Heidegger, Dreyfus argues, showed that while the clearing was not present in pre-Socratic thought, neither was it denied. Heidegger reads the “truth of being or alathea” as “unconcealment” and says “this understanding was lost when Socrates and Plato took Being to be the ground of phenomena, and truth to be the correspondence of propositions to an independent reality.”

Dreyfus notes that Foucault’s references to pre-Socratic Greece are “much sketchier” but argues that “he too points to the emergence of theoretical knowing as the great turning point in our history. The pragmatic and poetic discourse of early Greek civilization was destroyed by the rise of theory.” He quotes Foucault (in L’Ordre du Discours) to this effect: “The Sophists were routed... [From] the time of the great Platonic division onwards, the [Platonic] will to truth has had its own history.”

Dreyfus continues this point by quoting Foucault from The Birth of the Clinic and from History of Sexuality Volume One to show what a difference this change made to the practice of medicine and the understanding of sexuality: on medicine—“When Hippocrates had reduced medicine to a system, observation was abandoned and philosophy introduced into medicine”; on sexuality—“the West has managed... to annex sex to a field of rationality.... [W]e are accustomed to such ‘conquests’ since the Greeks.”

Furthermore, Dreyfus says, while Foucault has little to say about Greek philosophy per se, where Heidegger obviously has much to say, nonetheless, their “concerns converge upon the transformation which issues in the modern world and our current understanding of human beings.”

Dreyfus takes the shift in the interpretation of the role of “man” as another point at which the “parallel” between Foucault and Heidegger “comes into sharp focus.” He draws out the strong

46. Id.
47. Id.
48. Id. at 83.
49. Id.
50. Id. at 84.
51. Id.
similarities between Foucault’s account of the rise of “man” offered in *The Order of Things*, especially as it is “brilliantly” presented through an analysis of Velasquez’s *Las Meninas*, and Heidegger’s account of the “radical transformation in our understanding of being which took place in the seventeenth century.” After citing Descartes as an instigator of this shift, he quotes Heidegger (in *Being and Time*) to support his point about the ground shared by Heidegger and Foucault: “What is, in its entirety, is now taken in such a way that it only is in being to the extent that it is set up by man, who represents and sets forth.”

I have surely said enough to establish the point that Foucault, in rejecting philosophical hermeneutics, established a viable alternative. That this viable alternative led, at least in part, to the governmentality approach is assumed. I move on now to the promised discussion of a small sample of Gadamerian literature, concentrating on advancing my argument that Foucaultians and Gadamerians have little in common.

III. A BRIEF LOOK THROUGH GADAMERIAN EYES OFFERS NO GLIMPSE OF FOUCALUT

Mootz claims that Gadamerian philosophical hermeneutics is an approach based on “the ontological claim that all understanding results from a decentering ‘fusion of horizons’ in which a ‘prejudiced’ individual confronts a text or other person in an ‘experience’ that disrupts her presumed insularity.”

We have already seen evidence that this is not a direction that could be called Foucaultian. Shortly I add to this some points about the differences between the understanding of the subject contained in this summary statement and the Foucaultian understanding of the subject.

Another hint of this difference is found in a summary point offered by Aylesworth:

Gadamer believes that the human sciences, insofar as they comprise a body of methods and techniques, are not indistinguishable from technology and its totalizing agenda. Philosophical

52. *Id.* at 84-85.
53. *Id.* at 84.
hermeneutics, on the other hand, offers a more fundamental understanding of experience in terms of practical reason.\textsuperscript{55} An "experiencing" subject is, it seems, central to Gadamerian concerns, while it is certainly not central to Foucaultian governmentality work.\textsuperscript{56}

Remembering that Foucault is not and never was a theorist of discourse, we should not be fooled into thinking Gadamerian remarks about language are similar to the Foucaultian approach to language even where they appear so. Some of Smith's points about Gadamer on the statement\textsuperscript{57} may look like some of Foucault's points in \textit{The Archaeology of Knowledge} (or even \textit{The Order of Things}), but when we take into account that Smith approaches the statement as a component of language where Foucault approaches it as a component of discourse, we should realize that these are two very different ventures. To understand this point fully, it is necessary to accept that for Foucault and Foucaultians discourse is not language (as it clearly is for Gadamerians).

This point is made very well in a Griffith University discussion document by Ian Hunter circulated in the early 1980s—\textit{Michel Foucault: Discourse Versus Language}.\textsuperscript{58} Hunter argues that,

Foucault's reformulation of the concept of discourse derives from his attempts to provide histories of knowledge which are not histories of what men and women have thought. Foucault's histories are not histories of ideas, opinions or influences nor are they histories of the way in which economic, political and social contexts have shaped ideas or opinions. Rather they are reconstructions of the material conditions of thought or "knowledges." They represent an attempt to produce what Foucault calls an archaeology of the material conditions of thought/knowledges, conditions which are not reducible to the idea of "consciousness" or the idea of "mind."\textsuperscript{59}

\begin{quote}

56. It has to be admitted that when Gadamerians turn to certain particular practices that do not traditionally feature accounts of experiencing subjects, they are able to leave this plank out of their building materials. I have in mind, especially, Heelan's very detailed and fascinating account of what a hermeneutic philosophy of natural science might look like. See Patrick A. Heelan, \textit{Hermeneutical Phenomenology and the Philosophy of Science, in GADAMER AND HERMENEUTICS, supra} note 55—an account to which I return.


58. Ian Hunter, Michel Foucault: Discourse Versus Language (1984, unpublished manuscript, on file with author). While this paper has never been published, some points in it were later aired in \textit{IAn Hunter, Culture and Government: The Emergence of Literary Education} 20 (1988).

59. Hunter, \textit{supra} note 58, at 45.
\end{quote}
In expanding upon this, Hunter goes on to cash out Foucault’s metaphor that discourse has no inside (that is, no inside in thought) and no outside (that is, no outside in things). Foucault, Hunter tells us, aims to fragment “thinking,” not to totalize it as “thought” or “language.” In stressing that there is no “inside,” Foucault is urging us to drop the idea of a thinking process that can be found external to and prior to the use of words and symbols so as to make their use possible.60

Hunter is showing us Foucault’s notion of discourse as it goes about producing aspects of life. A linguistic version of discourse could not give us access to these objects. In explicating the “other” side of Foucault’s treatment of discourse—that it has no “outside”—Hunter says:

[O]ur use of words is not governed by the familiar notion of “reference”.... [I]t is the use of words (that is, the operation of

60. Id. In developing this, Hunter combines some of Foucault’s insights with some of Wittgenstein’s in the first of two examples:

[P]rior to our use of words we do not have mental acts/processes which are then “expressed” in words...[for example, consider] a simple mathematical discourse, a simple algebraic formula for expanding a series: \( y = 2x + 5 \); if \( x = 2 \), then the series runs 9, 23, 51, etc. Now at any point in the expansion of this series, what does it mean to “think” of the next number? Surely it means to perform the calculation (the discursive operation) which results in that number. There is no question of this discursive operation expressing my thought of the next number, a thought which exists independently of the operation of the mathematical discourse. For this to be the case it would have to be possible to think of the next number without performing the calculation. And this is not possible... It is unintelligible because performing the calculation materially produces the criteria for what we will call “the next number.” One doesn’t think of the next number by some general faculty of recognition prior to being equipped—in a very straightforward sense, in schools—with the techniques of algebra.

Id.

Hunter draws on Foucault’s account of the discourse of confession in The History of Sexuality Volume One to build his other example:

Here, Foucault is making the same general point, namely, that consciousness of “sins of the flesh” is not something that exists in the mind. Rather it is something that appears, historically, on the surface of an organization of techniques and statements.... Foucault demonstrates that confession, at the time of the church fathers, wasn’t a particularly important church ritual. Indeed, up until the Renaissance, confession was more or less an annual event for Catholics. Foucault records that during the Renaissance a pressure emerges for confession to become much more frequent, to become (eventually) a weekly phenomenon, and he also records that what counts as a confession changes. The rules for making a confession, the structure of the confessional, the text put about for both penitent and confessors to learn, alter. And they alter in a way that privileges what we would now call “sins of sexuality.” During the Renaissance sins of sexuality become the cardinal sins, the “league ladder” of sins alters. Once gluttony and sloth were up there with sex but during the Renaissance sex becomes the big one and the important thing is that not only does sex as a sin, an act (as in adultery and fornication) become extremely important but also and for the first time, the possibility that one might sin in thought becomes important.

Id.
definite forms of calculation . . . ) that determines what will count as the properties of objects. For example, it would be fruitless to try to ground the meaning of \( y = 2x + 4 \) by pointing to the numbers that are its object. The reason being that operating the formula is how one points to the numbers.\(^{61}\)

Hunter stresses again that Foucault is not totalizing here, but fragmenting—fragmenting reference. "He is attempting to break up 'reference' into domains of reference, domains established by the operation of particular forms of calculation and types of statement that organize the diverse spaces in which particular types of object can appear."\(^{62}\)

This makes it easier to see that only those Gadamerians prepared to criticize Gadamer's "downgrading of the statement"\(^{63}\) can be thought of as being even vaguely on the same page as Foucaultians. Davey is such a Gadamerian. He provides a thoughtful account of Gadamer's complex rejection of naive ahistorical treatments of statements,\(^{64}\) but in doing so goes so far as to argue, drawing heavily on Pannenberg: "Contrary to Gadamer's belief that the statement distorts meaning by obscuring the background horizon of commitments and assumptions upon which any discourse depends, Pannenberg argues that it is precisely the statement that allows 'the infinity of the unsaid' to come into view."\(^{65}\)

A turn to the Gadamerian commitment to the "conversation model" yields similar results. Mootz promotes this model thus:

Gadamer's principal philosophical claim is that our truthful relation to the world subtends but is not exhausted by modern technical-empirical science and that the Enlightenment picture of a monadic, prejudice-free subject decoding the world of objects must therefore be viewed as a mirage . . . . His focus is on the seamless web of truth and meaning that we constantly renew simply in the course of living . . . . From this perspective, interpretation is not just an activity designed to bring the being of certain objects into sharper focus; it is our fundamental mode of existing.\(^{66}\)

This looks promising for Foucaultians, with its focus on creating a sharper focus on the being of certain objects, though when Mootz selects Gadamer's treatment of the practice of conversation as

\(^{61}\) Id. of

\(^{62}\) Id.

\(^{63}\) R. Nicholas Davey, A Response to P. Christopher Smith, in GADAMER AND HERMENEUTICS, supra note 55, at 42, 53.

\(^{64}\) Id. at 50-57.

\(^{65}\) Id. at 55.

emblematic of his (Gadamer's) philosophical hermeneutics, he inadvertently turns away from a potential Foucaultian approach. He uses the following quote from Gadamer's *Truth and Method* in positioning his promotion of the conversational model:

> Conversation is a process of coming to an understanding. Thus it belongs to every true conversation that each person opens himself to the other, truly accepts his point of view as valid and transposes himself into the other to such an extent that he understands not the particular individual but what he says.67

Mootz reads this, alongside other similar passages, as "an ontological claim about the nature of hermeneutical understanding."68 Gadamer's "model" of conversation, Mootz tells us, is central to his method of dealing with texts: "Gadamer seriously intends the claim that interpreting a text involves entering a conversation with it...[T]here is no ahistorical text-in-itself that can be applied, but rather only a horizontal text that meets an interpreter in a dialogical encounter within a particular context."69

For Foucaultians, the conversation model is a diversion, a false lead in any investigation seeking to think in new ways about the object of that investigation and its relation to other objects. A text-focused formula70 based on the idea of a fixed understanding of the centrality of conversation is bound not to be where Foucaultians are heading.71 Where Gadamer and Gadamerians seem to take conversation and dialogue as ontological givens, Foucaultians want to view them solely as objects to be investigated. Foucaultians cannot be tempted by Gadamer's entreaty: "If language has its authentic life only in conversation, then the Platonic dialogue will awaken a living discussion now as before, and will achieve the fertile fusion of all

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67. *Id.* at 501.
68. *Id.* at 502.
69. *Id.* at 503.
70. Aylesworth's suggestion that Gadamer is more text-obsessed than was Dilthey—"Gadamer is more in agreement with Romantic hermeneutics...than with Dilthey, who thinks of the text as the object to be deciphered"—is more grist for my mill, though not, I think, a reason for Foucaultians to seek to align themselves with Dilthey rather than with Gadamer (no models of hermeneutics are particularly attractive to Foucaultians, though some may be more attractive than others). Aylesworth, *supra* note 55, at 64.
71. Jeff Minson is even more harsh in distancing the Foucaultian approach from the Gadamerian approach, especially when it comes to investigating politics. See Jeff Minson, *Ascetics and the Demands of Participation*, 9 POL. SCI. NEWSL. 2027 (1998), in which he writes, "The beginning of wisdom...is to bracket off that epitome of the romantic fantasy of politics as an interminable beautiful conversation: the normally privileged notion of 'dialogue.'"
horizons in which, questioning and searching, we must find our way in our own world."\textsuperscript{72}

But, you may reasonably ask, what about the things Gadamer and Foucault share, like a rejection of the Enlightenment heritage and with it both neo-Kantianism and Cartesianism, and more than a passing indebtedness to Heidegger? As we have already seen, in the case of the Heidegger debt, sharing things does not in any way mean using them in the same way. I could well share golf clubs with Tiger Woods, but, alas, our uses of them would quickly lead people to forget that they were the same clubs, so inconsequential would this fact be.

So while Gadamer, according to Mootz, is pointedly challenging "the Enlightenment model of a disinterested observer gathering data about an entirely distinct external world,"\textsuperscript{73} he is doing so to further the conversation model: the "hermeneutical experience" involved here "draws upon the familiar experience of a conversation . . . . [A]I understanding occurs as the product of the give-and-take experiences of the interpreter within a given historical and social situation."\textsuperscript{74} As we have seen, there's nothing Foucaultian about this model.

In taking us through some of the ways in which his work was influenced by Heidegger, Gadamer says Heidegger's move away from "academic philosophy"—"the history of problems in neo-kantianism and Husserl's transcendental phenomenology"—led him (Gadamer) to see links between "the radicality of Heidegger's energetic questioning" and "the ancient task of ethics."\textsuperscript{75} From here, Gadamer says, "The question I asked myself was how one could speak of an ethics in Plato's adoption of the Socratic question and Socratic dialectic. I attempted to clarify this through phenomenological methods."\textsuperscript{76} He adds, "I then found myself confronted with a problem that would later lead me to a fundamental problem of hermeneutics—the linguisticality of understanding."\textsuperscript{77}

\textsuperscript{73} Mootz, \textit{supra} note 54, at 314-15.
\textsuperscript{74} \textit{Id.} at 315.
\textsuperscript{75} Gadamer, \textit{supra} note 72, at 15.
\textsuperscript{76} \textit{Id.} at 16.
\textsuperscript{77} \textit{Id.} Minson's Foucaultian point on ethics might well be considered here. After asserting that the hermeneutics-based notion of dialogue presupposes that only such a mode of exchange can have ethical dimensions, Minson offers a slight qualification and adds a rhetorical question:

I do not suggest that political romanticism is in play whenever a call for dialogue is heard. But, in that case, might there not be modalities of discussion in which the
Gadamer seems to be suggesting that Heidegger led him to hermeneutics, via a sophisticated philological study of various aspects of Greek understandings of knowledge, by way of phenomenology. This suggestion is supported by Gadamer when, in discussing “the special hermeneutical problem of what the written retrieval and repeated awakening of the figure of Socrates means in Plato’s writing, years and decades after Socrates’ death,” he says, “What was imparted to me by Heidegger’s introduction to Aristotle’s thought in ethics, rhetoric, physics, and metaphysics had to be put to a special kind of test in the Platonic dialogue.”

This is all well and good and a sound basis for a healthy Gadamerian approach to various investigations (including those of a sociolegal nature), but it must surely raise still more doubts in any Foucaultian’s mind that this Heidegger is the same one who inspired, even if only in part, the Foucaultian approach I sketched earlier. Foucaultians could never treat “Heidegger’s introduction to Aristotle’s thought in ethics, rhetoric, physics, and metaphysics” as a step on the road to the conversation model, but would rather treat it as an introduction to certain objects of investigation, that is, as an aid to help us “think differently” about ethics, rhetoric, physics, and metaphysics by way of undermining any authority they have gathered over the years. Heidegger would certainly not lead Foucaultians to support this authority, as he seems to lead Gadamer to do.

Smith inadvertently highlights differences between, on the one hand, Nietzsche’s and Heidegger’s influence on Gadamer and, on the other, the influence of these two thinkers on Foucault when he writes, “Gadamer, who comes to Plato with the hermeneutical concern of the interpreter’s dialogical encounter with the ‘other’ of the text uppermost in his mind, is able to see another side to him that his eremitic critics, Nietzsche and Heidegger, miss.” Perhaps they did not miss anything, perhaps they simply looked at these matters in a different way, a way not encumbered by such a strong commitment to hermeneutics, a way that Foucault has since taken up and developed.
Davey, in criticizing Smith, offers a glimpse of a Gadamerian reading of Heidegger that appears closer to the Foucaultian reading of his work. He says, “Smith eschews any criticism of the conversational model of hermeneutic understanding Gadamer allegedly derives from the structural character of Plato’s dialogues.” He goes on:

What Christopher Smith does not make plain, whereas Gadamer most certainly does, is that the conversational model of hermeneutic understanding has a specific philosophical entailment, namely, a devaluation of the status of the propositional statement or assertion. Is this “devaluation of the status of the propositional statement” an echo of the Foucault of The Archaeology of Knowledge?

Developing his line of criticism of Smith, Davey offers some quotes from Truth and Method in support of his summary of three themes—“language as the medium of hermeneutical experience, language as determination of the hermeneutic object, and language as the determination of the hermeneutic act.” In doing so, he suggests he is drawing out “the spirit of Heidegger.” He argues from here that, “A close reading of sections 31 to 34 of Being and Time reveals that language is fundamental to Heidegger’s existential hermeneutic.”

Now Foucault has disappeared. As I argue above, with much help from Hunter, it is not language that is fundamental to Foucault (not even the Foucault of The Archaeology of Knowledge and The Order of Things), it is the notion of discourse as developed in a very non-linguistic manner. Foucault is obviously taking something else from Heidegger, or at least he is understanding Heidegger’s basic concepts very differently. As we have already seen, one of the more provocative readings of Foucault from within the Foucaultian camp (by Dreyfus) actually reads Heidegger’s Dasein as a concept that directly parallels Foucault’s treatment of power. How very different this is from Davey’s understanding of Dasein as derived from a linguistically-related notion of discourse: “Dasein—the nature of our being-in-the-world as creatures who understand—is constituted by discourse.”

81. Davey, supra note 63, at 43.
82. Id.
83. Id. at 46.
84. Id.
85. Id. at 47.
86. Id. at 48.
Another possible route for a link between Gadamer and Foucault is suggested by Aylesworth. This one too goes through the town of Heidegger, but here the vehicle is Ricoeur:

Where Gadamer develops a dialogical model of interpretation, in which the text is a "thou" with whom we are engaged in conversation, Ricoeur insists upon the reflective distance of the text as a linguistic object. This entails a broader difference in their understanding of the relation between philosophical hermeneutics and the practices of the human sciences. For Gadamer, philosophical hermeneutics is more fundamental than the methods of the Geisteswissenschaften, and provides a corrective for the methodological alienation of their subject matter. Ricoeur, on the other hand, believes that philosophical hermeneutics must serve an epistemological function vis-a-vis the human sciences, and must incorporate their critical practices into its own discourse.  

The possible link is, alas, another detour, inasmuch as Foucault, while closer to Ricoeur in this way than to Gadamer, is much more radical still, imposing a greater "reflective distance" again, to the point where the human sciences themselves become his objects of investigation. Similarly, in regard to the status of subjects, when Aylesworth says that Ricoeur understands that "the identity of the subject is not fixed, but enlarged through the encounter with the text," I can treat this as further evidence in support of my point that Ricoeur cannot quite provide a link between Gadamer and Foucault. This position too does not go far enough—for Foucaultians it is certainly true that the subject does not have a fixed identity, but it so true that Foucaultians would not dare suggest that subjects can be "enlarged" by texts, or by anything else, as this is already to give them too much of an identity, something which lies waiting for a text to come along. For Foucaultians, having no fixed identity means having no identity other than that which is produced in particular situations; there is nothing there, waiting for anything.

This difference between Gadamerians and Foucaultians in handling the status of the subject can be seen again in regard to discontinuity. Aylesworth says, "Gadamer suggests that one of our most fundamental experiences of time is that of a discontinuity, or a

87. Aylesworth, supra note 55, at 63.
88. Id. at 73.
89. Lawlor, in arguing, contra Aylesworth, that there are in fact more similarities between Ricoeur and Gadamer than there are differences, only adds fuel to my fire: if Ricoeur is in close agreement with Gadamer, he is no use as a bridge between Gadamerians and Foucaultians. Leonard Lawlor, The Dialectical Unity of Hermeneutics: On Ricoeur and Gadamer, in GADAMER AND HERMENEUTICS, supra note 55, at 74, 82.
becoming other." Of course Foucault's notion of discontinuity could not be about a "fundamental experience," as there are no fundamental subjects to serve as vehicles for such things as "fundamental experiences."  

Risser offers another possible link between Gadamerians and Foucaultians when he argues that some "poststructuralist" work, especially that of Barthes, which sees itself as an "advance over hermeneutics" actually misunderstands "contemporary hermeneutics":  

[F]or contemporary hermeneutics also insists, in its own way, on effacing the markings which serve as borders to a text. In the case of the border of signature, of author, this is most obvious. For Gadamer, the normative notion of author's intention represents only an empty space, for what is fixed in writing always frees itself for a new relationship.  

As such, Risser provides more than a few hints that the poststructuralist enterprise and Gadamer's enterprise have a lot in common. This would be ammunition for an argument that claimed common ground between a poststructuralist Foucault and Gadamerian philosophical hermeneutics, but I am pointedly not mounting such an argument. In being indebted, as I am, to Dreyfus and Rabinow's argument that Foucaultian work is neither hermeneutics nor structuralism precisely because it follows its own direction, I feel safe in adopting the position that Foucaultian work is no more poststructuralist than it is structuralist.  

Cook, responding to Risser, adds that poststructuralism and philosophical hermeneutics are related because of their debt to Heidegger (and Husserl). However, this can make no difference for my argument, remembering my suggestion that the Heidegger drawn  

90. Id.  
91. Id.  
92. James Risser, Reading the Text, in GADAMER AND HERMENEUTICS, supra note 55, at 93, 94.  
on in the Foucaultian approach and that drawn on in the Gadamerian approach may as well be two different Heideggers.

More tempting for my argument is Cook’s attempt to bring Derrida into the mix.\textsuperscript{94} However, in a footnote she acknowledges that while this move should create the space to also bring in Foucault, “It is the author’s belief . . . that such a comparison would substantially undermine any attempt to find similarities between poststructuralism, understood as a unified set of theories, and hermeneutics.”\textsuperscript{95} Enough said.

Madison, too, looks into possible links between Gadamerian hermeneutics and Derridean poststructuralism. In his case, however, there is not even a hint that this may provide a route for stronger ties between Gadamerians and Foucaultians as he assiduously sets up a somewhat bizarre opposition between Gadamer and Derrida. He places Derrida in what he calls the “Counter-Tradition” (in which he also places the Pyrrhonists, Kierkegaard, and Nietzsche)\textsuperscript{96} and then proceeds to explain how he cannot really understand Derrida. It seems, however, that he can understand him enough to claim that any positive features of Derridean thinking are actually already positive features of Gadamerian thinking, and on this note he completely dismisses Derrida as a thinker absorbed by a negative philosophical quest.\textsuperscript{97}

Another possible source of a link between the two positions is a shared opposition to Habermas. Nicholson positions Gadamer as the winner of a long running debate between Gadamer and Habermas in which Habermas argues for a neo-Marxist/critical theory rationalism while Gadamer argues for philosophical hermeneutics.\textsuperscript{98} Should we

\textsuperscript{94.} Id. passim.

\textsuperscript{95.} Id. at 288 n.4.

\textsuperscript{96.} Gary B. Madison, Beyond Seriousness and Frivolity: A Gadamerian Response to Deconstruction, in GADAMER AND HERMENEUTICS, supra note 55, at 119, 135.

\textsuperscript{97.} Froman works hard to reposition Derrida in regard to Gadamer, in response to Madison's attack. See Wayne J. Froman, L’Ecriture and Philosophical Hermeneutics, in GADAMER AND HERMENEUTICS, supra note 55, at 136. Joel Weinsheimer is another Gadamerian who considers Derrida’s work more sympathetically than does Madison, focusing on Derrida’s treatment of the role of the dead metaphor in philosophy. See Joel Weinsheimer, Gadamer’s Metaphorical Hermeneutics, in GADAMER AND HERMENEUTICS, supra note 55, at 181. However, neither Froman nor Weinsheimer do enough to rescue this potential line of inquiry in our investigation of possible links between Gadamerians and Foucaultians. Hugh J. Silverman in summarizing Descombes, takes a slightly different tack, suggesting that Gadamerians are able to be “at once hermeneutic, analytic, and deconstructive.” Hugh J. Silverman, Interpreting the Interpretative Text, in GADAMER AND HERMENEUTICS, supra note 55, at 269, 269. This may be so, but it does not bring the bulk of Gadamerians, nor Gadamer himself, closer to a Foucaultian position.

\textsuperscript{98.} Graeme Nicholson, Answers to Critical Theory, in GADAMER AND HERMENEUTICS,
then ask, is another possible similarity an antirationalism? We should ask, but I do not think we can get far. I doubt that a similar stance against Habermasian hyper-rationalism could do more than sit alongside oppositions to neo-Kantianism and to Cartesianism as similarities that ultimately do not do enough to overcome the big differences between philosophical hermeneutics and the Foucaultian approach.99

IV. A FEW EXCEPTIONS?

Perhaps a more likely source of productive contact between Gadamerians and Foucaultians involves rhetoric. Mootz develops a thoughtful Gadamerian treatment of rhetoric for use in the analysis of sociolegal objects.

In developing his approach, at least in one particular piece,100 Mootz confesses to some “presumptions.” Two of these are of interest to us:

My thesis is that the interpretive turn in legal theory works as a critique of legal positivism in at least one surprising way: by reinvigorating (even if in a dramatically new form) the natural law tradition. This thesis [involves some] presuppositions.... Hans-Georg Gadamer’s philosophical hermeneutics provides the most sophisticated and persuasive account of the “interpretive turn”.... [and] Gadamer’s hermeneutics illuminates the activity of legal practice and correlatively that legal theorists provide important contextual work that reinforces Gadamer’s philosophical themes.101

These two “presumptions” immediately attest to the fact that, for Mootz, hermeneutics needs to be handled as a source of “illumination” of sociolegal sites—illumination powered, it seems, by the contexts produced by the sociolegal. To put this another way, I read Mootz as telling sociolegal scholars that Gadamer can help them only if they stick to careful interpretations of contexts they themselves must provide.

99. My doubt here is strengthened by the fact that Misgeld manages to find more similarities between Gadamer and Habermas than does Nicholson, even though he eventually acknowledges mainly differences between them. See Dieter Misgeld, Modernity and Hermeneutics: A Critical-Theoretical Rejoinder, in GADAMER AND HERMENEUTICS, supra note 55, at 163.

100. Mootz, supra note 54, at 311.

101. Id. at 312-13.
Mootz takes us further into the nexus between his version of Gadamerian philosophical hermeneutics and sociolegal studies when he notes,

Today, the legal system—which is premised on the production and interpretation of authoritative texts as sources of governing authority—is a prominent venue for this hermeneutical experience, since the performance and reception of speeches before all competent citizens of the polis no longer occurs. Every attempt to understand a legal text, Gadamer insists, is a function of applying the text to the case at hand; thus he regards legal reasoning as a particularly vivid model of all hermeneutical understanding.  

Expanding on the idea of understanding a legal exchange as a conversation, Mootz adds, “An interpreter understands what a legal text is saying by suppressing her subjective designs and allowing the text to speak to the question posed by the case at hand.”

I have already argued that the text-focus of Gadamerians is a bar to productive contact between them and most Foucaultians. But as Mootz is taking us on a very particular sociolegal journey, I bear with him.

Summarizing Gadamer’s treatment of “the rhetoric of legal argumentation,” Mootz says, “Gadamer’s hermeneutics is philosophical because it abandons the focus on methodological rules and instead analyses the unitary hermeneutical situation that subtends all human knowledge, including the methodologically-secured empirical knowledge of positive science.” Mootz stresses that the Gadamerian approach necessarily “signals the tremendous importance of the rhetorical tradition.” He develops this point by first discussing the importance of Vico to Gadamer’s *Truth and Method* and then by discussing what Gadamer is trying to do in regard to rhetoric more generally: “As one commentator recently concluded, Gadamer is not advocating that we elevate rhetorical study over philosophy as much as insisting on the rhetorical nature of all humanistic inquiry, including philosophy.”  

Mootz is particularly concerned that we understand Gadamer’s debt to ancient rhetoric: “Gadamer relates ancient rhetoric to his inquiry into our pre-methodological, traditional complex of meanings.... Gadamer  

102. *Id.* at 317.  
103. *Id.* at 318.  
104. *Id.* at 314.  
105. *Id.* at 315.  
106. *Id.* at 315-16.  
107. *Id.* at 316.
argues that genuine rhetoric concerns the 'discovery and transmission of insight and knowledge,' an event that he reminds us is exemplified in the 'art of leading a conversation.'

Is this ground that is actually shared by the Gadamerian approach and the Foucaultian approach? To put a positive spin on it, we can at least say that inasmuch as rhetoric can be broadly understood as a tradition that favors persuasion over dogma, construction over bedrock, interpretation over the imposition of supposed fact, there may well be a commonality here. But we must look further.

In discussing the way Gadamerian hermeneutics concentrates on meanings produced by and through individual experiencing subjects as they relate to one another and to texts, Mootz further emphasizes the role of rhetoric: the interpreter acts in the manner described above "rather than by charting in advance the line of inquiry, just as a rhetorician must be attuned to her audience." The interpreter must "suppress her subjective aims [and] attend [to] the saying" of the historically effective text as it is revealed in particular circumstances. For example, Gadamer believes law holds authority because it is the practice of hermeneutically appropriating governing texts to current disputes.

The Foucaultian package under consideration would certainly place the emphasis of the analyses differently, but, sticking to my positive spin for the time being, it is reasonable to say that rhetoric's pragmatic underpinnings can be counted as a vague family resemblance between Gadamerian and Foucaultian approaches.

Mootz insightfully marries Gadamer to the pragmatic philosophy of Chaim Perelman. He says that Gadamer and Perelman are each "important contributors to this century's philosophical effort to identify the deficiencies of the Cartesian tradition and to fashion a new account of understanding and knowledge." After acknowledging substantial differences in their backgrounds and trainings, Mootz posits: "[I]t is plain that Gadamer and Perelman share important themes: the dialogic character of understanding, the inadequacy of neo-Kantianism as an account of knowledge, and the overriding ethical imperative of holding oneself open to questioning

108. Id. at 316-17.
109. Id. at 318.
110. Id.
111. Mootz, supra note 66, at 498.
and challenges rather than proceeding as if one is possessed of apodictic truth."\textsuperscript{112} Mootz also says that Gadamer is developing the "rhetorical tradition" to "serve as a resource for textual interpreters in our literate culture."\textsuperscript{113}

In synthesizing Gadamer and Perelman, Mootz sees the need to highlight a couple of weaknesses of Gadamer's approach: Gadamer "does not develop a pragmatic account of rhetorical exchange"; and, "Gadamer's phenomenology of understanding remains somewhat vague with respect to the activities by which people pursue justice and morality in the course of daily life."\textsuperscript{114} Perelman provides the perfect means of correction:

Perelman demonstrated in his first book that arguments about the dictates of justice could not be rational since they did not accord with formal logic. Confronted by this bizarre yet inescapable conclusion, Perelman rejected the Cartesian philosophical tradition from which it issued and set for himself the task of identifying the means by which it is possible to secure adherence to reasonable claims regarding the requirements of justice.\textsuperscript{115}

Mootz traces Perelman's Aristotelian move to "distinguish rational truths from reasonable arguments."\textsuperscript{116} In doing this, he says, "As a prime example, Perelman points to the operation of the legal system in which arguments are made and action is taken despite the inevitable lack of indubitable knowledge about the questions raised by the case at hand."\textsuperscript{117} Mootz thereby uses Perelman to advance the case for a style of sociolegal inquiry that can act as a sort of model for philosophical inquiry more generally, suggesting that this is closer to an ancient understanding of philosophy than it is to modern thinking on the matter.\textsuperscript{118}

As I argued earlier, Foucaultian work can also sensibly be understood as a development of a certain type of ancient thinking which equally rejects the dominance of Cartesian and neo-Kantian propositions in favor of a type of pragmatism. As Wahl puts it, "if one can speak of a continuity from the first to the last in Michel Foucault's work... it is found... in his pragmatism.... In other words, it is not so much a question of what was (or is), but rather of

\begin{footnotes}
\footnote{112}{\textit{Id.} at 507.}
\footnote{113}{\textit{Id.}}
\footnote{114}{Mootz, \textit{supra} note 54, at 320.}
\footnote{115}{\textit{Id.} at 320.}
\footnote{116}{\textit{Id.}}
\footnote{117}{\textit{Id.} at 321.}
\footnote{118}{\textit{Id.} at 321-23.}
\end{footnotes}
what was done, as it was being done.”119 Obviously I am not going to go so far as to say that the Gadamerian and Foucaultian approaches are equally in the thrall of Perelman, simply that some of the themes Perelman draws out are examples of what is best about each of the two packages.

Mootz is obviously involved in a bid to secure a framework that can be used to consistently capture the practice and the spirit of knowledge as rhetoric. In this sense, “[r]hetorical knowledge can be defined as the effort of two or more persons working together creatively to refashion the linguistically structured symbols of social cohesion that serve as the resources for intersubjective experience with the aim of motivating action of some kind.”120 Further, “[r]hetorical activity...is not a technical skill employed in the pursuit of independently selected ends but rather is a means of discerning and evaluating the ends available to a given community with certain means at its disposal.”121

Mootz, drawing on Perelman, has the legal system at the front of his thinking: “The legal system is one of the most important fora for the development of rhetorical knowledge in contemporary American society.”122 He supports this claim by making particular use of the 1997 Washington v. Glucksberg case about “assisted suicide.”123 Discussing Justice Souter, Mootz says, “Souter’s opinion persuasively describes the adjudication of fundamental rights as a hermeneutical-rhetorical project in terms that Gadamer and Perelman would endorse, even though Souter articulates his reasoning in the idiom of contemporary constitutional discourse.”124

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119. Wahl, supra note 23, at 70. DREYFUS & RABINOW, supra note 1, at xxii (suggesting that Foucault always worked with a commitment to a certain form of pragmatism). Foucault, they say, “annoys many by insisting on a pragmatic intent in all significant historiography” and add that his interpretation of history “grows out of pragmatic concerns.” Id.

120. Mootz, supra note 54, at 323.

121. Id. at 325.

122. Id.

123. Id. at 326-27 nn.43 & 47.

124. Id. at 326. Mootz adds:

Souter tracks the philosophical claims made by Gadamer and Perelman about the nature of human understanding and the acquisition of knowledge, lending support to the claim that the demands of legal practice may indeed highlight the hermeneutical-rhetorical features of all understanding. Lawyers know very well that argumentation is a bounded and rational enterprise that nevertheless cannot aspire to a process of deduction from principles, even though the rhetorical conventions of legal practice and judicial opinion-writing ironically work to conceal this (supposedly dangerous) fact . . . .

Id. at 327.
A Foucaultian approach to any particular judicial decision might well accept Mootz's claims about judges and lawyers and their use of argumentation fitting certain rhetorical philosophical principles. However, it would also add a historical dimension. No judicial decision could be understood by a Foucaultian without tying it to a genealogy of the way decisions are made and presented within particular jurisdictions: a history of some of the contingencies—courts, written judgements, reporting procedures, architecture, and other court cultural factors, etc.—of the decisions.

Mootz bids to secure a framework that can be used to consistently capture the practice and the spirit of legal knowledge as rhetoric. In this sense,

Rhetorical knowledge can be defined as the effort of two or more persons working together creatively to refashion the linguistically structured symbols of social cohesion that serve as the resources for intersubjective experience with the aim of motivating action of some kind.\textsuperscript{125}

Further, "Rhetorical activity... is not a technical skill employed in the pursuit of independently selected ends but rather is a means of discerning and evaluating the ends available to a given community with certain means at its disposal."\textsuperscript{126}

In using Perelman in this way, Mootz provides another touch that might sit well on a Foucaultian canvas. Rather than relying on an inflexible notion of the individual and individual experience, here the stress is on the development and management of a particular intersubjective realm, a community, understood not as an organic Gemeinschaft but more as a construction, an invention, as Foucaultians are wont to call it.

So, can I then say that rhetoric, especially as explored by Mootz's reading of Perelman as a boost to Gadamerians, provides a means of building an exception to my rule that Gadamerians and Foucaultians should be very wary of each other? I can only do so weakly. Or more accurately, I can only do so warily. The above discussion does not, I suggest, provide a warrant for anything more. And, of course, a suggestion that Gadamerians and Foucaultians must be wary in dropping their wariness of the other is hardly an argument against them being wary.

\textsuperscript{125} Id. at 323.
\textsuperscript{126} Id. at 325.
The final candidate I consider for the status of exception to my rule is Heelan's Gadamerian account of science that I touched upon earlier. In building his account, Heelan offers the following point about "theory" which involves a point about "explanation":

[W]hatever is observed (inside or outside of science) involves things which are not directly observed but are implied by the semantic network of the language. Such semantic connections are not of themselves scientific (i.e., explanatory-theoretical) connections, and do not constitute a theory, for they are to be found in natural language which is not a theory about the world but a description of it. A theory is rather about what underlies— "explains"— the objects of a descriptive semantic network.¹²⁷

Perhaps this passage, while skeptical in a Foucaultian manner, is too language-focused to appeal to Foucaultians. But, in adding the following definition of the history of science, Heelan comes closest to providing a solid link between Gadamerians and Foucaultians:

The history of science is more than the history of scientific writing and discourse, including illustrations, mathematical models, or abstract theories; in addition, there is the history of the culture of laboratory instruments with special reference to readable technologies.¹²⁸

This quite Foucaultian account bears a strong similarity to some of the work of Bruno Latour, one of the founders of a recently developed school of "science studies" who has been taken up by some Foucaultians as one of the heirs to Foucault's approach.¹²⁹ Despite this, and while conceding that Heelan's Gadamerian account of science provides the possibility of a genuine link between Gadamerians and Foucaultians, I head to my conclusion saying that one strong link does not a bridge make.

CONCLUSION

I have said enough to spell out my argument—it is difficult, perhaps impossible, to successfully mix Foucaultian and Gadamerian insights into a framework for sociolegal studies. But perhaps I have not said enough to make clear my disappointment at this outcome. I

¹²⁷. Heelan, supra note 56, at 226.

¹²⁸. Id. at 227. Kockelmans offers a sympathetic critique of Heelan. In doing so, he argues that "all human truth claims are claims within limited contexts of meaning," and invites greater consideration by scholars of science of the conditions of truth, a position which might be said to be closer to some Foucaultians than to most Gadamerians. Joseph J. Kockelmans, Beyond Realism and Idealism: A Response to Patrick A. Heelan, in GADAMER AND HERMENEUTICS, supra note 55, at 213, 239.

¹²⁹. KENDALL & WICKHAM, supra note 15, at 60-61.
began this project with the genuine hope that some sort of workable alliance would be forged. I must conclude, albeit reluctantly, by facing the fact that any attempt to read Foucault and Gadamer together, through a single lens, inevitably confronts the dilemma of how to bring them both into focus simultaneously. There is no single reading, it seems, that is adequate to both, since they are each dealing with a slightly different, although sometimes overlapping, set of problems, to which they bring different, though sometimes overlapping, approaches. At best, one has to adjust one's vision so as to view each separately. While this means that they cannot be brought into any simple conjunction, it also means that they cannot be simply opposed either. As I suggested at the outset, a nodding acquaintanceship might be as good as it gets.130

130. I owe the formulation of much of this conclusion to Jeff Malpas.