COMMENT ON EDER

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The first difficulty in Eder is that the experience of academics working in the common law tradition renders us skeptical about the possibility that there could be something like an overall sociological theory of "the law." What those in the Weberian tradition, including for these purposes Habermas, see as the law appears to us as quite a jumble of relatively discrete topics, such that the law of torts which looks different from the law of criminal procedure and, what is worse, the law of the sixth amendment's requirements with respect to counsel which looks different from the law of the sixth amendment's requirement with respect to confrontation of adverse witnesses. Nor does it seem to us that there are any readily available generalizations concerning long-term trends, as distinct from short-term variations attributable to differences among judges in their political preferences.

The second difficulty is that that same experience makes us skeptical about the utility of the specific concepts used in the tradition in which Habermas writes. Eder offers us three such concepts: rationalization, materialization, and proceduralization. Someone like me, whose primary legal specialty is United States constitutional law, can translate those concepts to make them meaningful to my understanding of my subject. Thus, rationalization seems to describe the development of an increasingly elaborate rule-structure governing freedom of expression; materialization seems to describe the distribution of public assistance according to particularistic rather than general criteria, as in the Lockheed and Chrysler bailouts and in the administration of welfare according to social work criteria; proceduralization seems to describe the validation of informal means of dispute settlement such as plea bargaining, as well as the interest among constitutional scholars these days in theories of constitutional law that stress dialogue rather than the coercive imposition of one or another interpretation of the Constitution. Yet, having done this sort of translation, I am left wondering what exactly I have gained in understanding.

In part the difficulty is that these concepts, which are central to the discussions in which Habermas is engaged, do not seem to capture the central features of contemporary legal developments in the United States. Where scholars concerned with rationalization probe the increasingly elaborate rule structure of the first

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amendment, constitutional lawyers tend to be more interested in the gaping interstices. From a sociological point of view, what seems more compelling is how limited the rule structure is, and how much is left to discretionary interpretation. Similarly, materialization understood as the administration of law according to particularistic criteria seems no longer to describe the stated aims of contemporary welfare systems, as Simon has so acutely shown (1983). And the inroads that proceduralization has made seem, at least in the area of public law, to be quite limited and intensely controversial (see, e.g., Fiss, 1983; McThenia and Shaffer, 1985).

The concepts described by Eder thus are difficult to apply descriptively to the law with which I am familiar. What is worse, the skepticism, associated with the common law tradition, concerning large-scale theories tends to direct the attention of those in *that* tradition to more discrete social practices than the law. And, when we look at those practices, we tend to see quite a jumble of rationalization, materialization, and proceduralization. In the administration of welfare, for example, we see a lot of directives specifying general criteria for the provision of assistance, but also a lot of room for maneuver within the bounds of those directives. Of course, not everyone can maneuver successfully, but the system as a whole provides opportunities for those recipients who are well-counseled to work around the rules in a way not readily explained by the concept of rationalization or materialization. And, from the other side of the picture, there seems to be good reason to think that, as actually administered, proceduralized law will be in the hands of relatively de-skilled professionals who will be unable to satisfy the requirements of informal negotiation and dialogue and will turn instead to relatively rule-bound approaches (however, see Handler, 1986).

Perhaps the best way to make this point is to appeal to what I take to be a near-universal experience of people inside bureaucracies. Many such bureaucracies purport to govern their internal operations pursuant to well-defined rules. Yet, everyone inside them knows that there are ways to get things done by going outside or around the rules, and indeed that some things that must be done can be done only by going outside the rules.

In addition to these concerns about the descriptive accuracy of the concepts deployed in the tradition in which Habermas works, I wonder as well about some normative matters. In the first instance these concerns are provoked by the connotations of the term rationality. On the whole, in the Western tradition to speak of something as rational is to commend it. Yet, Weber's concern over the iron cage of modernity shows that there is a dark side to rationality.

One might characterize the tradition deriving from Weber, including Habermas and Luhmann, as an effort to locate some process to bear the weight of normative approval that rationality can-

not bear after Weber. Thus, materialization might be seen as an attractive process because it allows decision-makers to respond to the particulars of individuals' situations even if previously-stated general criteria might seem to preclude a positive response. The mention of previously-stated general criteria should immediately identify the dark side of materialization, of which the originators of the concept of course were aware: It is in severe discord with the fundamental ideas of the rule of law, and therefore lends itself to the kinds of abuses—exemplified in the United States by the social work administration of public assistance described by Simon (1983)—against which the rule of law is designed to guard. The critical literature on proceduralization with which I am familiar does not focus on its dark side, but is more concerned with values associated with the rule of law and with substantive criteria according to which benefits should be allocated. But surely there is a dark side. Consider the position of the participant in a dialogic process who ends up failing to receive what he or she has sought. I suspect that that person will feel abused by the process, either because what he or she had to say was not taken seriously or, perhaps worse, because the outcome demonstrates that the person lacks the personal characteristics—particularly verbal facility—that produce success in dialogic processes (see Tushnet, 1988: 243–245).

Perhaps a better course might be to attempt to retrieve the normative value placed on rationality by expanding our understanding of what rationality is. Here I think of recent efforts by feminist theorists to supplant the prevailing understanding of rationality as decision according to general rules with a notion of rationality that has room for particularized decisions. Feminists have argued that they emphatically do not mean merely to reverse the existing situation in which reason is privileged over emotion, so that emotion would be privileged over reason, but rather intend to reconceptualize both reason and emotion. In the terms of the present discussion, the effort is to treat materialization as, not a successor to, but a part of rationalization.

If this feminist effort is well-conceived, it places much of the work in the tradition of Weber, Habermas, and Luhmann into question. It can be seen, specifically, as a challenge to Habermas's effort to rehabilitate the law. It oversimplifies, but does not I think distort, Habermas to suggest that in his scheme systems are the domain of rationalization, no longer attractive after Weber, while the lifeworld is the domain of particularistic decisions of the sort discussed under the heading of materialization. Seen in this way, the lifeworld too is no longer very attractive because of the tensions described earlier between it and substantive and rule-of-law values. For Habermas, the law serves to mediate between the domains, as proceduralization is intended to do. If rationality is

reconceived, however, the effort to replace it with something normatively attractive may be entirely unnecessary.

These reflections lead me to agree with Eder's suggestion that ultimately what is at stake in these discussions is not really the sociology of law, understood as an effort to understand the law in action, but is something akin to the sociology or history of ideas. That is, concepts such as rationalization and the like are less useful in describing the actual operation of legal practices than they are in helping us understand how certain segments of the intellectual community, and through them perhaps some portions of the general public, conceptualize the law. If they are thought of in this way, my previously expressed misgivings concerning their descriptive inaccuracy become inapt. They may be inaccurate in describing the law in action, but, according to the present suggestion, they could be useful in describing the ideologies associated with law at various times by particular theorists. The concepts sometimes provide metaphors that are helpful in understanding the law in action, and in suggesting connections between practices that initially seem quite different. To say that they are useful metaphors, however, is to make two points. Metaphors may in some sense be the foundation or even the entire content of scientific theories (see Lempert, 1988: 155–157), but that is not how Habermas and Luhmann present them. In addition, metaphors are effective with particular audiences, and this fact itself calls for a certain kind of sociological analysis. However, since I am outside the tradition in which Habermas is located, I am in no position to provide that analysis.

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REFERENCES

FISS, Owen (1983) "Against Settlement," 93 *Yale Law Journal* 1073.

HANDLER, Joel (1986) *The Conditions of Discretion: Autonomy, Community, Bureaucracy*. New York: Russell Sage.

LEMPERT, Richard (1988) "The Autonomy of Law: Two Visions Compared," in Gunther Teubner (ed.) *Autopoietic Law: A New Approach to Law and Society*. Berlin: Walter de Gruyter.

MCTHENIA, Andrew and Thomas SHAFFER (1985) "For Reconciliation," 94 *Yale Law Journal* 1660.

SIMON, William (1983) "Legality, Bureaucracy, and Class in the Welfare System," 92 *Yale Law Journal* 1198.

TUSHNET, Mark (1988) *Red, White, and Blue: A Critical Analysis of Constitutional Law*. Cambridge: Harvard University Press.