Articles

Down by Law: Irony, Seriousness, and Reason[+]

By Gunter Frankenberg[*]

A. Concerning a recently raised ironic tone in the law

Blindfolded Justice never cracks a smile. Laws don't joke around. In Bertolt Brecht's *The Caucasian Chalk Circle,*[1] People's Judge Azdak instructs us that "the law must always be dispensed with complete seriousness."[2] "Because it's such a serious matter," Solomon would have said.[3] "Because it's so *stupid,"* Azdak explains, "and gone before you know it."[4]

Since the time of the Mosaic Law and Solomon's, supposedly, wise judgments, law and judicial decisions have been enveloped in an aura of solemn, austere seriousness. This seriousness is reflected in the specialized language of jurists, in their esoteric logic, in legal rituals and ceremonies far removed from everyday life. It is also reflected in the serious attitude lawyers and legal scholars adopt with regard to their subject matter. Form, formality, and formalism are all taken seriously. They are said to stand for matters of substance *demanding* seriousness. According to the will of legislatures and the pronouncements of judges, according to legal theories and dogmatic legal doctrines, law

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[+] This essay appeared in 83 Northwestern University Law Review 360 (1988/1989). We acknowledge permission of Northwestern University Law Review in publishing this version.

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[1] BERTOLT BRECHT, *The Caucasian Chalk Circle*, in 7 BERTOLT BRECHT COLLECTED PLAYS 141, 207-37 (John Willett & Ralph Mannheim eds., 1976).

[2] *Id.,* 209.

[3] *See*, *e.g.*, 1 *Kings* 3:10-28. In this Biblical account, Solomon ascertained the true mother of a child by suggesting that the infant be cut in half with a sword. The woman to whom the child truly belonged would, Solomon knew, give up the infant before allowing him to be harmed. "And all Israel heard of the judgment which the king had judged. And they feared the king, for they saw that the wisdom of God was in him to do judgment." 1 *Kings* 3:28.

[4] BRECHT (note 1), 209, ("Judgment must always be passed with complete solemnity," Azdak says, "because it's such rot.").

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

involves nothing less lofty than justice, or, should this prove unattainable, at least the maintenance of social peace. Therefore, jurists take nothing so seriously as the law -- except, perhaps, themselves.

Brecht was not the first to offer us an alternative way of looking at the law. Doubts have long been articulated, disrespectfully and from an ironic distance, about whether formality can really deliver all of its promises. Doubts have arisen regarding the false appearance generated by presenting the particular as the general, the domination of form over content, and the gap between law's initial promise and subsequent performance. Critique and irony have long accompanied this mulish seriousness on its quest for transcendental fixed points in a stubbornly fickle and this-worldly law.

The two judges, Solomon and Azdak, represent two contrasting, ideal-typical attitudes toward legal work: on the one hand, affirmative, theoretical-dogmatic seriousness; on the other, a seriously critical, occasionally ironic distancing. Solomon stresses the wisdom -- or, in more contemporary language, the rationality -- of the law, directing attention to what *should* be; Azdak concentrates on facts and consequences, directing attention to what appears unjust and irrational.

Solomon, quite modern in his obeisance to rationality, takes on the Sisyphean task of casting law as *the* rational order of life within society. First, the law must disarm people previously accustomed to -- literally -- taking the law into their own hands and in exchange equip them with civil rights. Further, the law must liberate the individual from the privileges and disadvantages of birth and class, guaranteeing her moral autonomy while simultaneously binding her to the social whole. Today's Solomon is thus immediately confronted with the difficult task of finding satisfactory grounds of justification. All shortcuts -- to the religious revelation of legal norms, oracular prophecy, the absolute sanctity of a tradition, the idea of law as the "emanation" of a people's spirit, and ultimately even to the "natural rationality" of law -- have been cut off. The Enlightenment has dried up these sources, as well as all others fed by subterranean metaphysical streams. In the Age of Reason, only the will of the people as sovereign ultimately confers legitimacy on general statutes. Reason is seen as coming to normative expression in this will, however established or represented. Furthermore, reason extends to judicial decisions; their rationality is rooted in their derivation "from the law."

Modern law -- or more precisely, its claim to rationality -- thus presents legal theory and doctrine with a daunting task: guaranteeing the rationality of statutory law and its application. I identify this as the legal project of modernity, characterized by a theoretical-doctrinal form of epistemology and practice, which I call construction, that is carried out in earnest. Legal theory and doctrine as "construction" -- certainly a simplification, perhaps even a bit of a caricature, but also intentionally equivocal -- conjures up the image of the (male) legal architect at his drawing board, developing models, conceptual systems, and methods. The "architect" might be variously labeled: Solomon or Montesquieu, legal

positivist or natural law theorist, systematic or conceptual jurist, "mainstream legal thinking" or *herrschende Meinung,*[5] the Supreme Court or the *Bundesverfassungsgericht.*[6] I view all of these as incarnations or institutionalizations of the modern legal project, and identify each of them with the serious tone.

Azdak, not intrinsically contemptuous of reason, is nevertheless offended by too much seriousness. There is only one right on behalf of which he constantly wants to bring an action -- the right to criticize. Not in the name of the State, or of an absolute Truth, or of the People *in abstracto,* but realistically -- in the name of practical humanity. His sharp eye for cracks in the edifice of rationality and his legal-empirical glances behind the normative curtain cause Solomon constant embarrassment. Even if the class character of a rule or of an argument is not always immediately obvious, two crucial points exist that cause serious trouble for jurists concerned with the rationality of the law.

First, legal rules and doctrines are to be generally and abstractly formulated, although they are to be applied to concrete life situations, without thereby allowing their internal rationality to be impaired. A long path leads from a statute or precedent to the ruling in a specific case, and the linguistic signs along the way point in different directions. This is what jurists sometimes call the indeterminacy of the law. Prejudices or preferences of those applying the law can acquire the force of a legal judgment, thus disturbing the tranquil image of a neutral and objective "discovery" of the truth, guided by law or precedent and legal method.

Second, the external rationality of legal norms also appears to be a precarious matter. Law is patently allied to politics: In exchange for receiving its compulsory force, the law bestows on politics a cloak of legitimacy. Nevertheless, the law should not be merely "politically" powerful, but should rather -- precisely as "law" -- be rational, and therefore acceptable. Ultimately, law should not command blind obedience, but rather should be followed voluntarily, and for "good reasons," by rational beings. Of course, only those legal norms that bestow rights or impose duties on everyone in the same manner and to the same degree are capable of receiving such approval. This condition is more easily formulated as a general principle than put into practice, when a society's members start out unequally equipped from vastly different initial positions. Equality without respect for a person's standing and needs is prone to be unjust -- and will be considered political in the end. Equality that is to serve concrete purposes, however, operates on the basis of social valuations and interests -- and has to be considered political from the very start. The sociopolitical condition of legal rules and principles seems patent, and it impairs their universal validity. Interest calculations, class-specific ideologies, and particularistic

[5] The German phrase *herrschende Meinung* is freely translated as "prevailing opinion."

[6] This is the Federal Constitutional Court of West Germany.

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

purposes stand a good chance of reaching the level of legislation, thus distorting the universalistic claims of the law and its autonomy *vis-a-vis* society and politics.

Critical assaults on both internal and external rationality constantly provoke the architects of jurisprudence to construct new, sometimes admittedly impressive, models intended to renovate and stabilize the edifice of reason. When the down-to-earth Azdak sniffs out "internal irrationality" -- not the spirit of the laws, but the arbitrary will of judges and advocates -- Solomon responds that judges add nothing to the law. They are merely the "mouthpieces" through which it speaks. And if that doesn't sell, he proclaims that all courts are to apply the law *more geometrico:* through a system of abstract and, of course, value-free concepts, plus the rules of legal reasoning, which shall lead the way to a proper judgment. Should Azdak counter this critically, by pointing out the indeterminacy of legal language, the existence of judicial preconceptions, and wide room for interpretation, Solomon could until recently retreat to hermeneutic or interpretive activity if he did not want to surrender the claim to rationality.

On the other hand, where Azdak realistically sees "external irrationality" -- that is, not liberty, equality and fraternity, but instead the domination of a privileged class; not legal reason, but the logic of capitalism at work -- Solomon answers by pointing to the rationality of the democratic legislative process, or to some fundamental norm that exists prior to the law of the land, or to an ultimate rule of recognition built into the positive law. Each of these constructive solutions is intended to guarantee both the -- at least "relative" -- autonomy of the law and its legitimacy. Again, however, the critics swoop down, pointing out new logical inconsistencies and contradictions, identifying intrusions of ideology into the law and, at the very least, demonstrating the existence of implementation deficits.

The competition between construction and critique on the field of jurisprudence is like that of the proverbial hare and hedgehog.[7] Both are more or less rigorous, in the spirit of a modernity condemned to enlightenment. Unlike in the realm of fables, however, here the legal-critical hedgehog works to the advantage of the hare: The serious constructor learns from his serious critic. The serious tone has dominated for a long time now. How else would one speak of a "recently raised ironic tone?"[8]

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[7] The fable of the hare and the hedgehog is of German origin. *See The Hare and the Hedgehog*, THE COMPLETE GRIMM'S FAIRY TALES 760 (1972). The hare, being haughty, insults the hedgehog by poking fun at his crooked legs. *Id.,* 761. The hedgehog responds by challenging the hare to a footrace. The hedgehog "outruns" the hare because he positions his mate at each turning point of the race. *Id.,* 762. The hare cannot tell one hedgehog from another, and every time the hare reaches a turning point a hedgehog welcomes him with "I am here already." *Id.* After running 74 times, the hare finally drops dead of exhaustion. *Id.,* 763. One moral of the story is that "no one, however great he may be, should permit himself to jest at anyone beneath him."

[8] This is an allusion to both modernity and postmodernity and a first step in an attempt to think them about simultaneously. Cf. IMMANUEL KANT, *Von einem neuerdings erhobenen vornehmen Ton in der Philosophie*, in

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What, ultimately, is the significance of this tone? Does it disturb the background harmony of construction and critique in modern law? The specter of legal nihilism[9] is making its presence felt. In the following Essay, this tone will be presented as the postmodern critique of law and set in relation to Azdak and Solomon. Of course, it must first be shown that such an ironic tone indeed exists. In the final analysis, this could be simply a matter of "legal science fiction," the pretext for an essay that ultimately goes nowhere because it hopes, through use of a fictitious tone, to conjure up a "postmodern" that has no independent existence -- not in the legal world, anyway.

Brecht, in any event, can serve as an ear-witness. His social-critical ironization of existing relations alienates, distorts even, the voice of legal rationality. In the writings of Karl Marx, who played to petrified, juridified relations their own melody in order to make them dance, the irony is quite biting. [10] Rudolf von Jhering, a true jurist, moderated irony with witticism, "in order to make 'seriousness' that much more effective," and wickedly satirized legal constructions in a "conceptual heaven."[11] Within this tradition, but intent on maintaining an audible dissonance to the good, serious tone, the American Realists exposed legal formalism -- which hoped to keep law and politics neatly separated and held everything in the sphere of law as conceptually, logically determinable -- as "transcendental nonsense." [12] The ironic legal-critical tone unfolds even more freely in several works of the Critical Legal Studies (CLS) Movement, which will be discussed in detail below.[13]

The ironic lines running from Marx via Jhering to CLS are intricately entangled. Without attempting a complete phenomenology of the ironic tone, I would like to distinguish two

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SCHRIFTEN ZUR METAPHYSIK UND LOGIK 377 (Wilheim Weischedel ed., 1977 Werkausgabe VI), and JACQUES DERRIDA, *Von einem neuerdings erhobenen apokalyptischen Ton in der Philosophie*, in APOKALYPSE 9 (1985).

[9] The accusation of legal nihilism or hostility to law is always raised when a relative truth is posited as absolute with doctrinaire seriousness. Such intolerance, which critics of law wish to ban from legal discourse, signals a hegemonic thought that cannot abide doubts. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE LAW JOURNAL 1 (1984). On the prohibition against speaking, *see also* MICHEL FOUCAULT, *Die Ordnung des Diskurses* 215 (1982) (translated in *The Discourse on Language* in THE ARCHAEOLOGY OF KNOWLEDGE (1972)).

[10] Juridification, the English translation of Verrechtlichung, refers to the transformation of social relations and conflicts into legal relations, through such means as statutes and court decisions. The process of juridification is discussed further at notes 24-27 and accompanying text.

[11] RUDOLF VON JHERING, SCHERZ UND ERNST IN DER JURISPRUDENZ v-vi, 1, 245 (1885); *see also* ERNST IMMANUEL BEKKER, ERNST UND SCHERZ UBER UNSERE WISSENSCHAFT (1907).

[12] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUMBIA LAW REVIEW 809 (1935). An informative and ironic self-presentation of "legal realism" is offered in Karl Llewellyn, *Some Realism About Realism -- Responding to Dean Pound*, 44 HARVARD LAW REVIEW 1222 (1931) (discussing Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARVARD LAW REVIEW 697 (1931)).

[13] For a detailed discussion of the CLS movement, *see, infra,* Part **G** (notes 62-76 and accompanying text).

major modes. In the first, a proper world is ironically juxtaposed to the "real," but upside down, world. This constructive, or pedagogic, irony follows the modern principle, as presented in the next Section. If authorities are needed, this brand of irony could call on Hegel to support its critique of hypocrisy, or on Socrates for its opposition to the geometric spirit and the extremism of conceptual thinking.[14] Marx and Brecht, both of whom enjoyed ridiculing false truths, offer a logical and ethical version of constructive irony -- one that brings to light the buried scandals of domination and alienation within the capitalist system.

Michel Foucault had a different irony in mind when he spoke of an "emancipatory laughter" directed against the order of things.[15] This irony is aimed not merely at the accidents of "regressions" of modernity and against the truncation of its claim to rationality, but rather against the compulsions of the project of rationality and against doctrinaire seriousness, which seeks authority as compensation for its self-imposed compulsions. This type of irony should help overcome -- or, to put it into postmodern lingo, to "deconstruct" -- the division of the world into angels (those on the side of good, the defenders of reason) and devils (those on the side of evil, the irrationalists). Deconstructive irony, if there is such a thing, does not proceed destructively. It does not say that such divisions or other dichotomies and binary schemata are false. Such would be a work of mourning, which would lead back to the black seriousness. Instead, this type of seriousness maintains that things are more complicated than a demagogy of angels and devils can acknowledge. No occasion is granted, therefore, to proclaim oneself a partisan of either the bright project of modernity or of some dark, imaginary counterproject.

Nonetheless, reasons exist for exercising tolerance in the theoretical and doctrinal practice of law. A major reason is offered perennially by the doctrinaire style of thinking that, although typical for jurists, is unjustified and certainly cannot be salvaged by any final legal construction. This style triumphs in the hypocritical privileging of "majority opinions" over "dissenting views," a triumph owed not to reason but to the compulsion to lay all doubts to rest.

A more current reason also presses us to plead for liberation from compulsory oppositions in legal theory and against doctrinaire seriousness in the law. Legal constructions operating under the claim of rationality have traditionally had trouble combining the guiding principles of freedom and equality. As discussed below in the fourth Section,[16] the

[14] On the history and modern forms of irony, *see* VLADIMIR JANKELEVITCH, L'IRONIE (1964).

[15] This image of a postmodern, not automatically constructive, irony goes back above all to MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1973), and MILAN KUNDERA, DAS BUCH VOM LACHEN UND VOM VERGESSEN 85 (Franz Peter Kunzel transl., 1980) (translated in THE BOOK OF LAUGHTER AND FORGETTING 77-115 (Michael Henry Heim transl., 1980)). The demarcation from cynicism follows 1 PETER SLOTERDIJK, KRITIK DER ZYNISCHEN VERNUNFT 37 (1983) (translated in CRITIQUE OF Cynical Reason (Michael Eldred transl., 1987)).

[16] *See, infra,* Part **D** (notes 39-52 and accompanying text).

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

libertarian-egalitarian calibrated legal grammar has recently run up against problem areas that cannot be declined according to the rules of "securing freedom" or "equality of treatment," because legal understanding is thwarted by destructive processes -- the mediatization[17] of language and the dissolution of the boundary between the world of facts and the world of counterfactual principles. Here -- and not in the Zeitgeist -- is where skepticism finds its motive for seeking a tolerant legal theory.

B. Serious construction as the principle of modernity

In the theater of modernity, the subject occupies center stage. He is, however, a subject bereft of his world. Left on his own, because enlightened, he must henceforth manage without metaphysical certainties. Philosophy consoles the subject over the loss of his former world with the promise that in his new world everything is theoretically possible; in particular, that the world is capable of being constructed.[18] The subject is posited as an autonomous, rational, and positively male being. The project and principle of modernity is both prescribed for him and inscribed within him: the construction of the world and of the self. Classic modern thought conceives of the world as image and representation. The world becomes a picture; it exists only within and through a subject that believes it can create the world by producing its true image, conquering it as a picture and assigning to it a history.

Inasmuch as self-reflection takes the lead in the work of construction, the relationship of the imagining subject and constructor to himself becomes the foundation of all ultimate certainties. Orienting standards from other spheres or epochs are no longer available. Modernity must derive its normativity from within itself, and therein lies the compulsion to self-referential reasoning or *Selbstbegrundung.* Subjectivity and its hidden gender bias thus define the normative content of modernity. Consequently, the rational utopias of the law of reason and political democracy offer the hope of overcoming man's self-incurred minority. An obvious and promising resolution of this normative program is quickly discovered in the concept of human rights. "Man qua man" advances to become the sole standard for right and wrong. The foundation of human rights frees the individual from history, privileges, and metaphysics, at the same time promising protection against the

[17] By "mediatization," I mean the transformation of language into a medium that tends increasingly to make available and disposable not the world but rather the subjects who utilize the signs of language for constructive purposes.

[18] This very compressed sketch of the modern world view is derived from JURGEN HABERMAS, DER PHILOSOPHISCHE DISKURS DER MODERNE: ZWOLF VORLESUNGEN (1985) (translated in THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES (Frederick Lawrence transl., 1987)); MARTIN HEIDEGGER, *Die Zeit des Weltbildes*, in 5 GESAMTAUSGABE (HOLZWEGE) 75 (1977); MAX HORKHEIMER & THEODOR W. ADORNO, DIALEKTIK DER AUFKLARUNG 9 (1986) (translated in DIALECTIC OF ENLIGHTENMENT (John Cumming transl., 1986)); KANT, *supra,* note 8; and RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 129 (1979).

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

growing power of the state and against other temporal powers. This compulsion to self-referential reflection corresponds to the utopia of man's emancipation.

Yet, the cognitive isolation and normative constraints of this work of construction, with its hermetical focus on modernity, create an all too easily irritated modern self-image. The radical break with all traditions and all obligations, except for those supported by "good reasons," cuts construction off from all historical certainty and any consoling image of a "hereafter." The constructor lives in the dogmatic structures of reason, among logical -- or at least conceptual -- systems and frameworks. His situation is deadly serious. And this seriousness is felt by anyone arousing suspicion of having betrayed the modern project. Those who point to the failure of reason, without offering a substitute construction, trigger the anxieties of the modern *homo faber theoreticus* (maker of theory) about his loneliness in the post-modern world. They activate his defenses against recognizing the endlessness of his efforts.

As the proliferation of modern critiques of both the subject and reason indicates, revisions soon became unavoidable.[19] A sociologically and psychologically informed critique unmasked the fiction of the "merely observing" -- and thereby knowing -- subject.[20] It destroyed the myth of his autonomy by demonstrating his powerlessness and proving the de facto irrationality of his reason. The objectivistic self-image of a world constructor keeping his "inner nature" under control gave way to the discovery of the "other" of reason. The will to power, unbridled drives, and socioeconomic forces were all analyzed at play within the "reasoning subject." The "critique of instrumental reason" destroyed the image of rationality as objective control over things and domination of "external nature." Searching analyses of the processes and mechanisms of social rationalization -- such as bureaucracy, formal law, and economic specialization -- register the collapse of the vision of "social progress based on modern technology." Instrumental reason, originally conceived for the purpose of dominating nature, has been transformed into the apparatus' own naked domination. The subject no longer bestows the mark of significance to objectivity; rather, he is *himself* mediated, subjugated to the laws of technology and bureaucracy. He has become, precisely, a subject.

The critique advanced by the philosophy of language dismantled the subject as creator of meaning and rejected once and for all the paradigm of consciousness as representation of

[19] The revisions or critiques of "classical" reason have been examined in HABERMAS, *supra,* note 18; ALBRECHT WELLMER, *ZUR DIALEKTIK VON MODERNE UND POSTMODERNE VERNUNFTKRITIK NACH ADDORNO* 70 (1985); and concisely in a brief essay by Seyla Benhabib, *Kritik des "postmodernen Wissens" -- eine Auseinandersetzung mit Jean-Francois Lyotard*, in *POSTMODERNE – ZEICHEN EINES KULTURELLEN WANDELS* 103 (Andreas Huyssen & Klaus Scherpe eds., 1986) [hereinafter *POSTMODERNE*].

[20] The otherwise admittedly problematic subsumption of such diverse critical positions as those of Nietzsche, Marx, Theodor Adorno, Max Horkheimer, and Foucault under the rubric of a "sociologically and psychologically informed critique" is due only to my emphasis on the construction problematic.

the world, replacing it with the paradigm of *language.* The conception of linguistic signs as "private characterizations" and of the subject as the source of significance were destroyed when the philosophers of language observed the "other inside of reason:" the public, social character of language, the application contexts of linguistic signs, language games as life forms in a verbally-revealed world. The language-philosophical decentering of the subject makes visible the communicative practice that provides the basis for the life of meaning. The representation of the modern world in the constructive montage of identifying concepts is thus broken down into its elementary particles.

Yet the project of construction is taken up once again, this time, of course, as reconstruction. The theory of communicative action[21] "inter-subjectivizes" the subject-centered reason in the bath of communicative rationality, replacing the paradigm of knowledge of objects beyond the subject with the paradigm of understanding among subjects capable of speaking and acting. Fundamental for this reconstruction is no longer the asymmetrical relationship between subject and object, but the performative attitude of participants in interaction who reach agreement with one another concerning things that exist in the world, thereby raising criticizable validity claims. Communicative intersubjectivity assumes the leading role, replacing self-referential reflection. The step taken by the theory of communication is constructive, inasmuch as it is intended to bridge the loss of meaning "discovered" by language philosophy. Unlike the positivism of language game practices, this theory relies on idealizations that transcend language games, in particular on the imputation of a "purified conversation:" the ideal speech situation. Whether the self-image of modernity can be permanently corrected along the lines of a, here only crudely sketched, "rationality intrinsically incarnated in situations of communicative action as well as in the structures of the life world"[22] is discussed below in Section four.[23]

I. Critical Remarks on the Rationality of Law

The waves of rationality critique also have been lapping at the shores of legal theory. Motifs of a critique unmasking legal rationality can be found in legal theories trying to account for the hidden background assumptions of rational legal constructions. Critics have leveled philosophical objections against the *a priori*-istic, Kantian brand of legal theory, which conceived of itself as isolated from morality and politics. Against the rational

[21] JURGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS (1981) (translated in The Theory of Communicative Action (Thomas McCarthy transl., 1984); *see also*, JURGEN HABERMAS, VORSTUDIEN UND ERGANZUNGEN ZUR THEORIE DES KOMMUNIKATIVEN HANDELNS 571 (1984); JURGEN HABERMAS, ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS 9, 144 (1976).

[22] HABERMAS, *supra*, note 18.

[23] *See, infra,* Section **D** (notes 39-52 and accompanying text).

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

law, which had been intended to interpret and organize social relations, these critics -- *realistic* in the broadest sense -- have emphasized those very social relations. They have done this by pointing out the possessive-individualistic premises, patriarchal biases, and hidden economic assumptions of that rationality. Legal scholarship has discovered the purpose in law: to hide social interests behind abstract legal categories and ultimately to embed the reality of the commodity-producing society in a system of subjective, essentially property-protecting rights. A sociologically and psychologically informed jurisprudence, such as Legal Realism, puts legal rationality on the defensive, driving it from the once-secure bulwark of the highest legal principles to either the semantic form of the universality of the law, or the will of the political legislature, or the methodologically controlled and socially responsible decision-making of judges.

Marxist-oriented critics of law, by contrast, scarcely give bourgeois law a chance. By deriving the legal form from the commodity form and thus demonstrating their identical internal logic, they establish the existence of essential relations between legal and economic categories. The assumption of a causal-functional relationship between socioeconomic and legal development allows one to recognize the legal forms necessarily corresponding to successive phases of capitalism: first abstract-formal, then flexible-material law. These Marxist critics -- in more or less refined versions of conspiracy theory -- trace the genesis and transformation of legal norms and judgments back to the interests and calculations of economically dominant social forces; or they expose the universalism of legal language, logic, and principles as ideological shells concealing highly particular interests. This form of law, we are assured, will necessarily die off -- after the revolution, of course.

The critique of instrumental reason is utilized in legal critiques that focus on legal formalism, attempting in the tradition of Marx and Max Weber to lay bare its internal mechanisms and social consequences. Center stage is occupied here by the investigation of juridification, which is particularly, although not exclusively, characteristic of the welfare state.[24] Here the ambivalence between the guarantee and the denial of freedom tends to shift into a legally-effectuated political or social expropriation -- or "colonization" -- of the "life world," into a custodianship over citizens who have otherwise come of age, and into

[24] Juridification strikes one as an almost postmodern phenomenon, or, at any rate, as a wrong turn in modern legal development. Yet, it is not always clear in following the juridification debate, which has wide ramifications, just what exactly is at issue. Humanistic motifs (such as alienation) are combined with critiques of rationality (such as social expropriation, colonization) and technical legal objections (such as norm uncertainty, implementation deficits). Sometimes the quantity, sometimes the quality, of the law is rebuked. Also, always lurking in the background is a rarely explicated conception of a "correct" law. An excellent analysis of the juridification literature, with many useful references, is presented in Gunther Teubner, *Verrechtlichung -- Begriffe, Merkmale, Grenzen, Auswege*, in *VERRECHTLICHUNG VON WIRTSCHAFT, ARBEIT, UND SOZIALER SOLIDARITAT* 298 (Friedrich Kubler ed., 1984) [hereinafter *VERRECHTLICHUNG*]. *See also* DILEMMAS OF LAW IN THE WELFARE STATE (Gunther Teubner ed., 1986), and *VERRECHTLICHUNG UND VERDRANGUNG: DIE BUROKRATIE UND IHRE KLIENTEL* (Albrecht Funk & Heinz Gerhard Haupt Wolf-Dieter Narr & Falco Werkentin eds., 1984).

the reification and alienation of their social relations. Despite such a somber diagnosis, certain of these critics hold fast to the project of construction, seeking to combat juridification through the institutionalization of "particular freedom relations," the strengthening of subjective rights, or the conversion to a purely procedural law that is to secure the cooperation of all concerned parties. Given the "all-around reduced legal subject" in the juridified world, decay theorists and those who focus on the "essential logic" of the system lose all interest in constructive projects. They dismiss law as the "primal phenomenon of irrational rationality,"[25] accompanied by a bourgeois subjectivity whose "history is already over."[26] Ultimately, of course, this mourning is fed by the promises of rationality found in the very bourgeois law that is being declared dead.

Whether the philosophy of language will leave a more lasting mark on legal discourse is still unclear. The realists left no stone unturned in their efforts to demystify talk of objective rights as pre-existing, unambiguous essences, and to unmask as mere legend the supposed "determinacy" of legal language. Within German jurisprudence, at any rate, recognition of the existence of prior judicial understandings, and of considerable room for interpretation and valuation, caused a considerable uproar.[27] It is questionable whether this "loss of certainty in legal thought" can be compensated with the help of hermeneutics. It seems unlikely that the interpretive community of jurists could agree on a single binding methodology, and an authoritative, clarifying word on the subject can scarcely be expected from some supreme court. It must also be doubted whether skepticism about the rationality of judicial decisions and of law per se can be neutralized on the metalevel of theories concerning legislation and the administration of justice, given the confusion and uncertainty in this area.[28] True, a multitude of constructive proposals exist here, as well as in the area of practical legal work. Yet, like the classic constructions, these too are swiftly attacked as "ideology" by an ever more radically gesturing rationality critique in both philosophy and jurisprudence, a critique presenting itself as deconstructive and calling itself postmodern.

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[25] THEODOR W. ADORNO, NEGATIVE DIALEKTIK 302 (1966).

[26] U.K. PREUSS, DIE INTERNALISIERUNGDESSUBJEKTS: ZUR KRITIK DER FUNKTIONSWEISE DES SUBJEKTIVEN RECHTS 330 (1979).

[27] Rarely does a work deserve the commendation "paradigmatic," but it undoubtedly applies to the seminal study of JOSEF ESSER, *VORVERSTANDNIS UND METHODENWAHL IN DER RECHTSFINDUNG* (1970).

[28] In the theories of legislation and judicial decisionmaking, one finds historical and sociological foundations competing in a rather unmediated way with the search for a priori-istic foundations of law. *See, e.g.,* RECHTSPRECHUNGSLEHRE (Norbert Achterberg ed., 1986); and Norbert Achterberg, *Die Bedeutung der Gesetzgebungslehre fur die Entwicklung einer allgemeinen Regelungstheorie*, *ZEITSCHRIFT FUR DAS GESAMTE GENOSSENSCHAFTSWESEN [ZFG]* 221 (1986).

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

II. Serious and ironic deconstruction—a counter-project?

It appears that, outside the citadel of law, an epochal intellectual-political battle has been raging between modernity and "postmodernity."[29] The Zeitgeist, always eager for quick satisfaction, has already crowned the latter as victor. That may well have been rash. At this point the only thing that seems certain is that something is moving, although no one knows exactly what or in which direction.

What this "postmodernity" actually amounts to -- whether it has already begun and replaced modernity, whether modernity is therefore dead or has at any rate reached a stage of terminal exhaustion, and what we are to make of postmodern insights -- here the roads part. The "old Europeans" and defenders of an enlightened modernity are united on at least this much: postmodernity is either something impossible or it is a machination of the Counter-Englightenment. It tries to attract adherents with the vision of a future that would do better to remain in the past. The "neo-French" protagonists of postmodernity counter with the impudent image of a modernity that has served merely as a transition between the Middle Ages and a still open future. Or, more mildly, they ironically characterize modernity as an age of "masculine head-births." The camps have long been formed, and the fronts drawn up, although most recently they seem to have loosened somewhat. Project directors have been appointed,[30] another ironic triumph for exactly the sort of dichotomous thought that the protagonists of the new reason set out to deconstruct.

[29] The contributions to *POSTMODERNE*, *supra,* note 19, offer a discriminating and mostly non-partisan introduction to postmodernism that is very worthwhile. Those interested in getting to know some of the "classics" of postmodernism should look at IHAB HASSAN, THE DISMEMBERMENT OF ORPHEUS: TOWARD A CONCEPT OF POSTMODERNISM 259 (2d ed. 1982); JEAN-FRANCOIS LYTOTARD, *LA CONDITION POSTMODERNE: RAPPORT SUR LE SAVOIR* (1979) (translated in THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans., 1984)); ROBERT VENTURI, COMPLEXITY AND CONTRADICTION IN ARCHITECTURE (1977). On the critique of logocentrism as the domination of reason over all otherness, on the domination of language (that is, the concept) over writing, and on the critique of phallogo-centrism as the tyranny of masculine signifiers, *see* JACQUES DERRIDA, *GRAMMATOLOGIE* (1974) (translated in OF GRAMMATOLOGY (Gayatri Spivak transl., 1976)); and JACQUES DERRIDA, *DIE STIMME UND DAS PHÄNOMEN* (Jochen Hörisch transl., 1979); *see also* JONATHAN CULLER, ON DECONSTRUCTION 43, 89 (1982) (a particularly sympathetic presentation of "theory and critique after structuralism").

For a critique of postmodernism, *see* BURGHART SCHMIDT, *POSTMODERNE – STRATEGIEN DES VERGESSENS* (1986); BENHABIB, *supra*, note 19; Jurgen Habermas*, Modernity versus Postmodernity*, 8 NEW GERMAN CRITIQUE 3 (1981); and Axel Honneth, *Der Affekt gegen das Allgemeine: Zu Lyotards Konzept der Postmoderne*, 38 MERKUR 893 (1984).

[30] The positions of Jurgen Habermas and Jean-Francois Lyotard illustrate the initially "frontal" standoff. See HABERMAS, *supra,* note 29; and Jean-Francois Lyotard, *Beantwortung der Frage: Was ist postmodern?*, 4 TUMULT 131 (1982); *see also Jay, Habermas and Modernism*, 4 PRAXIS INTERNATIONAL 1(1984); *Rorty, Habermas and Lyotard on Post-Modernity*, 4 PRAXIS INTERNATIONAL 32 (1984).

III. Two Readings of Postmodernity

Faithful to the construction metaphor and also as a bridge over the impassable -- because perhaps intentionally unreadable -- postmodern terrain, deconstruction[31] is an attempt to disassemble rationalistic constructions into their individual parts, in order to bring to light fissures, tensions, hidden components, buried tools, and compulsively simplifying antitheses. Deconstruction seeks to bring these elements of rationalistic constructions to the light of an even more radical Enlightenment. This results in at least two readings of postmodernity worth taking seriously: as a revolt against institutionalized modernity and as a radicalization of the linguistic turn.

1. *A Revolt Against Institutionalized Modernity.* -- Most likely, the revolt against institutionalized modernity began in architecture, which through historical citation rejected the commandment of "purity of style" and the "pragmatism of a rigorous functionalism" in favor of a disorderly, complex, and ironic vitality, which seeks to bring a full context to architectonic expression.[32] Ultimately, following literary criticism and art, sociology was also "infected" by the critique of canonized modes of thinking, seeing, and creating. [33] This appears most clearly in debates about modernization, particularly in the critique of a paradigm of social progress measured solely along a developmental path derived from Western industrial societies and a spatio-temporally neutralized pattern of progress.

The counter-cultural tendencies and revolts of the 1960s and 1970s can be interpreted as the social substrata of these deconstructive movements. In any event, they displayed recognizably postmodern features. Abandoning the fora and transgressing the limits of rational debate and opposition, they offered -- occasionally neo-Romantic -- counter-cultural models and radically questioned the rationality claims of European social culture -- of course, not infrequently carried along by a theory that itself bore Eurocentric

[31] On the levels of deconstruction, *see* JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass transl., 1978). DERRIDA'S OF GRAMMATOLOGY, *supra*, note 29, could be read as a primer, albeit a sometimes difficult one, on deconstruction.

[32] A visit to the exhibition "*Vision der Moderne -- Das Prinzip Konstruktion*" in the *Frankfurt Architekturmuseum* prompted me to use the construction metaphor and to, cautiously, analogize architectonic and legal-theoretical constructive labors. *See VISION DER MODERNE: DAS PRINZIP KONSTRUKTION* (Heinrich Klotz ed., 1986) (exhibition catalogue).

The architectonic form of the *Frankfurt Museum fur Kunsthandwerk* strengthened my intuition that it might be possible to combine seriousness and irony, construction and deconstruction. On the language of postmodern architecture, *see* VENTURI, *supra*, note 29, and the clear -- if somewhat dramatic -- introduction in CHARLES JENCKS, THE LANGUAGE OF POST-MODERN ARCHITECTURE 7-8 (1984) ("'[P]ost-modern' is not the most happy expression. . . . It is evasive, fashionable and worst of all negative -- like defining women as 'non-men.'").

[33] References in Andreas Huyssen, *Postmoderne -- eine amerikanische Internationale*?, in POSTMODERNE (note 19), 13-44; and VINCENT LEITCH, DECONSTRUCTIVE CRITICISM: AN ADVANCED INTRODUCTION (1983).

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

hegemonial pretensions. The caricature of a unified modern culture is confronted with a pluralism of life worlds, the social-theoretical construct of a single huge society is confronted with a "patchwork of minorities."[34]

Transposed into the legal sphere, this points to a revolution in the making. Simple ordering patterns and dichotomies, such as "individual/state" or "private/public," have become complex; between the individual and the whole appear minorities, intermediary forces, even external nature, all demanding legal-theoretical attention and practical legal protection. The spatio-temporal neutralization of history and society through abstract legal categories is criticized as alienation and reification. The legal revolt against the institutionalized, modern understanding of law finds its voice in the critique of juridification.

2. *A Radicalization of the Linguistic Turn.* -- A second reading of postmodernity might suggest that critics of rationality have driven us from the modern ivory tower and into a postmodern supermarket, in which -- as incongruous as it may sound -- they have radicalized the linguistic turn.[35] [n35] Here one finds, among other things, the "aesthetic populism" in the language of architecture, the "happy eclecticism" of postmodern art, philosophy, and -- as remains to be shown -- legal theory. Next to this, one finds the "happy polytheism of language games," including "allusions to things which are thinkable but which cannot be represented." Lyotard expresses this as the "play of surfaces," the "circulation of intensities and emotions," and, finally, a "linguistics of decoded currents." Everything flows, theoretically, and anything goes, methodically. The postmodern supermarket stocks more than just "good reasons."

Or, does it perhaps stock less? Is all of this a premeditated and thus utterly inexcusable confusion? Or is it the fateful irony of a modernity that left everything up to a knowing subject, demanding that he -- with his limited powers -- attempt to perform a task, namely the construction of world and self, requiring infinite power?[36] Might it be the fateful irony of a modern law that, promising the utopia of liberation, actually entangles its subjects in the alienating and reifying practices of their own enslavement?

There are, alas, no obvious answers. The "genuine" postmodernists, the post-structuralists,[37] are less interested in answers than in "completing the linguistic turn" with

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[34] JEAN-FRANCOIS LYOTARD, *DAS PATCHWORK DER MINDERHEITEN* (1977).

[35] THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD (Richard Rorty ed., 1967).

[36] HABERMAS (note 18), 306; FOUCAULT (note 15), 372.

[37] The French anti-"master thinkers" -- R. Barthes, G. Deleuze, J. Derrida, J. Kristeva, J.F. Lyotard, and L. Irigaray -- usually are considered to be "post-structuralists." Helpful, but demanding, introductions to the post-structuralists are offered by CULLER, *supra,* note 29, and LEITCH, *supra*, note 33.

insights on the random motion of linguistic signs. Theories are no longer to find their fulfillment in the realization of *constructive* ideas. The "life" of linguistic meaning does not even permit such work of construction, since it reduces itself to an anonymous existence of codes within a not-rationally-controllable play of differences. The "grand narratives" of the "master thinkers," concerning the emancipation of the subject, the spirit, or humanity as a whole, have been played out -- deconstructed. Unity of discourse is probably lost; universal meanings, particularly that of a *unitary* reason, have become very fragile. In the critique of totalizing thought, we are fast approaching an "Age without Paradigms." But is it also an Age without utopias?

Has the thread been cut? Or is the post-structuralist withdrawal only a negative gesture, pointing nowhere? Is it a gesture that, contrary to all postmodern rhetoric, does not *reject* the inheritance of the Enlightenment but instead further *radicalizes* the critique of rationality?

Evidence appears to exist for both conclusions. The cancellation of all significance and the renunciation of all theories striving to identify and explain phenomena sounds like the surrender of the modern project. But must this really be taken so seriously? Even postmodern thinkers seek -- at least -- a public and its understanding and agreement. Even the free play of signifiers, grammatical signs, and rhetorical levels does not get anywhere without meaning, or foundation in language or writing. Even the ironic tone wants to resound -- just *differently* than the serious tone. Logic is probably still at work when familiar units of synthesis -- such as history, society, or structure -- are disassembled, and the marginal or repressed, the ignored or disfigured, are brought to language. Only the text, so it seems, survives the waves of deconstruction and secretly creates unity; textual work remains with us as emancipatory practice. Instead of a liberation of the subject, of course, we are dealing with a liberation of the text from the overpowering author/subject/logos and a release from the task of re-presentation. It looks as though the post-structuralists, while demystifying petrified rationalisms, get caught up in "a quasi-metaphysical theory of textuality."[38]

3. *Contemporary Critiques of the Two Readings of Postmodernity.* -- Yet, both the linguistic turn and the anti-modernist revolt have been taken up by contemporary critiques of law. Of course, this has taken place in German jurisprudence with a different theoretical orientation, and under different political portents, than in the American CLS movement.

For a critique of the poststructuralist leveling of the genre distinction between literature and literary criticism, *see* HABERMAS (note 18), 224. Most recently, the deconstructors have been forced to attend their own deconstruction, this time from a feminist perspective. *See* ALICE JARDINE, GYNESIS: CONFIGURATIONS OF WOMAN AND MODERNITY (1985); JANE GALLOP, THE DAUGHTER'S SEDUCTION: FEMINISM AND PSYCHOANALYSIS (1982); FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER (Seyla Benhabib & Drucilla Cornell eds., 1986).

[38] Andreas Huyssen, *Postmoderne -- eine amerikanische Internationale*?, in *POSTMODERNE* (note 19), 38.

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Before examining in more detail the difference between a conservatively-inclined German constructivism and a rebellious American deconstructivism, it seems worthwhile to identify where the paths of legal criticism diverge. The significance and the contemporary problematic of counterfactual thinking brings us to the normative core of both modernity and its critique.

C. Counterfactual thinking, seriousness, and irony

Counterfactual thinking plays a decisive and positive role for the project of construction. Here is the *locus classicus* of respectable seriousness: The normative constructor counterfactually confronts the bad reality of the present with the image of a better, future reality. Counterfactually moving from "Is" to "Ought," contradictions can be bridged, losses of meaning and deficits of practice can be compensated for, and utopian perspectives opened up.

Three modes of application must be distinguished. First, as in Niklas Luhmann's systems theory,[39] the counterfactual can be simply normative. In this sense, however, every norm would be counterfactual.

Second, the counterfactual may be located in some transcendental realm, in which, as in Immanuel Kant's theory of law,[40] the claim is raised that the subject under discussion is something ineluctable, something that cannot be further grounded. Thus, the "transcendental fact" of rationality is unavoidable for all members of a life form.

Finally, the theory of communicative action gives to the counterfactual a weak transcendental sense. The theory investigates the "necessary" idealizations that are automatically made by participants of a specific communicative practice, for which no functional equivalent exists. It concludes that communicative actors, in their everyday attempts to make themselves mutually understood, must raise reciprocal validity claims. Accordingly, we all stand under the "weak transcendental" obligation to claim sincerity for expressive statements, correctness for normative statements, and truth for theoretical statements. Briefly and counterfactually:

> Upon entering into an argument, the participants cannot avoid reciprocally imputing to one another satisfactory fulfillment of the requirements of an ideal speech situation. And yet they know that discourse is never definitively

[39] For an exposition of Niklas Luhmann's systems theory, *see* NIKLAS LUHMANN, *SOZIALE SYSTEME: GRUNDISS EINER ALLEGEMEIN THEORIE* (1984) [hereinafter *SOZIALE SYSTEME*]. For Luhmann's most recent statement of his theory, which addresses recent criticism, *see Law as a Social System*, 83 NORTHWESTERN UNIVERSITY LAW REVIEW 136 (1989).

[40] *See* WOLFGANG KERSTING, WOHLGEORDENETE FREIHEIT: IMMANUEL KANTS RECTS UND STAATSPHILOSOPHIE (1984).

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

> "purified" of all hidden motives and compulsions for acting. Just as we can't proceed without the imputation of a purified speech situation, we must nevertheless always settle for "impure" communication.[41]

The strong and even the weak transcendental versions of the counterfactual are quite ambitious -- the latter version in any event with respect to argumentative discourse. They nourish hopes for an improvement of the world, and in this they cannot be criticized. Moreover, they want to establish a universal significance. The theory of communicative action then alludes to the fiction of a universal context, built into the situation of intersubjective understanding per se, transcending all of the infinitely diverse everyday contexts. Such universalizing thoughts immediately call forth their own critique, borne of the suspicion that the "idealism of a pure, non-situated rationality"[42] has once again slipped in. We are suspicious of a rationality intent on re-establishing the domination of the general over the particular and contemptuous of the diverse contexts from which it secretly lives.

I. The Cognitive Control of Facticity and the Mediatization of Language

I suspect that counterfactual thinking, even when enlightened by a philosophy of language, believes it has facticity under cognitive control -- with its generalizations considered adequate to their object. Observation, reflection, and understanding should, when the need arises, always be capable of shifting from the level of general thought to whatever may really be the case. However unclear, unclean, repressively complex or alienated facticity may be, nothing should hinder the observing theorist from at all times being capable of bringing it "to language" or "to conceptual formulation." Here, again, one would have little to object to, as long as it seemed even intuitively plausible that the "real world" could indeed be conceptually construed and distinguished from the counterfactual.

It appears to me, however, that contemporary events and developments have rendered problematic both our cognitive hold on facticity and the separation of the two realms of facticity and counterfacticity, if indeed these were ever unproblematic.[43] Consequently, generalizing and counterfactual thinking run the danger of blinding us rather than helping us towards a constructive detachment from reality.

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[41] HABERMAS (note 18), 374, 379. For a critical commentary, *see* Martin Seel, *Eine zweite Moderne?*, 40 *MERKUR* 245 (1986).

[42] HABERMAS, *supra*, note 18.

[43] The normative structure of reality has been demonstrated by ethnomethodological research for everyday, understanding-oriented action. According to this research, every aspect of our communicative behavior is saturated with normative expectations and with imputations of normative correctness.

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Indeed, the conceptual-constructive disposal of facts is confronted by an all but trivial problem as a result of the mediatization of language, which makes available and disposable the subjects who utilize language for constructive purposes. Hypermodern information technologies, new media, progressive computerization, and high-tech communication are now pressing language to their services with instrumental rationality, driving man out of his final refuge outside the *forum internum* of conscience. This slow expropriation of the speaking subject goes hand in hand with the conversion of language into a commodity that can be consumed at will. The consequences are palpable, and subject to culture-critical attack, as the deprivileging of both the spoken and the printed word and the dequalification of reading and writing in "perfect capitalism."

For quite a while commodity production has tended to obliterate even the verbal memory of use-values. In this respect, Marx has rendered the most profound analysis of the mystified world of capitalism. Yet, "perfect capitalism" goes further and produces its own languages. Under a ceaselessly advancing digitalization of signs and the invention of new programming "dialects," the chain of signifiers is constantly torn apart and recombined. What has been lost is the idea of language as the unity and locus where meaning is being created.

II. The Dissolving Boundary Between Facticity and Counterfacticity

I want to make these tentative -- and admittedly vague -- reflections somewhat more concrete by focusing on the dissolution of the boundary between facticity and counterfacticity, here offered as my second contention. I start from the assumption that counterfactual thinking applies to the perception, description, and removal of threats to human existence, and that within this realm is where counterfactual thinking must prove itself.[44] It can hardly be disputed that since the third technological revolution, the greatest danger for all human life in society and for the survival of the human race comes from nuclear energy -- although the genetic technologies are no longer far behind. The so-called peaceful and unpeaceful utilization of this energy source has already led to devastations, the comprehension of and reparation for which far transgresses everyday common sense -- which is always limping behind technological progress and therefore inclined either to demonize or to trivialize it.[45] Even scientists, and the political and legal experts they

[44] *See* FREDRIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT (1981); and COLIN TURNBULL, THE FOREST PEOPLE (1961). These works demonstrate how, for "primitive" and class societies, collective consciousness is organized around the perception of dangers threatening the survival of the group.

[45] Even great minds are not immune to this sort of misjudgment: "We read with some surprise that Engels, after the Franco-Prussian War, believed that weapons have now reached such a degree of perfection that further progress of a radical nature is no longer possible." HANNAH ARENDT, *MACHT UND GEWALT* 7 (1985) (citing FRIEDRICH ENGELS, *HERRN EUGEN DUHRINGS UMWALZUNG DER WISSENSCHAFT* (1878)).

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instruct, lately have been supplying us with words that mean nothing: A "Super-GAU"[46] actually should not be able to occur in the first place -- not even through human error. "Critical values" are continually being adjusted, in accord with the growing certainty that "danger prognoses" and "damage calculations" are radically uncertain. At least until the Chernobyl disaster, the "residual risk" was left at the mercy of a "practical reason," for which a nuclear society no longer has room.[47] As if to confirm this, West Germany's Atomic Energy Statute[48] simply -- and foolishly counterfactually -- relies on patterns of early capitalist trade law to answer questions regarding the licensing of nuclear power plants and transportation of nuclear materials, seeking to guarantee the "reliability" of plant operators a little as though they were mere innkeepers[49]. Frankly, but not without a certain involuntary irony, the statute pegs the required level of risk control and danger prevention to the "current standards of science and technology."[50] Faced with a technical progress beyond human and scientific responsibility, not even the legislators appear to have retained faith in the counterfactual power of norms.

Nor do the two more ambitious variants of counterfactual thought remain unaffected by this. Perfect capitalism has driven the subject out of the dwelling place of his language; the atomic state has banished the nuclear society to a border situation in which the borders themselves have been suspended. We are forced to accept the perspective of a peaceful/unpeaceful destruction, "a destruction without survivors, without mourning, and without symbolic significance."[51] To this extent we live in a "post-apocalyptic age"[52] that forces us -- not transcendentally, but existentially -- to think the unthinkable, because total destruction is capable of being produced. In this regard, facticity and counterfacticity fuse together.

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[46] A "Super-GAU" is an abbreviation for *gropter anzunehmender Unfall*, or a nuclear accident beyond scientific control such as that which occurred at Chernobyl.

[47] The "residual risk" philosophy under the guidance of "practical reason" was first developed by the German Federal Constitutional Court in the 1978 *Kalkar* decision (49 *BVerfGE* 89), which effectively imposed on the citizenry as "socially acceptable burdens . . . all uncertainties transcending this threshold of practical reason." *Id.,* 143. In the *Kalkar* decision, the court reviewed the constitutionality of the West German Atomic Energy Statute, *see, infra,* note 48, to specify the safety standards for nuclear reactors such as that near the town of Kalkar. In doing so, the court considerably relaxed the constitutional protections for life and health that had received nearly the status of an absolute rule in its abortion decision. *See* 39 *BVerfGE* 1, 43 (25 February 1975).

[48] *Gesetz uber die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren* (Atomgesetz), Federal Gazette – *Bundesgesetzblatt* (BGBl.) I, 3053 (31 October 1976).

[49] *Atomgesetz*, §§ 3; 4; 9.

[50] Atomgesetz, §§ 7 II Nr. 3; 9 II Nr. 3.

[51] DERRIDA (note 8), 91.

[52] On the post-apocalyptic quality of our era. *Id.,* 129.

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What follows from this for counterfactual thinking and seriousness in the law? Unless they want to appear tragicomic, they will have to say farewell to the demagogy of the angels and the "two realms" theory. True, even those who focus their attention on issues such as the nuclear threat, the destruction of the natural environment, or the development of cloned reproduction will not throw out questions of justice with the nuclear-heated bath. Yet, the universalistic postulates of freedom and equality, that is, the traditional "good reasons" alone, can neither improve the world nor save legal rationality. When, however, even animal reactions such as anxiety are rational, then even the iron rationalists must shake their heads in wonder and offer other than counterfactual commentaries to the "(post) apocalyptic" game of instrumental reason.

If it is correct that those catastrophic threats are universal -- and would be definitive, should they occur -- then we all have occasion to dismount from the high horse of an institutionalized modernity that produced this threat with its belief in progress.

Constructive thought is confronted not with pure facticity but with a reality that is always already normatively structured. Existential threats that confront us all constitute meaning and compel recognition of the fallibility of modern work of construction. "Noble seriousness" must arouse the same suspicions as a modernity whose principle of reason has been converted into "technological progress" and has marginalized questions of justice.

What are we to make of a just world that merely postpones its destruction from one day to the next? How much seriousness and how much irony can a legal rationality evoke when it sings at full voice the praises of individual freedom and, a bit more softly, those of social justice, but abdicates before the task of normatively controlling the destructive insanity of nuclear, genetic, and other technologies? An answer to these questions is suggested by a confrontation with the postmodern doubters of the law -- in particular, with the "autopoeticists" in Germany and the advocates of the CLS movement in the United States.

D. Autopoiesis, or postmodern doubts about legal rationality

Were one to rely on self-incriminations or the labels offered by third parties, then the theory of law as an autopoietic system within an ensemble of autopoietic systems[53] and

[53]These cursory objections, which are rather inadequate in proportion to Luhmann's voluminous theoretical oeuvre, are based on a consideration of some of his works. *See* NIKLAS LUHMANN, *AUSDIFFERENZIERUNG DES RECHTS* (1981) (translated in THE DIFFERENTIATION OF SOCIETY (Stephen Holmes & Charles Larmore trans., 1982)); *LEGITIMATION DURCH VERFAHREN*, ch. II (1975); *SOZIALE SYSTEME*, *supra*, note 39; OKOLOGISCHE KOMMUNIKATION (1986); and Niklas Luhmann, *Einige Probleme mit "reflexivem Recht*," 6 *ZEITSCHRIFT FUR RECHTSSOZIOLOGIE* (*ZFRSOZ*) 1 (1985). I focus my critique on the system-theoretical rededication of the rationalistic construction project as a modernism curbed by no normative principles. Systemtheoretical theories conceive of such things as society, law, politics, economy, and science as functionally differentiated "systems."

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its earlier, discourse-theoretical incarnation, the theory of reflexive law,[54] would seem to be those theories that extend furthest into the postmodern field. Still, with respect to Luhmann's legal theory -- which others, at least, have labelled postmodern -- the question of the relation of modernity to postmodernity, of seriousness to irony, finds no answer. The constructive conception of rights as a social form of reason; of law as the locus of a rationality in which that which is right converges with that which is just; and of judicial decisions as a methodically-controlled mode of dispute resolution characterized by "good (legal) reasons" -- all this Luhmann rejects as misguided and antiquated.

In functionally differentiated societies, rationality cannot mean an idea, a norm, or a principle that counterfactually confronts the real existing systems. According to Luhmann, "[t]he concept of rationality formulates only the most ambitious perspective of self-reflection of a system."[55] Luhmann's project is to describe this self-referentiality as adequately as possible. His goal is a theory of empirical systems and their concrete reproduction. In this sense, which is neither rationalistic-constructive nor deconstructive in the main, society, law, politics, economy -- and anything else capable of being thought of as a system -- are presented as autopoietic systems that reproduce themselves both in their elements and as a whole, almost exactly like external nature.

Consequently, law consists of communications having the characteristic of producing other communications. It appears as a self-referential system that is operatively closed -- that is, generating the difference between system and environment by the binary code[56] legal/illegal -- yet cognitively open. Underneath this primary difference, doctrinal programs fix the conditions for correct decisions. Accordingly, justice exists only as the consistency of legal decisions, measured against the normative quality of the norms. A rejection of the Enlightenment's legal project could hardly be more clearly formulated! Self-referentiality and binary coding allow no recourse to the rational law as a condition of

[54]Scarcely less productive than Niklas Luhmann, the project director of General Systems Theory, is Gunther Teubner, the father of "reflexive law." For his most important contributions to an allegedly postmodern legal literature, *see* Teubner, *Reflexives Recht*, 68 *ARCHIV FUR RECHTS- UND SOZIALPHILOSOPHIE* [ARSP] 13 (1982); *The Transformation of Law in the Welfare State and After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, in DILEMMAS OF LAW IN THE WELFARE STATE (note 24), 3, 299; *VERRECHTLICHUNG*, *supra*, note 24; *Gesellschaftsordnung durch Gesetzgebungslarm? Autopoietische Geschlossenheit als Problem fur die Rechtsetzung* (1985) (unpublished manuscript); *see also* Gunther Teubner & Helmut Willke, *Kontext und Autonomie: Gesellschaftliche Selbststeuerung durch reflexives Recht*, 5 *ZFRSOZ* 4 (1984). But *see Ingeborg Maus*, *Perspektiven "reflexiven Rechts" im Kontext gegenwartigen Deregulierungstendenzen*, 19 *KRITISCHE JUSTIZ* 390 (1986) (critical of Teubner); Richard Munch, *Die sprachlose Systemtheorie: System differenzierung, reflexives Recht, reflexives Recht, reflexive Selbststeuerung und Integration durch Indifferenz* 6 ZFRSOZ 20 (1985) (same); Richard Nahamowitz, *"Reflexives Recht:" Das unmogliche Ideal eines post-interventionistischen Steuerungskonzepts* 6 *ZFRSOZ* 29 (1985) (same).

[55]LUHMANN, *SOZIALE SYSTEME* (note 39), 638, 645.

[56] It seems likely that the binary coding is loosened by the introduction of a "rejection value." *See* Luhmann, *Die Codierung des Rechtsystems*, 17 *RECHTSTHEORIE* 171 (1986).

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autonomy. The supposed facticity of self-referential systems permits only the question: "To what extent is the theoretical apparatus of the legal system (and particularly of legal dogmatics) capable of perceiving autopoietic systems in its environment and taking them into account?"[57] The theorist is indifferent to everything else.

Yet, the ostensible empiricism of the theory of autopoietic systems does not wash. Its normative modesty is a false one. Its categories and models are not merely descriptions taken from real (legal) life, but rather -- and who should know this better than Luhmann himself? -- highly selective reductions of complexity. Hidden inside the seemingly realistic and sober acceptance of "that which is simply the case" is a secret passion for the status quo, whose "rationality" is projected into the system or referenced metaphorically to biologism, the use of biological concepts in social theories. Luhmann reveals this most clearly in his "secret theory" of judicial procedure, which entangles the participants in a ritual and treats their disappointments in a quasi-therapeutic manner, in order to absorb possible outbreaks of protest.

Were this system theory completely cynically intended, one might with appropriate malice say that it was as postmodern as the neutron bomb, which eliminates the subject while leaving everything else as it was. It would be more accurate to see the theory of autopoietic systems as an admittedly ingenious, but not postmodern, enterprise, since it can no more do without an ultimate fixed point than could the Kantian theory of law. I am referring to the difference between system and environment, to which every system problem can be reduced. Certainly, the old European project is here rethought: In place of the self-referential subject stands the self-referential system, the self-reference of system operations replaces the self-reassurance of thinking, and instead of knowledge of the world we are now dealing with the observation of observations. Yet, an awful lot of cheerfully autopoietic constructing is going on here. On the basis of a sociobiologically rededicated reason, constructive thought ends up as a constructivism[58] that indifferently reproduces the leveling effect of modernity's catastrophic possibilities.

Mutatis mutandis, after making all the necessary changes, the same is true for legal theories that are inspired by organization theory, which accuse themselves of postmodernism.[59] Here the theory of reflexive law is the most advanced attempt to

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[57] LUHMANN, *Einige Probleme mit "reflexivem Recht,"*, *supra*, note 53.

[58] HUMBERTO MATURANA & FRANCISCO VARELA, *DER BAUM DER ERKENNTNIS* (1987).

[59] Particularly intended here is Karl-Heinz Ladeur, who distinguishes himself from Luhmann and the "later" Teubner by combining democratic-theoretical intentions with his legal theory, while nevertheless rejecting conceptions of identity. *See*, in particular, KARL-HEINZ LADEUR, *VORUBERLEGUNGEN ZU EINER OKOLOGISCHEN VERFASSUNSTHEORIE, DEMOKRATIE UND* 285 (1984); *Ein Vorschlag zur dogmatischen Neukinstruktion des Grundrechts aus Art. 8 GG Recht auf "Ordnungsstorung"*, 2 *KRITISCHE JUSTIZ* 150 (1987); *Vom Gesetzesvollzug zur strategischen Rechtsfortbildung*, 4 *LEVIATHAN* 339 (1979).

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construct society after a model of large organizations. As distinct from the "pure" theory of autopoietic systems, this theory asks whether and how law can still regulate. In harmony with Luhmann, the law is posited as autonomous (or operatively closed, as the term goes). When law is given the task of regulating, its autonomy is caught in a "trilemma:" Every legal regulatory intervention that exceeds the limits of the respective systemic self-regulation either (1) remains irrelevant, because it speaks the wrong language; (2) produces disintegrating effects in the area to be regulated ("juridification"); or (3) produces such effects within the regulatory law itself ("deformalization").

What sort of theoretical response is possible to this asserted mutual indifference of the systems? Self-referentiality is offered as the key to the problem. Law is reoriented away from regulation of other areas and towards "regulation through self-regulation." Law restrains and observes itself; it becomes reflexive. The observing reflectiveness of the knowing subject creeps, as it were, into the form of laws: law models for itself its own society, economy, politics, and so on -- and *vice versa*. This is the old representational model in a new autopoietic garb!

And where is the transcendental component hiding? God no longer reveals anything and nature maintains a normative silence. A hierarchy of legal sources is unavailable, for modern/postmodern law springs from the arbitrariness of its own positivity. Systems appear to have no place for the transcendent. What dominates are operative closure, circularity, and the ineluctable self-referentiality of law -- with one important soft spot. Although it cannot directly regulate, the law nevertheless should offer "options" for regulation and prestructure negotiating systems between organizations. Because the law is open to information from outside, it allows for reflection processes that adequately react to the systemic environment. Thus, just like the liberalistic law of the free market society, reflexive autopoietic construction requires an invisible hand. Suddenly "structural couplings" and "interferences" emerge from the bush to take their place at the switch points of the systems, in order to help achieve a modelling of the external world within the internal. Thus, the legal system can perceive, for example, the economic system at least as a disturbing murmur; and legislation can help produce "order from noise,"[60] that is, economic order. Consequently, viewed from the vantage point of interference, we need not take so seriously the blind interaction of the system which observes itself and only itself. The basic material -- "meaning" -- transcends system boundaries by giving systems the capacity to influence one another, to inform one another of what is going on -- almost in a life-world manner. Actually, systems were only supposed to be able to inform one another that they each operated according to a different guiding difference -- such as right/wrong or pay/don't pay. Yet from the vantage point of interference, the theorist

[60] "Order from noise" was first perceived in HEINZ VON FORSTER, OBSERVING SYSTEMS (1981). It has since caused a furor among autopoieticists. *See* LUHMANN, *ÖKOLOGISCHE KOMMUNIKATION*, (note 53), 128; and *see*, generally, TEUBNER, *Gesellschaftsordnung durch Gesetzgebungslarm*, *supra,* note 54.

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shuts his eyes and -- certainly unwillingly and without irony -- deconstructs the "unyielding rigidity"[61] of autopoiesis.

Our critique of counterfactual thinking was admittedly all too brief in its exclusive concentration on the "progress" problematic. Nevertheless, in light of that critique, and additionally our equally cursory presentation of the allegedly postmodern models of law, we can offer a tentative conclusion. The original vision of construction modernity, that theoretically everything is feasible, has today struck back in two forms: in a perfected technology of destruction, and in an elegant system-theoretical, super-cooled image of a "brave new world." Such an end to legal-normative constructions would mean not only the exhaustion of the passion for justice but also the depoliticization of postmodernity as *"posthistoire."*

E. The Critique of Law in Revolt: Critical Legal Studies

Zack: "Do you know what I mean?"
Roberto: "Yes. I know what I mean."
Down By Law[62]

Studying the contemporary critique of law in the United States, loosely and intricately grouped in the CLS movement, we encounter the "genuinely" ironic tone of deconstructive legal work. Unlike the conceptual strategies and constructivist lines running to postmodernity in Germany, CLS can be effortlessly aligned with the revolt against institutionalized modernity and the linguistic turn. The revolt is already embodied, before any specific content, in its stylistically impure amalgam of critique traditions and variants. CLS derides any attempt to develop a "unified school." One can easily discover within CLS Marxists and students of the Frankfurt School, neorealists and Left Wegerians, followers of pragmatism and existentialism, structuralists and poststructuralists, as well as a distinctly feminist critique of law.[63] This potpourri alone, enough to make any serious constructor

[61] LUHMANN, *Einige Probleme mit "reflexivem Recht," supra*, note 53.

[62] *Down by Law* (Island Pictures 1986) (directed by Jim Jarmusch).

[63] The question of the "true" significance of the Critical Legal Studies movement can be answered neither once and for all nor exhaustively for the present moment. This is merely an intrinsic feature of movements. A sense of the thematic breadth and historical depth of CLS can be gathered from the bibliography published in 94 YALE LAW JOURNAL 461 (1984).

For essays that help place the first two generations of Crits, *see* The Politics of Law: A Progressive Critique (David Kairys ed., 1982); and MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

The culture of dissent, in both theoretical and methodical respects, that makes up the fascination of CLS is reflected in various works, which -- although demanding -- also can be read as introductions to the movement. *See* Robert Gordon, *Critical Legal Histories*, 36 STANFORD LAW REVIEW 57 (1984); David Kennedy, *Critical Theory,*

shudder with revulsion, guarantees a large measure of irony. Theoretical eclecticism, which appears to be postmodern per se -- comparable to play with citations and fragments of postmodern architecture -- provides for a new unclarity in the critique of law. Such a period of critical experimentation generates a doubly ironic tone, which I would like to render more audible in two ways that might betray a European voice: externally, by reviewing aspects of its history, and internally, by describing a recent contretemps that nicely illustrates the confusion of critical voices.

I. Fatherless Critique

"Grandfathers and sons" might be an appropriate formula for the historical-psychological approach that characterizes CLS as a "fatherless critique of law." The Crits take from the "Legal Realists" both their central theme -- the indeterminacy of law -- and the (post)Azdakian style of their critique.

The realist grandfathers are held in high esteem. Their skepticism *vis-a-vis* legal rationality was concentrated against the three iron dogmas of American, as well as German, legal thinking: first, that rights have an objective existence that can be demonstrated by means of the tools of legal methodology utilizing concepts and logical operations; second, that judicial decisions are appropriately described as the rationally duplicable, and therefore "reasonable," application of legal rules and principles; and third, that the precedent system allows the holdings of earlier decisions to be logically applied in later cases.[64] The realists confronted mainstream talk of objective rights as preexisting and unequivocal essences with the fact that language -- including legal language -- is an ambiguous, malleable, many-sided medium of communication, one leaving plenty of room for interpretation and manipulation. Legal arguments detached from politics, morality, and social reality are thus

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Structuralism, and Contemporary Scholarship, 21 NEW ENGLAND LAW REVIEW 209 (1985/1986); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, STANFORD LAW REVIEW 575 (1984); and Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARVARD LAW REVIEW 563 (1983). As a friendly yet critical observer, Andrew Altman sketches the legal-skeptical debate that was set off by the "Legal Realists" and reheated by CLS. *See* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin,* 15 PHILOSOPHY & PUBLIC AFFAIRS 205 (1986). CLS meanwhile has become the honored, and scorned, object of at least these symposia. *See A Symposium of Critical Legal Studies*, 34 AMERICAN UNIVERSITY LAW REVIEW 929 (1985); 6 CARDOZO LAW REVIEW 1013 (1985); and Critical Legal Studies Symposium, 36 STANFORD LAW REVIEW 1 (1984). This is a sign that CLS may already belong to the institutionalized (post)modern -- a suspicion shared by at least one of its "founding persons." *See* Duncan Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO LAW REVIEW 1013, 1029 (1985).

[64] On the influence of extra-legal factors on judicial decisionmaking, *see* Max Radin, *The Theory of Judicial Decision, Or How Judges Think*, 11 AMERICAN BAR ASSOCIATION JOURNAL 357 (1925); on the indeterminacy of legal language, *see* COHEN, *supra*, note 12; on the logic of the precedent system, *see* Herman Oliphant, *A Return to Stare Decisis*, 14 AMERICAN BAR ASSOCIATION JOURNAL 71 (1928).

necessarily conceptually circular -- or, as Felix Cohen rather more drastically put it, "transcendental nonsense."[65]

The alternative conception of the Realists had suggested that it is not preexistent rules and concepts that "solve" a case, but rather the rules and rights that a judge discovers, interprets, recognizes, and adopts -- the ones she finds pertinent, primary, and constitutional. Neither prior legislative determinations nor precedents can eliminate the possibility that a judge will decide in a particular way. Far more decisive is which choice she makes, that is, which interests she sees as legally significant and worth protecting, and of course which political preferences guide her in this choice. Thus concepts, rules, and principles do not describe what judges actually do. At best, they may lead to highly uncertain generalizations about what judges might do.

As it turned out, the Realists themselves ultimately shrank back from the radical consequences of their indeterminacy thesis, silencing the ironic tone of their skepticism amidst efforts to create a "responsible law" on the basis of empirical data gathered and interpreted with a little help from the social sciences.

Here the Realists and the Crits part ways: The latter wish to radicalize the skepticism and complete the linguistic turn. And it is at exactly this point that the father generation -- the postrealists[66]-- tried to revive the law from the beating it had received from the Realists. Any halfway scientific means was good enough for the postrealists, as long as it promised to guarantee, more or less, the determinacy of judicial decisions and the autonomy of the law. To this end, the postrealists engaged in an unrestrained plundering of neighboring disciplines, where they discovered the policymaking model for jurists and the economic analysis of the law for judicial decisions. Alternatively, they sought their, or the law's, salvation by focusing either on politically legally institutionalized processes, or on social or fundamental, values -- supposedly anchored in the Constitution. Thus, the rationality of the law is to be guaranteed variously by political-scientific analyses, or economic efficiency calculations, or pre-established burdens of proof and evidentiary rules in judicial procedure, or fundamental values capable of commanding consensus.

The sons and daughters of CLS cannot even *critically* identify with these, seriously intended, postrealists' reconstruction attempts. Utilizing a somewhat dissonant and unwieldy collection of "dead and living Europeans," plus a few non-Europeans, Crits ironically carry the eclectic postrealist game a major step further. Crits parody the style of

[65] COHEN, *supra*, note 12.

[66] " Postrealism" serves as a collective label for the efforts, which were stimulated by the Realist critique, to renew the law through American legal scholarship. Essentially one can distinguish four strategies of modernization of legal dogmatics and judicial decision-making: politicization, economization, substantialization, and process orientation of the law.

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the postrealists and their theoretical and methodological pluralism by, for example, calling on Derrida as a key witness for a critique of American administrative law,[67] or claiming the Realists Habermas, Lukacs, Marcuse, Marx, and Rorty collectively as their methodological stepfathers.[68] While the postrealists pride themselves on the fact that their own eclecticism is intended to serve a higher cause -- that is, bringing legal reasoning back under "scientific" control -- they accuse the Marxist, Foucauldian, Derridean, phenomenological and feminist dissidents of nihilism and irrationalism. That CLS sprightly springs from one genre of indeterminacy thesis, to which I return below,[69] [n69] unsettles the self-conception of the postrealist legal modernists. The fathers of pluralistic "inventionalism" thereby overlook the fact that they were the ones who first loosened the requirement of grounding the rationality of the law with exclusively legal-theoretical means. The new and postmodern virtuoso eclecticism that generates the ironic tone of CLS offends representatives of mainstream opinion, who rightly believe they bear witness to an unmistakable lack of reverence for the father generation.

Of course, the post-Oedipal conflict between passed-over fathers and grandfather-fixated sons and daughters also has a substantive dimension. The confrontation between renovators and critics of law is homologous to the struggle between modernists and postmodernists. In both cases the stakes are high: the future of philosophy/jurisprudence and of reason/law. From the prompt and pitiless deconstruction of each successive reconstruction attempt, the postrealists may have gathered that many Crits are disinclined to (re-constructively) sing the praises of law. Such a critique annoys those occupying mainstream positions, and this is also why the Crits are labelled "out-of-control leftist radicals" and not "neoconservatives," the label applied in Germany to the neo-French theorists for their alleged acquiescence in the political status quo. Unlike the modern/postmodern *Kulturkampf,* however, the feud between mainstream jurisprudence and CLS has not remained a purely academic matter. In fact, it has received a remarkable measure of strategically distorted media coverage,[70] thus bringing, presumably with a

[67] Gerald Frug criticizes the legitimation models for bureaucracy in American administrative and business law with the aid of a Derridean deconstruction of the boundary between the "objective" and "subjective" factors, as these are separated -- and also dogmatically controlled, according to the various model builders -- in the respective models. *See* Gerald Frug, *The Ideology of American Bureaucracy in American Law*, 97 HARVARD LAW REVIEW 1276 (1984).

[68] *See, e.g.,* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MARYLAND LAW REVIEW 563 (1982); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WISCONSIN LAW REVIEW 975 (1983). The listing of theoretical-methodical influences in a footnote at the start of an essay, if at all possible in footnote 1, is one of the more tedious earmarks of CLS critiques.

[69] *See, infra*, note 87 and accompanying text.

[70] *See, e.g.*, The Veritas About Harvard, THE WALL STREET JOURNAL, 3 September 1986, 26, col. 1; Peter Mancusi, *The Harvard Law School Feud*, BOSTON GLOBE, 27 April 1986, 19; Richard Lacayo, *Critical Legal Times at Harvard*, TIME,

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certain voyeuristic pleasure, to public attention the self-lacerations of the legal academe, and in turn, causing the legal/political establishment to worry about its own citadel, the Harvard Law School.

II. McCarthy's Return, or Irony in a Crisis

To illustrate this feud, and the problematic self-conception of the Crits, I will briefly describe a controversy set off by an anti-CLS attack from a respected liberal-reformist legal scholar. In a short and metaphorical essay entitled *Of Law and The River,*[71] Dean Paul Carrington of Duke University Law School complained of a "decay of professional behavior and qualifications."[72] According to Carrington, intellectual courage and a professional attitude toward the law were being undermined at several American law schools. His intended targets were the "nihilistic" CLS theories, which deny that the law has any determinate content. His professional ethics would oblige such nihilists, particularly Roberto Unger,[73] to quit the sacred halls of legal education. Radical doubts about law, it was made clear, must be silenced.

This unfriendly warning from the thought police provoked an avalanche of liberal-minded protest from the Crits. En masse, they rejected the reproach of nihilism:[74] "None of us thinks that the law has no content." Astonishingly defensive semantics were rolled out: "CLS people often say . . . that laws are 'indeterminate.' What they mean by this is not that. . . ." The ideal of "academic freedom" also was immediately invoked. All of these responses were served up with the old liberal pathos of enlightenment, and without a trace of irony!

Unquestionably, such an attack from the ranks of the legal mainstream is eminently dangerous, especially for younger critical academics without tenure, but also for curriculum choices and the political climate within law faculties. Carrington's polemic

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18 November 1985, 87. For further details and analysis, *see* Gerald Frug, *McCarthyism and Critical Legal Studies*, 22 HARVARD CIVIL RIGHT-CIVIL LIBERTIES REVIEW 665 (1987).

[71] Paul D. Carrington, *Of Law and The River*, 34 JOURNAL OF LEGAL EDUCATION 222 (1984).

[72] *Id.*

[73] Carrington refers exclusively to Unger's programmatic essay on CLS. *Id.* (citing UNGER, *supra*, note 63). Reference should be made to Unger's books, which although influential in CLS hardly stand at its "center." *See* ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975); LAW IN MODERN SOCIETY (1976); PASSION: AN ESSAY ON PERSONALITY (1984); and POLITICS (1988). For a symposium on Unger's work, *see* also *Roberto Unger's Politics: A Work in Constructive Social Theory*, 81 NORTHWESTERN UNIVERSITY LAW REVIEW 589 (1987).

[74] In the following characterizations of the CLS response, I rely generally on the contributions to debate in *Of Law and the River, and Nihilism and Academic Freedom*, 35 JOURNAL OF LEGAL EDUCATION 1 (1985).

conjured up visions of a McCarthyite turn, complete with political purges. Nevertheless -- without wishing to sound snide -- one is amazed to hear such *modern* defensive arguments, including references to Galileo Galilei! CLS behavior exactly like Solomon! Whatever happened to Azdak and his postmodern brother? Are rational legal principles and liberal thought perhaps more deeply rooted in us, and the law of the land, than the pre-Carringtonian critical rhetoric would have led one to suspect? Should law, whose seriousness is directed towards a just social order, be taken seriously after all as possessing an intrinsic value? Or, did the need to defend critical insights merely compel an instrumental, strategic use of constitutionally guaranteed freedoms?

Both attitudes toward law appear to me to be justified, and for precisely that reason neither is compelling. Julius von Kirchmann could have taught the Crits that while, on the one hand, they are correct to criticize jurisprudence as the "servant of chance, error, and ignorance," on the other hand they should not live like the "worms, from the rotten wood of indeterminate and contradictory doctrines and laws, but rather should concern themselves with the natural law."[75] Unger would presumably be a perfect example of critical-constructive legal scholarship, and von Kirchmann would presumably have aggressively defended him as a critic, not as a beneficiary, of academic freedom. Unger's thesis that formalism and objectivism assert, but cannot ground, the relative determinacy of legal doctrines and principles *vis-a-vis* political ideologies and visions is both plausible and familiar. Ultimately, his own position is to a great extent constructive:[76] the struggle over the law, and also over doctrines and principles, should open itself for the necessary controversy concerning the proper structure of society and the possible and desirable relations of human beings with one another.

F. Taking Rights Lightly

What is the point of all this talk of nihilism and incomprehensible legal theory, of corrupted professional ethics and a failure of intellectual courage? Obviously, it is in part an effort to eliminate an all too critical examination of mainstream legal discourse. Otherwise it might become overly obvious that Solomon's wisdom has sunk to the level of manipulative argumentation games. That would necessarily ruffle the self-image of jurists. On the other hand, one suspects that Carrington and others in the mainstream are concerned to protect

[75] JULIUS VON KIRCHMANN, *DIE WERTHLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT* 22 (1848).

[76] *See* ROBERTO UNGER, KNOWLEDGE AND POLITICS, *supra,* note 73; PASSION, *supra*, note 73; POLITICS, *supra*, note 73. Step by step, Unger has fulfilled the program formulated in KNOWLEDGE AND POLITICS. PASSION presents his theory of personality, which is central for both the critique of liberalism and for the outline of a communitarian society. Politics presents a lengthy explanatory theory along with a more fully explored political vision. Unger calls his approach "supertheory," which -- for all his sympathy for CLS -- is intended to distinguish himself from CLS's "ultratheory."

the law itself from an all too radical legal skepticism and might be content if only CLS would recant its indeterminacy thesis.

Whether a critique of the indeterminacy critique can be offered on theoretical grounds will be considered below.[77] But, this has nothing to do with professional ethics. From that standpoint, of course, it is understandable that some would take offense at the ironic tone of the Crits. For this tone signifies that CLS has dropped out of the, supposedly, constructive and competitive discourse of "mainstream opinion" versus "dissenting viewpoints," refusing to offer its own "better" doctrines. In response to Ronald Dworkin's dazzling postrealist program of legal renovation, *Taking Rights Seriously,*[78] David Trubek offered the ironic slogan *Taking Rights Lightly.*[79] It is not the legal project of modernity that is thereby betrayed but the open secret of legal discourse: that within the boundaries of academic rules virtually anything can be done, and more or less adequately justified. In the sense of "enlightenment about the Enlightenment," CLS renders the trivialization of construction work public knowledge. That is the reproach that can be made to the radical Azdaks. And that is exactly the point where, so to speak, professional ethics hit the fan.

I. Critique as Therapy Against the Compulsion to Construct

Under the banner of "trashing," CLS carries the ironic tone to an extreme. The slogan of the student rebels of the 1960s -- "Trash the glass of ruling class!" -- reemerges in the critique of law, now with new meaning: "Take specific arguments very seriously in their own terms; discover they are actually foolish (tragicomic); and then look for some (external observer's) order (not the germ of truth) in the internally contradictory, incoherent chaos we've exposed."[80]

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[77] *See, infra,* notes 82-88 and accompanying text.

[78] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Dworkin's efforts toward a renewal of law continue in A MATTER OF PRINCIPLE (1985) and LAW'S EMPIRE (1986). In LAW'S EMPIRE, Dworkin explicitly defends the moral coherence and integrity of law against radical skepticism (meaning CLS), which he takes seriously, discusses somewhat selectively and rejects as a misguided critique of the law. *See* RONALD DWORKIN, LAW'S EMPIRE (note 78), 271.

[79] David Trubek, *Taking Rights Lightly* (1984) (unpublished manuscript from lecture sponsored by the New School for Social Research and the Cardozo School of Law).

[80] Mark Kelman, *Trashing*, 36 STANFORD LAW REVIEW 293 (1984). As a demonstration of the trashing styles, or of the various methods of contradiction, *see* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO LAW REVIEW 205 (1979). Kennedy's article is a "classic" of the first CLS generation, thanks to its formulation and analysis of the "fundamental contradiction:" "that relations with others are both necessary to and incompatible with our freedom." *Id.,* 213. *See* also MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1979) (reconstructing, with the help of functionalist analysis, the "political tilt" of supposedly neutral legal materials); Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 MINNESOTA LAW REVIEW 265 (1978) (like Horwitz, operating within a critique of law informed by class theory); Peter Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory,* 61 MINNESOTA LAW REVIEW 601 (1977); and Peter Gabel, *The Phenomenology of Rights-Consciousness and the Fact of*

The particular irony of this mode of critique, or "method of contradictions," lies partially in the fact that the rules of discourse, the examination of consistency, and the immanent critique of logical operations are applied in a more rigorously disciplined manner than is done by mainstream scholars to the fruits of discourse, the legal doctrines. The critique of the economic analysis of law, for example, does not waste any time formulating a better analysis of this sort, but instead considers the discovery of contradictions and absurdities to be itself constructive, because the delegitimation of dogmatic principles and assertions creates free spaces for legal and social fantasy. This is, as it were, the political-therapeutic aspect of the trashing of contradictions and indeterminacy.

From a European or German -- or simply from my own -- perspective, the CLS attack on liberalism and mainstream liberal legal thought is somewhat puzzling. Why don't they go after "genuinely" conservative and right wing ideologies? Why don't they do what "we" as critical legal scholars do or would do: critique Social Darwinism or biologism in legal theory; join the campaign against conservative judicial candidates for the Supreme Court; and defend the (liberal) rights of minorities?

The difference in focus, I believe, is not a matter of style or degree but a non-Dworkinian matter of principle. The CLS methodists of contradiction, so it seems, diagnose mainstream legal discourse as a disease that cannot be cured by reforms, which is to say by embracing the better liberal tradition and by constructive efforts. The normalizing power of liberal-legal structuring and reasoning will inevitably overwhelm and castrate alternative normative programs and social visions. Good democratic intentions do not

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the Withdrawn Selves, 62 TEXAS LAW REVIEW 1563 (1984) (introducing the linguistic turn with his "critical phenomenology").

The members of the second CLS generation distanced themselves from the "fundamental contradictions" that the first, more Marxist-oriented generation had discovered, and turned their attention -- with a more structuralist methodological orientation -- to the dichotomies built into law. *See* Gerald Frug, *The City as a Legal Concept*, 93 HARVARD LAW REVIEW 1057 (1980) (examining the weakening boundary between the private and public spheres); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARVARD LAW REVIEW 1497 (1983) (contrasting market and family-oriented images of the world).

In the third generation, finally, it is the deconstructive approaches that dominate. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE LAW JOURNAL 997 (1985); Gerald Frug, supra note 67; David Kennedy, Spring Break, 63 TEXAS LAW REVIEW 1377 (1985); Allan Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE LAW JOURNAL 209 (1984).

From the feminist critique of the post-structuralist approaches, we can infer that the end of the line has not yet been reached, and that further CLS generations and styles of critique are to be expected. *See* JARDINE, *supra*, note 37, and the contributions in FEMINIST THEORY: A CRITIQUE OF IDEOLOGY (Nannerl Keohane & Michelle Rosaldo & Barbara Gelpi eds., 1982); Gerald Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AMERICAN UNIVERSITY LAW REVIEW 1065 (1985); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS LAW REVIEW 387 (1984). For a different, and less skeptical, feminist critique of rights, *see* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE LAW JOURNAL 1860 (1987); and her impressive treatise DIFFERENCE (1989) (forthcoming).

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

stand a chance against the political project of liberalism that comes across as the incarnation of universal reason and common sense, despite its rather particularistic privileging or possessive individualism.

This is not the place to judge the political soundness and practical implications of the Crits' radical trashing of the legal discourse. Suffice it to say that European Crits, after reading through treatises on contradictions and dichotomies in mainstream legal thought, ought to be extremely wary of works of construction. They have been warned, if nothing else, against the sweet temptations of scholarly self-delusion.

II. The Secret Determinations of Indeterminacy

The Crits' quite plausible exercises in and pleas for socio-intellectual therapy do not exempt them from theoretical liability. Critiques of law's rational determinacy claiming to possess genuine critical bite must be ready to submit to an exacting, if not extracting, dental examination.

The issue is to differentiate between trivial and nontrivial conceptions of indeterminacy as they attack modern law's rationality -- and then to explain precisely wherein the more-than-Realist radicality of CLS consists. In this endeavor it may be helpful to remember that law's claim to moral authority calls for a general justificatory scheme of its production and existence as centralized coercive power, and for a legal practice faithful to the rule of law in the exercise of this coercive power. Therefore, I distinguish between law as a multitude of interdependent norms, principles, and theories -- that is, law as a body or system of rules and standards -- and law as a multitude of institutionally anticipated and possible actions and events, such as judging, valuing, interpreting, weighing consequences, and taking interests into consideration -- that is, law as an institutionally anticipated system or networks of actions and events.

The indeterminacy hypotheses encountered in CLS circles[81] can be condensed into three main variants, with differing presumptions and consequences:

(1) "The unruly social-political world:" According to the weakest version of the CLS indeterminacy hypotheses, indeterminacy derives from the fact that although the practice of adjudication does lead to predictable results, these cannot be wholly derived either from the functional logic of the rule system or from the judicial or juristic functioning of the action system, but only from the influence, if not the dominance, of extralegal factors. Since the language of law is malleable, court rulings, and probably doctrines as well, can be

[81] *See* David Kennedy, *supra*, note 80; Mark Tushnet, *An Essay on Rights*, 62 TEXAS LAW REVIEW 1363 (1984).

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

determined in specific cases only from a combination of things such as legislative givens, majority views, precedents, social actors and interests, and political preferences. The referential vagueness of laws calls for the import of knowledge about the rule makers' real intentions and purposes.

Strictly considered, this external indeterminacy of law belongs to the basic stock of all sociologically-informed jurisprudence and critiques of law. It privileges empirical information over legal concepts, sociological over legal methods, purpose over system, and practical political reason over legal logic. In short, this position radicalizes the difficulties of any legal observer or analyst to make a predictable and rational sense of statutes, precedents, and doctrines.

(2) "The unruly legal practice:" The second variant of the CLS indeterminacy hypotheses is sharpened by the thesis that, even were all imaginable extralegal factors neutralized, the results of legal decisions still could not be intra-legally determined. Indeterminacy is thus located in both elements of the double structure of law: Law as a system of rules, in combination with law as an action system, leads to indeterminate results. In other words, while determinacy would be possible within the rule system, this is prevented by legal practice, which opens up room for prior understandings, valuations, and interpretations. Hence, law is not a system of rules "known" over time and place but is constantly changing when applied to concrete situations. Consequently, law does not have a settled meaning or a settled practice, but needs to be created time and again -- under the guidance of the interpreters' choice of method, understanding of "right law," and social-political vision.

This insight into the chasm between law in the books and law in action -- or, to be more precise, into the institutional indeterminacy of any dynamic law -- belongs to the basic stock of all hermeneutically-oriented jurisprudence and critiques of law. It privileges reasoning by example or ad hoc reasoning over deductive or systematic reasoning, legitimation through method over dogmatic self-legitimation, legal hermeneutics over conceptualism, and language over logic.

(3) "The unruly rule of law:" Radical rule skepticism, the final CLS hypothesis of indeterminacy, dictates that law as a rule system is constructed in such a way that it could not produce determinate results. In a mirror image reversal of the rule fetishism of conceptual jurisprudence, rule skepticists hold all legal judgments and foundations to be more or less purely *arbitrary,* following no ascertainable legal logic or methodology. Such rule skepticism is based either on legal rhetoric's openness to the manipulative influence of social forces, or on fundamental, intrinsic contradictions in the structure of law, or on the open texture of all social life -- including legal life -- and all discursive forms. This strongest variant, favored particularly by CLS authors of the movement's second and third generations, thus excludes the (at least otherwise imaginable) possibility that such internal indeterminacy could be reduced by procedures of reasoning or shared values or some metatheory of law. Clearly then, no easy cases exist, because contradictions are pervasive

in legal controversy; at best there may be a temporarily settled practice that, for the time being, suppresses one of the contradictory commitments.

Ultimately, the radical indeterminacy thesis asserts that law is not a rule system but chaos. The amalgamated contradictions form a structure that can yield no -- however idealized -- decision practice that would guarantee equal treatment and justice.

III. Political Reactions and Theoretical Responses

Whoever assails law's claims to rationality and determinacy invariably provokes heavy return fire from the defenders of law. Against the Realists' idea of external indeterminacy, those on jurisprudence's right wing resort to accusing their opponents of implacable hostility to the concept of law in any form. This reproach arises especially often when critics not only use legal-empirical arguments but also assert the existence of a system of class justice.[82] The autonomy of the law, the pure theory of law, and the impartial administration of justice are endangered. The legal sphere is threatened by infiltration from the social realm. The defenders of law are so agitated that they forget to ask the Realists why "reality" and purposes should be any more determinate than normativity and concepts.

The second variant of indeterminacy, although theoretically more explosive, seems to arouse less indignation. This is probably because constructive options for rationalizing the process of applying the law still remain available, under the direction of hermeneutics.[83] Yet, even the humble and philosophically minded hermeneuticist, who only calls for an openended process of interpretation, is charged with opening up the legal discourse to psychological analysis and, ultimately, advocating a political jurisprudence.

Finally, the third and radically skeptical variant breaks through the dams, setting off the reproach of nihilism,[84] since it seems to deny the very possibility of rational work of construction. The certainty orientation of a totalizing legal rationality, which constantly endeavors to center disparate events and appearances in the world by setting them within the framework of a rational comprehensive order, is dismissed as a hopeless and

[82] For convincing arguments against the reproach of hostility to law, *see* James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 685 (1985); and SINGER, *supra*, note 10.

[83] The hermeneutic turn, as represented by the contributions to the Interpretation Symposium published in 58 SOUTHERN CALIFORNIA LAW REVIEW (1985), is rather mercilessly dissected in David Kennedy*, The Turn to Interpretation,* 58 SOUTHERN CALIFORNIA LAW REVIEW 251 (1985).

[84] On the nihilism charge, compare SINGER, *supra,* note 9, who rejects it, with Owen Fiss, *Objectivity and Interpretation,* 34 STANFORD LAW REVIEW 739 (1982), who raises it.

tragiccomic enterprise. The manner in which legal theories give birth to neutral principles, final reasons, or formal processes of reasoning is seen as a desperate attempt to cut off persistent doubts. Natural law, a fundamental value or rule of recognition, or a basic legitimating principle of all positive law -- such as people's sovereignty -- are intended to counterfactually maintain control over the rational identity of justice and the law of the land. The skeptics call for a complete break with such idealism, which in legal discourse often degenerates into the authoritarian gestures of dominant opinions. And such a call provokes reaction.

This reaction may be -- and is certainly meant to be -- politically threatening. Theoretically, however, the conservative responses do not fly. In fact, they are not even interesting, because they squarely miss the transcendental moments and hidden indeterminacy of the indeterminacy critiques. Here as elsewhere, blind zealotry and distanceless seriousness are harmful. A slightly ironic approach to the old, established jurisprudence as well as to the Young Turks' critique of law can ease the conservatives' sense of being squeezed between concepts and meanings, signifiers and signifieds, and may ultimately reveal in a well organized legal discourse that everyone is on the side of both the Enlightenment and the counter-Enlightenment. And this means, among other things, that Realists, Hermeneuticists, and Crits mystify, too.

1. *The Limited Nature of the Critiques.* -- For one thing, it is striking that these critiques of law focus almost exclusively on the application of rules and standards, statutes, precedents, or principles. The gaps, ambivalences, and contradictions discovered in the doctrines, methodologies, and argumentations are indeed considerable. But one is not compelled to conclude from this that all idealizing legal-theoretical forms of thought must be renounced. Initially, the Realists and CLS only radicalize the difficulties of an observer trying to rationally ground the law from outside, while the hermeneuticist convincingly demonstrate that the law is not "out there."

2. *Creating a Power Vacuum.* -- Let us for the moment do what jurists usually do and leave this epistemological problematic undecided, temporarily conceding its theoretical soundness. There would then remain a second, rather more political, objection that could be formulated. The critique of law that has been made sensitive by indeterminacy analyses overly strains the fallible character of every legal argument. This could be gotten over, if only the self-imposed renunciation of even the weakest, but nevertheless criticizable, normative hypotheses did not create a power vacuum that opens the gates to any and every doctrinal construction. When all normative perspectives are equally valid, no single perspective possesses any validity. That is why the Realist, though "obsessed with referential vagueness"[85] and "paralyzed by the semantic sting,"[86] finally draws the

[85] KELMAN, *supra,* note 80.

[86] DWORKIN, *supra,* note 78.

https://doi.org/10.1017/S2071832200016886 Published online by Cambridge University Press

sting and moves towards a socially responsive law, striking a New Deal between law and politics. And that is also why the hermeneuticist resolves the openended process of interpretation in a "hermeneutic moment" -- to regain the certainty of a "right law" and a centrist political perspective.

Such avenues of theoretical and political compromise are not open to the radical skeptics. Their critical game must go on and leads to the land of chaos and contradiction. Radical norm skepticism, one might fear, blinds us to any verifiable difference between right and wrong. Who has an interest in that? It would seem only those who, if necessary, could probably succeed in realizing their interests even without the law. This in turn cannot be acceptable to the Crits, whose critique of legal education and of practical work in legal clinics and elsewhere are all intended to help dismantle hierarchical structures and ideological worldviews, and establish counterhegemonial power bases and democratic communities.[87]

3. *Beyond Idealized Forms of Thought?* -- Thirdly, and finally, remains the question of whether the post-postrealists in their indeterminate world can do without any fixed points, without any idealizing forms of thought. From the practice of CLS, we learn that they cannot. All indeterminacy theories either assign the critical observer a relatively determined position or force her to live secretly within a temporally or spatially determined background.[88] Thus, those who measure the class-specific bias or political-economic "tilt" of norms and doctrines implicitly "know" what a just or proper law would look like. Those constructing an empirically informed critique of law implicitly have in mind a relatively determined conception of what "is actually the case." Those who analyze the "deep structure" of the law by dissecting one of its momentarily frozen parts thereby anchor their critique in a relatively solid foundation. Even the radical CLS critique lives secretly within an imagined determinacy from a transcendental moment -- thus entangling itself in a performative contradiction.

G. Paths Out of Radical Skepticism

Is there a way out? In *Spring Break,* David Kennedy has proposed a theoretical strategy that dispenses with a solid starting block for the jump into the depths of the indeterminacy critique.[89] Through continual reflection on the pressures and possibilities present in every

[87] On the political program and practice of CLS, *see* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law,* 11 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 369 (1982-83); William Simon, *Visions of Practice in Legal Thought,* 36 STANFORD LAW REVIEW 469 (1984).

[88] DUNCAN KENNEDY (note 80), 1417.

[89] *Id.,* 1420 and n.21 (referring to DERRIDA, OF GRAMMATOLOGY (note 29), 158.

situation -- here, his human rights mission in Uruguay -- he aims to present an everdensifying, multilayered report on the mutual constitution and reciprocal exclusion of determinacy and indeterminacy in everyday social life and thought. Kennedy offers a theory of motion that orients itself on shifting situative contexts, declaring everything that manifests itself in these contexts to be relevant, not just what commonly passes for "good reasons." The reader is not to be supplied with *a priori*-istic knowledge, totalizing concepts, or doctrinaire truths, but rather should learn to adjust to surprises, the interplay of indeterminacy and determinacy, and a never ending critique.

Methodically this means everything is text; nothing lies outside of the text. Things such as emotions, expectations, role constraints, and strategic considerations are admitted as text and narratively or analytically introduced, and granted the same status and legitimacy as legal arguments. Kennedy deconstructs, in a rather postmodern fashion, the familiar stereotypical identities, such as the "the jurist per se," the pragmatic legal practitioner, the critical legal critic, or the human rights activist. He rescinds the borders between legal analysis and literature,[90] between human rights critique and storytelling in order to prevent either an objectivistic or subjectivistic viewpoint, or a serious or ironic tone, from dominating. He thereby elegantly constructs and -- mind you -- shifts from his own position as author to bring himself into the picture, in continual alternation from the perspective of the first person -- as affected individual, participant, narrator -- and the third -- as jurist, observer. His text points to no center, no privileged point from which it is narrated, observed, and reflected. Or, so it seems.

Kennedy's fascinating contribution to an anti-authoritarian legal literature manages to make fruitful Foucault's observation that the world "doesn't show us a legible face, nor is it an accomplice of our knowledge."[91] His situative, ad hoc, and shock -- yet, analytical -- jurisprudence moves away from the normalizing rhetoric of legal discourse. Nevertheless, Kennedy does not wholly succeed in making the knowing subject disappear after all. The author-subject maintains his rather powerful presence -- not as objectifying and normalizing authority but unquestionably as an authentic narrator. However much Kennedy wishes to get away from the truth claims, he is still constantly and implicitly asserting the truthfulness of his narrative and the authenticity of the narrator. However much he attempts to be everywhere and to perform in the various genres of critique simultaneously, space and time force him to move step by step -- in orderly fashion.

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[90] In an appendix to the article, Kennedy and Nathaniel Berman situate *Spring Break* within "contemporary legal scholarship." In doing so, they elaborate on some of the methodological issues underlying the article, responding to the literature of critical legal scholarship and extending that scholarship's use of ideas from poststructuralist literary criticism and continental philosophy. *See* DAVID KENNEDY (note 80), 1417.

[91] FOUCAULT, *supra,* note 9. Those complaining of CLS's empirical, legal-sociological deficits, while themselves cultivating an all too positivistic relation to empiricism, might also take this point to heart. *See, e.g.,* Klaus Röhl & Ralf Rogowski & Hubert Rottleuthner, *Rezension eines Denkansatzes: Die Conference on Critical Legal Studies,* ZFRSOZ 85 (1981).

The postmodern skeptic, guarded by irony and advancing with all nondeliberate speed, seems unable to outrun modernity. Even the ironic critic of doctrinaire seriousness, or of standard left criticism, must make use of the language of the rationalists, must seek understanding from those who have not been to Uruguay but "know" that torture is wrong, must try to convince the readers that the indeterminacy critiques mystify or reify -- and that a "situated anti-authoritarian practice" with a theoretical and political bias does not -- unless he feels comfortable in an autistic world, where nothing means anything, and where a critical tone does no longer resound. This lends the postmodern critic a tragi-comic aspect. As Kennedy's *Spring Break* perhaps best illustrates, postmodern legal criticism maneuvers precariously between self-enlightenment and self-illusion, always running the danger of losing itself amidst the "enlightenment about enlightenment" in an intellectual nomadism.

And this is where the communicative needs of readers and critics can grab hold and call into question the claim to authenticity. Kennedy's implicit message, that everything is relative, ultimately must be applied to himself, inviting speculation about the completeness or selectivity of his text, about his covert normative convictions and political visions. And what if the author would prefer to keep silent on these matters, so as not to appear modern? Then the reader must engage her theoretical imagination and deconstruct even this silence. Ironically, of course.