Articles

Socio-Theoretically Based Legal Science and Critical Legal Studies: Points of Contract and Divergencies[*]

By Christian Joerges[*]

Contents

A. The Critique of Legal Formalism
I. Civil Society and its Law
II. "Classical Liberalism" and Its "Legal Consciousness"
III. First Aside: Legal Discourses and Social Formations

B. Materialization Processes and the Indeterminacy of Law
I. The Materialization Concepts and Their Crises
II. The Inconsistencies and the Indeterminacy of Law
III. Second Aside: The Ambivalences of Juridification and the Indeterminacy of Law

C. The "New Intransparency"

---

[*] Translated by John R. Blazek. – A first version of this paper was presented at the seminar of Jürgen Habermas (Frankfurt/M., May 1988), a subsequent version at the Workshop on Legal Theory and Legal Doctrine (Florence, December 1988). I gratefully acknowledge comments by participants at these events as well as the encouragement and critique of David Kennedy, David Kettler, Andrea Maihofer, Sean Smith, Gunther Teubner and Joseph H.H. Weiler.

[*] Professor of Private Law and International Private and Economic Law; born 1943; Law Studies in Frankfurt and Montpellier, 1962-.66; Research Fellow, Georgetown University Law Center, Washington, D.C., 1966-67; Dr. jur., Frankfurt, 1970; Associate Professor, Frankfurt, 1973-74; Professor of Law, University of Bremen, 1974-; Dean of Law Faculty, 1975-1976, 1989-90; Co-Director, Centre of European Law and Politics, Bremen, 1982-87; Part-time, 1997-2007 Full-time Professor, European University Institute, Florence. Since 2007 Research Professor at the University Bremen, Centre of European Law and Politics and Collaborative Research Centre "Transformations of the State".– Fellowships at the Netherlands Institute for Advanced Study in the Humanities and Social Sciences in Wassenaar, 1985-96; at the Institute for Advanced Study in Berlin 1991-92. Visiting Professor at Madison, at Columbia, Global Law Faculty, NYU, Toronto and Trento, Italy. – Honorary doctorate University of Fribourg, Switzerland, 2009.

Research and publications on European economic law, regulation and governance; legal issues of the risk society; anti-liberal traditions of German legal thought, globalisation processes. – Current projects: "Trade Liberalisation and Social Regulation" (with Josef Falke, Bremen), "Globalisation and Democratisation" (with Johan E. Fossum, Oslo). – Forthcoming Publications: Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets, Oxford: Hart Publishing (ed. with Josef Falke), Constitutionalism, Multilevel Trade Governance and International Economic Law, Oxford: Hart Publishing (ed. with Ernst-Ulrich Petersmann); Jürgen Habermas. An Anthology. Vol. I: The Discourse Theory of Law and Democracy.Vol. II: Law and Democracy in the Postnational Constellation, London: Ashgate (ed with Klaus Günther & Camil Ungureanu). Email: cjoerges@zerp.uni-bremen.de

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

I. Procedural, Autopoietic, and Flexible Law
II. Visions, Disillusionments, Local Practices
III. Final Remark

Where do American and German critiques of their respective "mainstream" legal traditions converge, and where do they diverge? When can the convergences be interpreted as common learning experiences with modern law, as insights into the futility of critical efforts, as indications for their correction? Which divergences are due to differences between the legal cultures and philosophical traditions? Where are they reactions to more specific socio-political constellations and particular structurings of the respective academic systems? From which projects can the "other side" gain new insights, or perhaps entirely new perspectives? Such questions inevitably arise from a volume devoted to German and American critical and socio-theoretical contributions to the discussion of legal theoretical fundamentals. Yet they demand too much from an individual author (at least this one), and their enumeration is intended to make clear the sort of difficulties they occasion and suggest how they might be fruitfully dealt with. Günter Frankenberg[1] responded to this situation by using the *Kulturkampf* between modernity and postmodernity as a guideline for his presentation and discussion of American approaches. His contribution offered a perspective that surprised (and provoked[2]) German participants in the debate. In contrast, I shall focus on the manner of dealing with legal materials, that is, on the effects of different theoretical orientations on legal scientific work. The case for such an approach is easily made: Jurists seeking orientation for their work in the various fields of social philosophy, political economy, sociology, moral philosophy, structuralism and post-structuralism invariably fail to discover ready answers there – if only because, in those theoretical structures, the academic and practice-oriented modes of dealing with law have until now received at most only rudimentary attention. The arduous (and often irritating) processes of exploration that result from this[3] are not caused simply by the individual inadequacies of dilettantish non-philosophers; rather, they reflect the genuinely problematic situation in which jurists are presently enmired, and from which they need to

[1] Günter Frankenberg, *supra* in this volume.

[2] Even beyond the participants of the Bremen Symposium; see JOACHIM PERELS, DIE RECHTSTHEORIE AUF DEM WEG ZUR NEUEN BELIEBIGKEIT?, 307 (1987).

[3] It is no accident that in the course of the German protest movement of the Sixties, jurists spread out in all directions at once to ransack Marxism, Critical Theory, Systems Theory, Critical Rationalism, and Analytical Philosophy, nor that the contributions of the CLS-movement bristle with a complete arsenal of "famous dead Europeans (and some living ones)": James Boyle, CRITICAL LEGAL STUDIES: A YOUNG PERSON'S GUIDE, 19 (1985) (Typescript); or that one does not shy from simultaneously claiming inspiration from several intellectually disparate currents for the same contribution (see, *infra*, A II 2 at note 45). Secondary analyses which examine the references of individual authors to specific theoretical projects and philosophies typically come to the conclusion that the practice of legal-critical analysis does not stick closely to the views found in their theoretical sources; see Donald F. Brosnan, *Serious But Not Critical*, 60 SOUTHERN CALIFORNIA LAW REVIEW (SO. CAL. L. REV.) 259 (1987); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARVARD LAW REVIEW (HARV. L. REV.) 313 (1986).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

extricate themselves. What implications do philosophical debates have for the law and legal work? This is a theme apart, demanding from jurists not simply efforts of reception, but also active contributions of their own and further responsive inquiry. Although this focus on the transformation of theoretical projects into orientations for legal work is therefore justified, it is nevertheless indispensible to pragmatically delimit such an attempted "materialization" of the theoretical discussion. Regrettably, my account must be selective. Therefore, examples illustrating the various working orientations – to the degree I can speak of "illustrations" here at all – will be drawn almost exclusively from private law contexts; constitutional and public law will be considered only sporadically, while labor, social welfare, and family law, the international legal disciplines (and much more), will be wholly ignored.

A comparison of statements about law and its treatment within the American and German approaches presupposes the specification of common points of reference. The scheme underlying my account can claim a certain plausibility precisely because it seeks to analyze critical approaches: A critique must begin by naming its object – in both the US and Germany this object is "liberal" legal formalism (A). A critique must then demonstrate its own contemporary relevance, by shifting over to a diagnosis of the present, showing that the inherited defects of formalism continue to have an effect (or that they have not yet been successfully overcome). This dimension of critique is the meeting place for German analyses of the "materialization" of formal law and the American thesis of the "indeterminacy", even (or precisely) of "post-classical" legal developments (B). Finally, one must scrutinize a critique's own standards and perspectives – this is the central, but also the most difficult theme of most of the contributions to this volume (C). Although distinctions drawn between object, diagnoses, and perspectives of the critique of law have a certain plausibility, this should not suggest that they must be drawn the way I have in this essay. It is structured as an attempt to make the American and German contributions more transparent to one another. It nevertheless remains bound to the context of the German discussion concerning the rationality structures of modern law, and within the individual sections which follow it shall become clear how greatly individual perceptions and preferences influence my account. Somewhat more pessimistically (and realistically): The attempt to make German theoretical developments more transparent will surely encounter serious reservations from the Germans authors discussed, while Americans will certainly immediately note the neglect of feminist legal theory in my coverage of the American discussion and discover both numerous gaps in reception as well as an inadequate understanding of the discussion context – all of these are among the risks of comparative analyses.

A. The Critique of Legal Formalism

Sociological jurisprudence constituted itself in German at the turn of the century as a critique of the "mechanical", "reality-blind" subsumption technique of legal science, and

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

the forerunners and principle exponents of American Legal Realism fought against the idea that legal practice could be conceived as the application of objectively pre-existing rules.[4] Yet the German critique of legal formalism went further. It attempted to "explain" formalism and its difficulties, whether by recourse to social-structural determinants of law (and the critique of these structures), or through reconstruction (and critique) of its social-philosophical and epistemological premises – and the contemporary American critique of law distinguishes itself from Legal Realism precisely in that it transforms the latter's critique of formalistic method into a critique of the entire complex of liberal theory.

I. Civil Society and its Law

In an account intended to clarify the context of critical efforts in Germany, it is indispensible to begin by recalling the most ambitious, but at the same time theoretically most daring version of the critique of formal law. Although from the start, the German protest movement of the Sixties featured a wide (and contradictory) range of theoretical interests, it at first defined itself essentially through its relationship to Marxist theory – the revival of Marxist legal theory was in any event the most provocative form of opposition expressed vis-à-vis "mainstream" legal science.

1. Critique of Formalism as Critique of Capitalism

Looking back at the late Sixties and early Seventies, it is a questionable undertaking to select certain discussion contributions and declare them to have "exemplary" status. And yet: The works of two authors in particular (both represented in this volume) allow us to illustrate the various forms in which resort was taken to Marx's critique of political economy, forms which have had a lasting productive impact, not only in the later works of the authors themselves, but also in the wider German debate.

In his study on "Legalität und Pluralismus", Ulrich K. Preuss[5] developed a constitutional theory which was strictly tied to Marx's analysis of civil society. The bourgeois constitutions simulated in their promises and normative constructions the developmental level of pre-capitalistic "simple commodity production", in which the social nexus is produced through commodity exchange by individualized producers. In contrast, the defining characteristic of fully unfolded bourgeois-capitalistic society is the universalization of commodity exchange, i.e. the subsumption of labor power under the commodity form – and from this results, as Marx maintained, the necessities of capital valorization, which inevitably lead to economic

---

[4] See Johann Elias Schlegel, *supra* in this volume as well as on Free Law *infra* 3, note 23.

[5] ULRICH K. PREUSS, LEGALITÄT UND PLURALISMUS. BEITRÄGE ZUM VERFASSUNGSRECHT DER BUNDESREPUBLIK DEUTSCHLAND (1973).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

concentration and crisis processes, and to social conflicts conditioned by the institutionalization of class relations.[6] Preuß based his analysis on the contradictions of bourgeois constitutions. On the one hand, these constitutions must guarantee general freedoms of action, and maintain the calculability (in the sense of predictable continuity) of the social nexus; on the other hand, they must allow the state to take measures which tame class conflict and protect the valorization process of capital against its own self-destructive tendencies. These constraints lead unavoidably to a "two-tier" legality, which on the one hand postulates the Rechtsstaat form of the general law, but which also legitimates concrete state actions.[7]

To analyze the civil law of the bourgeois society, G. Brüggemeier[8] utilized the same sources, tracing the basic institutions, the theory, and the method of civil law back to the developmental logic of capital. However, his analysis of the structures of civil law formalism does not assert that it inherently and inevitably replicates the fundamental contradiction identified by Marx. Instead, he sees the legal reactions to the economic crises and the social conflict potentials of civil society as differentiation processes in which new regulatory frameworks evolve – e.g., economic law [*Wirtschaftsrecht*] for the control of economic crises as well (as for the domestication of economic power); and labor and social welfare law for the management and containment of class conflict.[9] This diagnosis already liberates itself from that "astounding pedantry, with which Marx tied every declaration about law to concrete economic relations, above all to the sphere of production"[10], because it only postulates a developmental connection between the contradictions Marx analyzed and the developments of the civil law system, while abandoning the claim that Marx's original categories could still adequately capture those developments.[11]

---

[6] *Id.*, 42.

[7] This starting point then determines not only the confrontation with the constitutional theory of the Weimar Republic (*Id.*, 65, 84), but also the understanding of the West German Basic Law (*id.*, 91, 102). The later development and revision of the approach is evident from Ulrich K. Preuss, *supra* in this volume. See also Karl-Heinz Ladeur, *supra* in this volume (at note 29).

[8] *Probleme einer Theorie des Wirtschaftsrechts*, *in* WIRTSCHAFTSRECHT ALS KRITIK DES PRIVATRECHTS. BEITRÄGE ZUR PRIVAT- UND WIRTSCHAFTSRECHTSTHEORIE, 9 (Heinz-Dieter Assmann & Gert Brüggemeier & Dieter Hart & Christian Joerges , 1980).

[9] *Id.*, 32.

[10] Oskor Negt, *10 Thesen zur marxistischen Rechtstheorie,* in: PROBLEME DER MARXISTISCHEN RECHTSTHEORIE, 10, 35 (Hubert Rottleuthner ed., 1975).

[11] The difficulties of the Marxist legal theory only vaguely referred to here have been pursued with patience and thoroughness by Rottleuthner, Marxistische und analytische Rechtstheorie, *supra*, note 10, 159.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

2. The Morality of Formal Law

Far more widespread than the here sketched couplings of social critique and the critique of law were (and still are) critical reconstructions of the social theoretical bases of formal law. Admittedly, these often went no further than references to an amalgam of ideas from English, French, and German social philosophy since Thomas Hobbes and/or classical political economy. But such global references to "the" social model of civil society stood in the context of an intensive appropriation of classical social philosophy[12], one whose object can be quite precisely stated. Its starting point is the thesis that legal theories and doctrines are always (explicitly or implicitly) based on social philosophical notions; accordingly, the reconstruction of "classical formal law" aims to comprehend this law as a component in the structure of civil society.[13] This approach to analyzing bourgeois law developed under the influence of the Critical Theory of the Frankfurt School and its revision in the early writings of Jürgen Habermas.[14] Correspondingly, the interest in the social-philosophical tradition was concentrated on its normative promises and their practical, social conditions of realization. This inspired controversies over formalism in German law and legal scholarship of the 19th century which was not oriented (for example) around the analyses and concepts of Max Weber[15], but instead remained far closer to the moral-philosophical legal theory of Kant. In other words: The critique of legal formalism begins by focusing on the initial withdrawal of legal science from social philosophy, a disengagement which Savigny had so successfully introduced with his Historical School of Law.[16]

In his more recent works, in which law has gradually become a central theme, Habermas has elaborated in two ways the idea that in modern law, rationality potentials can be

[12] See Gert Brüggemeier, *Vorstudien zu einer Wettbewerbsrechtstheorie. Untersuchungen zu den theoretischen Grundlagen eines sozialen Ordnungskonzepts*, Diss. jur. (1974).

[13] See Rudolph Wiethölter, *Materialisierungen und Prozeduralisierungen von Recht*, *in*: WORKSHOP ZU KONZEPTEN DES POSTINTERVENTIONISTISCHEN RECHTS, (ZERP Materialien, Heft 4), 25, 26 (Gert Brüggemeier & Christian Joerges eds., 1984). [English version: *Materialisation and Proceduralisation in Modern Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE, 221, 222 (Gunther Teubner ed., 1985)].

[14] *Der Begriff der politischen Beteiligung* (1958), reprinted in: KULTUR UND KRITIK. VERSTREUTE AUFSÄTZE, 9, (Jürgen Habermas 1973); STRUKTURWANDEL DER ÖFFENTLICHKEIT. UNTERSUCHUNGEN ZU EINER KATEGORIE DER BÜRGERLICHEN GESELLSCHAFT, NEUWIED-BERLIN (1962); THEORIE UND PRAXIS. SOZIALPHILOSOPHISCHE STUDIEN (1963) – Again, one must not understand the influence in the sense of a hierarchy between philosophy as superior science and the individual disciplines as applied sciences. The difficulties of a reflexive social theory which wishes to comprehend its own emergence and anticipate its own application has been noted by jurists too (see RUDOLPH WIETHÖLTER, RECHTSWISSENSCHAFT IN KRITIK UND ALS KRITIK, (1971) [Studium Generale der J. Gutenberg-Universität, 1973]).

[15] WIRTSCHAFT UND GESELLSCHAFT. GRUNDRIß DER VERSTEHENDEN SOZIOLOGIE, 496, 503 (Johannes Winckelmann ed., 1972).

[16] See Rudolph Wiethölter, *Bürgerliches Recht*, *in*: HANDLEXIKON ZUR RECHTSWISSENSCHAFT, 47, 50 (Axel Görlitz ed. 1972); see Jürgen Habermas, *Wie ist Legitimität durch Legalität möglich*, KRITISCHE JUSTIZ (KJ) 1, 7 (1987).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

reconstrued.[17] On the one hand, he is concerned with the universalistic aspects of formal law, which make up its – however imperfect – normative rationality. On the other hand, he wants to show that the universalistic elements of formal law are an intrinsic precondition of its very possibility of social efficacy. True, modern civil law can be described as a system-rational release of individual-strategic activity; nevertheless, its generality symptomatically demonstrates the need for a universalistic legitimation which would obligate the legal system to generalizable interests.[18] True, the bourgeois state initially established itself as an authoritarian, bureaucratically organized political order[19]; but even the (pre-democratic) *Rechtsstaat* gave effect to the universalistic principle of the binding of public power to pre-existing legal positions through the principle subjecting public power to positive law (Gesetzmäßigkeit der Verwaltung – "administration by statute" – the German Rule of Law) and the guarantees of private subjective rights[20] contained therein – the *democratic Rechtsstaat* then institutionalizes indispensible procedural pre-conditions for an impartial, universalistic (discursive) process of will formation, and binds public power to this.[21] The practical perspectives of the critique of formal law result from its (reconstruable) rationality potential, which in turn is borne by the process of rationalization of the lifeworld;[22] to be sure, the real existing formal law of liberal capitalism has not stood up against the standards of the universalistic principles of post-conventional reason; however, to the degree that, in the development towards the democratic Rechtsstaat, universalistic principles were institutionalized, it fell under increasing pressures to change.

---

[17] Habermas distanced himself early from "immanent critique", a form so characteristic for the "classical" Critical Theory (see Der Begriff der politschen Beteiligung, *supra,* note 14, 53); this is treated sytematically by Axel Honneth, *Von Adorno zu Habermas. Zum Gestaltwandel kritischer Gesellschaftstheorie*, *in* SOZIALFORSCHUNG ALS KRITIK. ZUM SOZIALWISSENSCHAFTLICHEN POTENTIAL DER KRITISCHEN THEORIE, 87 (Wolfgang Bonß & Axel Honneth eds., 1982); SEYLA BENHABIB, DIE MODERNE UND DIE APORIEN DER KRITISCHEN THEORIE, *id*., 127, 151.

[18] Jürgen Habermas, *Überlegungen zum evolutionären Stellenwert des modernen Rechts*, *in* ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS, 260, 265 (Jürgen Habermas ed., 1976); see Jürgen Habermas, Wie ist Legitimität durch Legalität möglich?, *supra,* note 16, 8 – In *Theorie des kommunikativen Handelns* (Vol. 2: ZUR KRITIK DER FUNKTIONALISTISCHEN VERNUNFT), 1981, 229, Habermas expanded on these statements: With its implicit moral contents, formal law corresponded to the replacement of religious and metaphysical world images by post-conventional structures of consciousness; this anchoring in the process of rationalization of the lifeworld not only belongs to the developmental conditions but also to the pre-conditions for the preservation of formal-legal attainments.

[19] On the dualism of law as "medium" and "institution" see, *infra*, B I 3 at note 97 and C I 1 at note 146.

[20] JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS (Vol. 2), *supra*, note 18, 527.

[21] Jürgen Habermas, *Wie ist Legitimität durch Legalität möglich?*, *supra*, note 16, 10.

[22] Jürgen Habermas*, supra*, note 19.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

3. The Disunity of Formal Law

"The prevailing ideal of the jurist is as follows: A high-level, academically-trained civil servant sitting in his cell, armed only with a thinking machine (state of the art, of course). Before him, on the sole piece of furniture (a green baize table), lies the official book of laws. Given any sort of case, real or invented, he is capable of fulfilling his duty and, with the aid of purely logical operations (and a secret technique only he is privy to), indicating in the law book with absolute precision the exact decision intended by the legislature."[23] The uproar which this polemic from "Gnaeus Flavius" aroused in 1906 would be incomprehensible if he had simply mischaracterized the "official" self-image of the legal-scientific positivism of that era. And yet, as Regina Ogorek demonstrates[24], the jurists of the 19th century did know better. Under the broad heading of "interpretatio logica" there occurred a shift in methodological emphasis from the "voluntas legislatoris" to the "ratio juris" – but the insight always remained alive that statutes program the law only in a highly incomplete manner, that elements of a pre-positive practical reason enter into interpretation.[25] In the theory of legal sources, those pre-positive elements of legal decision-making were identified by Savigny and the Historical School as "knowledge" of the cultural traditions, as the transformation (a task entrusted to the legal profession) of the "silently working powers" of the "spirit of the *Volk*" into positive law; by conceptual jurisprudence (*Begriffsjurisprudenz*) as the generation of further legal rules from previously created legal-scientific systematic structures, at the end of the 19th century through the conception of the judge as an office-holder whose verdicts, as "declarations of (legal) will" (*Rechtswillenserklärung* – von Bülow) enforce the state's claims to power.[26] In contrast, liberal-minded exponents of the *Rechtsstaat* idea were concerned with the binding of state power. Although they harbored no illusions about the interpretive freedom of the judiciary, they strategically propagated the ideal of the apolitical, will-less judge in order to further the creation of competencies and control functions vis-à-vis the state and its administrative bureaucracy.[27]

Such findings are irritating: Did Gnaeus Flavius merely dig up "old familiar arguments"[28], misinterpreting the political conflict constellations in the process? Yes and no: The Free Law objections to the idea of a mechanical legal method and its capacity to determine judicial adjudication were sound; these objections were not conceived as a critique of

[23] GNAEUS FLAVIUS (alias HERMANN KANTOROWICZ), DER KAMPF UM DIE RECHTSWISSENSCHAFT, 7 (1906).

[24] REGINA OGOREK, RICHTERKÖNIG ODER SUBSUMTIONSAUTOMAT? ZUR JUSTIZTHEORIE DES 19. JAHRHUNDERTS, (1986).

[25] *Id.*, 39-169.

[26] OGOREK, *supra*, note 24, 170-279.

[27] Ogorek, *supra*, note 24, 280-367.

[28] Ogorek, *supra*, note 24, 273.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

binding the authoritarian, pre-democratic state by the rule of law, but rather were directed against the substantive law production notions of conceptual jurisprudence and their anti-Enlightenment, anti-democratic forerunners. It is nevertheless true that the "openness" advocated by the Free Law movement (which had hoped for productive-constructive effects of a "deconstructive" critique after the constitutional monarchy was replaced by the Weimar Republic), took on a completely different significance in a situation where a democratically legitimated legislature saw itself confronted by a largely anti-republican judiciary.[29]

Does evidence of the law-creating self-confidence of 19th century legal science and the widespread complacency vis-à-vis state power that was not democratically legitimated confirm the thesis of the two-level legitimacy of bourgeois law and the *Rechtsstaat?*[30] Hardly: Materialist or functionalist explanations cannot account for the insight of legal science that legal interpretation is always at the same time law production, nor resolve the attendant problems for the legitimation of this law production. On whose promises should one actually rely, if one wishes to enforce the "unfulfilled normative validity claims"[31] of liberal legal notions? Certainly one can discover, in the chorus of voices through which legal formalism was articulated, the effective power of the "analytic of the civil society" and traces of post-conventional notions of morality. But the development was neither uniform nor linear, and its reconstruction as a collective learning process remains risky.[32]

II. "Classical Liberalism" and Its "Legal Consciousness"

American descriptions of legal formalism sound familiar: "Formality views the core of law as a system of general, autonomous, public and positive rules that limit, even if they do not fully determine, what one may do as an official or as a private person", writes Roberto M. Unger.[33] In the writings of Duncan Kennedy, to whom Unger makes extensive reference[34], one can find (both in the works relied on by Unger[35], and in later publications[36]) a

[29] See ERNST FRAENKEL, ZUR SOZIOLOGIE DER KLASSENJUSTIZ, 28 *(1927).*

[30] See, *supra*, 1 at note 7.

[31] Jürgen Habermas, *Überlegungen zum evolutionären Stellenwert des modernen Rechts* (note 18), 267 and *supra* 2, note 17.

[32] See the self-critical considerations in GÜNTHER FRANKENBERG & ULRICH RÖDEL, VON DER VOLKSSOUVERÄNITÄT ZUM MINDERHEITENSCHUTZ. DIE FREIHEIT POLITISCHER KOMMUNIKATION IM VERFASSUNGSSTAAT (1981) 9 as well as Barbara Freitag, *Theorie des kommunikativen Handelns und genetische Psychologie. Ein Dialog zwischen Jürgen Habermas und Jean Piaget*, 35 KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE UND SOZIALPSYCHOLOGIE (ZFSS) 555 (1983).

[33] ROBERTO M. UNGER, LAW IN MODERN SOCIETY. TOWARD A CRITICISM OF SOCIAL THEORY, 204 (1976).

[34] Horwitz, *infra*, note 44, 203.

[35] Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

multitude of citations which seem to confirm this impression: In its "ruleness", "classical-liberal" law wishes to make connection with "factual aspects of a situation" and its "generality is intended to assure the neutrality and predictability of its application".[37] This law is autonomous because it can draw from itself the substantive values then brought to bear in application.[38] In its formality, classical-liberal law corresponds exactly to the notions of order of laissez-faire economic liberalism[39] and fits into the overall complex of the liberal social-philosophical tradition.[40]

Such localizations of legal formalism in an ideal-typically stylized liberalism[41] must, because intended to capture the history of American democracy, necessarily emphasize other aspects than would a reconstruction of the German *Rechtsstaat* idea. Yet it is not the differences between the American and German traditions of liberalism, but rather differences in their appropriation and interpretation, which cause difficulties in mutual understanding. The American critique of legal formalism has undergone its own metamorphoses.

1. Instrumentalism

There is, of course, no European monopoly on Marxist critiques of political liberalism and legal formalism. In the US, there have been initial attempts at a renewal of Marxist legal theory[42] and, still more frequently, references to the Critical Theory of the Frankfurt School.[43] More influential than these connections and borrowings, however, has been the

---

[36] Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976); *The Structure of Blackstone's Commentaries*, 28 BUFFALO LAW REVIEW 205 (1979); *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, *in* 3 RESEARCH IN LAW AND SOCIOLOGY 3 (Steven Spitzer ed., 1980).

[37] *Form and Substance in Private Law Adjudication*, *id.*, 1687-1690.

[38] *Legal Formality, supra*, note 36, 359; Form and Substance in Private Law Adjudication*, supra,* note 36, 1754.

[39] *Form and Substance in Private Law Adjudication, supra,* note 36, 1745-1748.

[40] *Legal Formality, supra*, note 36, 361-363.

[41] See the often-cited analysis of ROBERTO UNGER, KNOWLEDGE AND POLITICS, 29-144 (1975).

[42] See the references in Robert W. Gordon, *New Developments in Legal Theory*, *in*: THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 281, 284-289 (David Kairys ed., 1982); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (U. PA. L. REV.) 687, 721-735 (1985) as well as the compilation of (at least temporarily) Marxist inspired authors of the CLS-Movement by Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. OF LEGAL STUDIES 1, 10 (1986) note 26.

[43] See the references in David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENGLAND LAW REVIEW (NEW ENGLAND L. REV.) 209, 244- 248 (1985-86) – Naturally, one can find close similarities transcending individual or selective receptions, if one takes an abstract enough viewpoint. Thus Jeffrey A. Standen

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

non-Marxist critique of legal formalism by Morton J. Horwitz.[44] For Horwitz, American formalism (whose heyday he places in the middle of the 19th century) means a synthesis of two lines of tradition which at first appear contradictory: On the one hand, the reorientation of civil law around the functional imperatives of an increasingly market-oriented society, a transformation based on *utilitarian* logic and carried out with the help of the judiciary, and on the other hand, the *formalistic* interpretation of the American constitution, aimed against redistributive state actions. Horwitz sees the secret of this synthesis' success in a historical alliance of interests between the legal profession and the entrepreneurial class. This is a social-critical thesis intended to counter evolutionary, optimistic interpretations of American legal development. It sees the law as functional-instrumental and formalism as an interests-bound invention.

2. Structuralism

Horwitz's successors have distanced themselves not from the substance, but from the approach of his critique.[45] Duncan Kennedy's works have set the tone for the newer type of critique.[46] Kennedy himself describes his approach as "in a loose sense dialectical, historical or the method of contradictions".[47] The loose tone does not betray methodological ignorance on Kennedy's part, nor can he be adequately dealt with by reproaches of syncretism or incoherency.[48]

(Note, *Critical Legal Studies as an Anti-Positivist Phenomenon*, 27 VIRGINIA LAW REVIEW 983 (1986)) focuses on the anti-positivism, the "anti- constructivism" and the utopian motives of the Frankfurt School, in order to support his thesis that the CLS movement imported German metaphysics (!) into the US (998). On the other hand, the advice of European authors to integrate refinements of the theorem of the "relative autonomy" of the law (See HUNT, *id.*, 37) or to recall the concept of critique of the early Horkheimer (see Roger Cotterrell, *Critique and Law: The Problematic Legacy of the Frankfurt School*, TIDSKRIFT FOER RAETTSSOCIOLOGI 3, 1 (1986)) hardly arouse interest.

[44] Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AMERICAN JOURNAL OF LEGAL HISTORY (AM. J. LEGAL HIST.) 251 (1975); THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

[45] See the critique in Robert W. Gordon, *Critical Legal Histories*, 36 STANFORD LAW REVIEW (STAN. L. REV.) 57, 79, 96-98, 100-102 (1984) as well as the more detailed review of David Sugarman, BRITISH JOURNAL OF LAW AND SOCIETY 297, 303-308 (1980).

[46] See Kennedy, *supra,* note 35 – The explicit retraction of the positions described here doesn't change this influence, especially when the retraction contains no distancing from the history of its impact (See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15, 17, 24, 43 (1984)) and Kennedy repeated the retracted statements a little later in modified form: *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL ED. 518, 551 (1986).

[47] Duncan Kennedy, Form and Substance in Private Law Adjudication, *supra,* note 36, 1712; see The Structure of Blackstone's Commentaries, *supra*, note 36, 210.

[48] One frequently encounters this reproach: Peter Goodrich, *Law and Modernity*, 49 THE MODERN LAW REVIEW (THE MODERN L. REV.) 545, 548 (1986) ("superficial ecclecticism"); Hunt, *supra*, note 42, 3 ("jumbled, incoherent eclecticism"); KOEN RAES, VAN JURIDISCH RELISME TOT KRITISCHE RECHTSTHEORIE. THE CRITICAL LEGAL STUDIES MOVEMENT IN DE VERENIGDE STATEN, 777, 780 (1987) ("ongestoord ecclecticisme"). Nevertheless: the censure of Kennedy is really

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

The most striking characteristic of Kennedy's analysis (and not just for someone habituated to the German variant of the formalism critique) is that it brackets out the question of the relationship between law and society. Instead, the analysis limits itself to legal texts, cases doctrines, theories – "that often unreal and fantastic rhetoric itself".[49] Kennedy's confrontation with legal formalism is thus not so interested in its social partisanship or the contradictions between normative promises and social relations, but rather in the immanent contradictoriness of legal texts themselves. In such texts (even from the heyday of formalism) Kennedy finds, despite all the affirmations of ruleness and the generality of rules, a holdover of standards, principles, and policies, which demand of legal application a substantive orientation around goals or social values.[50] Despite the affinity of classical-liberal law to economic laissez-faire doctrines, pre-classical substantive legal elements remain in existence and unfold: Next to subjective rights come reciprocity assurances, next to the facilitation of economic freedoms come regulative controls, the principle of self-determination is countered by paternalism[51] – and because all these oppositions are at work in the law and in legislation itself, methods of legal application oriented around "formal" models prove impossible to carry out.[52]

The strength of structuralist interpretations is their capacity to find contradictions in legal materials, and at the same time to discover in them a specific order and meaning[53], a theme or a problem around which oppositions are centered. This substantive core is the fundamental contradiction of individualism and altruism.[54] Kennedy lists several aspects of this dichotomy: It is not only discoverable in legal materials, but anchored in the "legal consciousness" of the liberal epoch[55], a consciousness which grounds the (contradictory) unity of law and binds it to the greater cosmos of political philosophy and economy[56]; at

directed at theoretical traditions, which no analysis of modern law could simply "transpose", and the confession that the confrontation with those traditions has left its traces behind says little about the qualities of the product that emerges from that confrontation.

[49] Kennedy*, Form and Substance in Private Law Adjudication*, *supra*, note 36, 1738.

[50] Kennedy, *Form and Substance in Private Law Adjudication, supra,* note *36*, 1688.

[51] Kennedy, *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1728-1737.

[52] Kennedy, *Legal Formality*, *supra*, note 35.

[53] Kennedy, *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1712.

[54] Kennedy, *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1717-1722.

[55] On the dating of this epoch, see Kennedy, *Toward a Historical Understanding of Legal Consciousness*, *supra*, note 36, 23.

[56] Early attempts at greater specification read as follows: "Consciousness refers to the total Contents of a Mind, including images of the Self, of emotions, goals and values, and theories about the Self ... Legal consciousness refers to the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment" (Kennedy, Toward a Historical Understanding of Legal Consciousness, *supra*, note 36, 23). "...

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

the same time, the dichotomy has inscribed itself in the individuals themselves: "We are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between irreconcilable visions of radically different aspirations for our common future".[57] Political liberalism and its law thus prove to be merely a specific form of dealing with the fundamental contradiction, a collectively practiced and individually borne performance of repression, which abandons itself to rationalistic hopes of order.

3. Deconstructionism

Does this message have a "positive" side, or does it steadfastly persist in pure negativity, refusing to engage in "constructive" criticism? Duncan Kennedy's work offers evidence for both stances. Legal thought is not only an "attempt to deny the truth of our painfully contradictory feelings", but also "an effort to discover the conditions of social justice", a "utopian enterprise".[58] Kennedy gives in to this utopian impulse of critique when he portrays altruism as a counter-ethic of "sharing and sacrifice".[59] On the other hand, this utopia is only an interpretation of pre-existing materials, which cannot be vindicated by any "claim of truth", and which moreover remains bound inextricably (yet without hope of a synthesis) to its opposite.[60] Both readings, the speculative-visionary as well as the skepticist-destructive, are at work in the CLS-movement. The most decisive exponent of the utopian-visionary style of critique is Unger.[61] The opposite pole is occupied by post-structuralism, whose exponents are inspired by Jacques Derrida to decipher the "dangerous supplement" of legal texts.[62] In a recent, systematically intended presentation

---

a defining characteristic of Classical legal thought was the assimilation of a great deal of law to a single subsystem dominated by the concept of power absolute within its judicially delineated sphere. A second defining characteristic of Classicism, in contrast to pre-Classical and modern thinking, was the claim that very abstract propositions were nonetheless operative" (Kennedy, Toward a Historical Understanding of Legal Consciousness, *supra*, note 36, 21).

[57] Kennedy, *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1685; see *The Structure of Blackstone's Commentaries*, *supra*, note 36, 212 and most recently *Freedom and Constraint in Adjudication*, *supra*, note 46, 548-554.

[58] Kennedy, *The Structure of Blackstone's Commentaries, supra*, note 36, 210.

[59] Kennedy, *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1717, see 1722.

[60] See, *infra*, B II 2, note 114.

[61] Unger's critique of legal formalism proceeds (as does Kennedy's) from the contradiction and thereby resulting infeasibility of liberal theories of justice, the separation of law and law application (UNGER, KNOWLEDGE AND POLITICS, *supra*, note 41, 67-100). But Unger's reconstruction of the connections of legal theory, political theory and the "psychology" of liberalism aims at a new social theory which overcomes the antinomies of "theory and fact", "reason and desire", and "rules and values" (see also the references *infra,* C II 1).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

of the "practice of deconstructionism", the goals of a legal appropriation of Derrida are made explicit: To demonstrate that arguments adduced to ground legal doctrines can equally well establish the opposite proposition (this is the "inversion of hierarchies"); the point is to recognize the ideological contents and functions of legal doctrines (i.e., their statements about social relations); vis-à-vis conventional interpretational methods the "free play" of texts is to be demonstrated in a new interpretive strategy.[63]

Deconstructive practice is tried out on individual authors[64], on specific objects[65], on such complex products as the American constitution[66], but also on "liberal thought" as a whole.[67] Like language itself, legal discourse is a "representational discourse", which pretends to be neutral vis-à-vis social relations, but which cannot deny its own dependence upon this social context.[68] A little more concretely (but also more trivially), and in relation to liberal law: The protagonists of laissez faire postulated a "natural" egoism; they thereby marginalized the altruism and community dependency of individuals, although economic individualism ultimately presupposed a "sharing of values" and "social cooperation".[69] The privileging of egoism (including its legal institutionalizations) is already ideological, because it claims to be a rational order of social relations and thereby suppresses its "dangerous supplement". The interpretation of authoritative legal materials, which wishes to orient itself on the will of their authors, cannot resolve the difference between "original" intentions and the situation at the time of interpretation; no surrogate for this principle of interpretation is capable of hindering the "free play" of the text.[70]

---

[62] The prominence of Derrida is a phenomena in itself; see, *e.g.*: Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1286-1292 (1984); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE LAW JOURNAL (YALE L. J.) 999, 1007-1009 (1985); Gary Peller, *The Metaphysics of American Law*, 73 CALIFORNIA LAW REVIEW (CAL. L. REV.) 1151 (1985); John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987); Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. J. 743 (1987); more comprehensively: Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 155-172, 182-197 (1984); Kennedy, *supra*, note 43, 271-289.

[63] Jack M. Balkin, *id*., 744-755, 761.

[64] *E.g.* David Kennedy, *The Turn to Interpretation*, 58 SO. CAL. L. REV. 251 (1985).

[65] *E.g.* Frug, *supra*, note 62; Dalton, *supra*, note 62.

[66] Leubsdorf, *supra*, note 62.

[67] Peller, *supra*, note 62; Balkin, *supra*, note 62.

[68] Peller, *supra*, note 62, 1153-1158, 1181-1191.

[69] Balkin, *supra*, note 62, 763.

[70] Balkin, *supra*, 785.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

III. First Aside: Legal Discourses and Social Formations

On both sides of the Atlantic, the critique of legal formalism was triggered by recognition of informal elements in the process of law application; it denounced the self-representations of legal formalism as self-deception (or the deception of others), as ideologies that refused to admit their dependence upon social structures or their functionality for specific interests. The unavoidable question which then arose – how were the "true" dependencies of formal law to be conceived? – compelled deep revisions of the critical approaches. The turning of attention to the social-theoretical premises of liberal law in Germany, and to "legal consciousness" in the US, simply bracketed the question of the relationship between law and society, without resolving it. The American focus on "legal consciousness" and its contradictions first becomes understandable with the assumption that a separation of the legal and social spheres is fundamentally mistaken, that social practice is produced via social, collectively shared constructions of reality, and that these constructions can be revealed through representative legal texts.

Two difficulties which this way of dealing with the relation of law and society entails should be emphasized: Even if one attributes a constitutive significance to the legal consciousness of formalism, one must realize that the functions of law are historically contingent, and that therefore the critique practiced on formalism cannot simply be transposed onto post-formal developments. A specification of the assumptions concerning the constitutive significance of legal consciousness which remains open for such contingencies must then find its way back to the question of the relation of the legal order to institutions of political authority and to the economic structures of society, in short, to the question of the social functions of law. A second difficulty arises from the critique's intrinsic tendency to conceive of legal consciousness as an internally contradictory super-aggregate which inscribes itself within individuals and sets the limits of a society's legal discourse. The locating of doctrinal, legal-political, and legal-theoretical controversies must, if one does not from the start limit the circle of discourse participants, at least touch on the intentions of the dissenters and declare the historical debates concerning the legitimation of formal law to have been a meaningless project. The transition from the structuralist-existentialist critique of liberalism to the post-structuralist critique of rationalism itself is then altogether logical.

B. Materialization Processes and the Indeterminacy of Law

Every listing of structural characteristics, ideal types, and discursive formations must tell us how the respective abstractions can be justified in light of the complexity of social and legal relationships, and every attempt to define the dilemmas of contemporary law from its relation to "classical formal law" must face the question of whether thereby once again a developmental logic which determines the law should be presupposed or not. Such notions of developmental determinism can hardly be taken seriously after the discrediting

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

of materialist derivations and functionalist analyses of formal law.[71] Nevertheless we still need to explain why, since the 19th century, the panoply of state-legal control instruments has expanded, doctrines in all areas of the law have been reshaped, and legal reasoning has been reoriented. The German discussion of the materialization of formal law is concerned with the characterization of those transformation processes, their relation to social and political problems, and the development of legal-political and interpretative programs. There appears to be no exact American equivalent to the German materialization program. American "liberal reformism" of the Sixties was more pragmatic and more concretely concerned with specific projects. On the other hand, the main interest of the later CLS-movement has not been with such reformist efforts. Central to this movement is a topos which admittedly has not been used first and exclusively to characterize "post-liberal" developments, but which is said to characterize the dilemmas of post-formalistic legal science – the indeterminacy of law. While it can be shown that there is some overlap between the German materialization discussion and the American indeterminacy thesis, the differences between the formalism critiques are also reproduced in the analyses of post-formal law.

I. The Materialization Concepts and Their Crises

Materialization is a popular but difficult concept. Therefore in defining it one usually turns with relief to various classical texts. The best known is Max Weber's diagnosis[72] of "nonformal" and "anti-formal" tendencies, which he saw threatening the formal qualities of modern law. To be sure, Weber interpreted the nonformal tendencies merely as reactions to the abstractness of legal thought, so cut off from everyday life; they yield to interests which formal law fundamentally favors, and moreover arise from the intrinsic necessities of legal thought as well as from the difficulty of practically administering the subjectivistic criteria which correspond to formal law. The "anti-formal" tendencies, by contrast, place the formalism of the law fundamentally into question. They originate with the emergence of the modern class problem, social demands of democracy, and the welfare ideology of monarchial bureaucracy.

Because Weber criticized the anti-formal tendencies as a regressive-irrational development, he would seem to be one of the worst possible witnesses on behalf of the program of materializing formal law. His skepticism here was also based on the difficulties such a program would have to confront: First, analyzing the social, economic and political processes through which the post-formal transformations of law occur; then, describing

[71] See Hubert Rottleuthner, *Theories of Legal Evolution: Between Empiricism and Philosophy of History*, RECHTSTHEORIE (BEIHEFT 9), 217 (1986); HUBERT ROTTLEUTHNER, ASPEKTE DER RECHTSENTWICKLUNG IN DEUTSCHLAND, 206 (1985).

[72] Winckelmann, *supra,* note 15, 504-513.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

the new structures of law and developing the techniques for using them; and finally, evading Weber's irrationalism objection, i.e., by demonstrating the superior rationality of a materialized law.

1. The Social State Transformation of Capitalism

The social-analytical foundation of the materialization concept was concerned with nothing less than a program for the transformation of the liberal-capitalistic society into a social democracy, which would overcome the class structures and economic crises of capitalism. This program has always been confronted with the necessity of conducting a two (and possibly a three) front war. On the one hand, it was directed against the notions of order of economic and political liberalism; on the other hand, it had to distinguish itself from Marxist theories of the state, for which an overcoming of capitalism was only imaginable within the framework of an "anti-monopolistic alliance strategy" or which viewed hopes for a transformation of capitalism as a mere "social state illusion".[73]

The history of the social state program (and of its fastidious disassociations from left and right) goes back to the Weimar Republic. It begins with the plans for a democratic labor[74] and economic institutional structure[75] (*Wirtschaftsverfassung*) and Hermann Heller's theory of the "social *Rechtsstaat*".[76] The materialization debate of the Sixties and Seventies attempted to orient itself juristically on the renewal of Heller's social state theory by W. Abendroth[77] and analytically in particular on the social analyses of C. Offe and Jürgen Habermas.[78] And it is in these analytical foundations that it then ran aground.

---

[73] See the analysis (widely read in its day) from Wolfgang Müller & Christel Neusüß, *Die Sozialstaatsillusion*, SOZIALISTISCHE POLITIK, 4 (1970), as well as the overview in HEINZ-DIETER ASSMANN, WIRTSCHAFTSRECHT IN DER MIXED ECONOMY. AUF DER SUCHE NACH EINEM SOZIALMODELL FÜR DAS WIRTSCHAFTSRECHT, 240 (1980).

[74] See, *e.g.*, HUGO SINZHEIMER, FORMEN UND BEDEUTUNG DER BETRIEBSRÄTE, (1919); DIE ZUKUNFT DER ARBEITERRÄTE, (1919), both works reprinted in: HUGO SINZHEIMER, ARBEITSRECHT UND RECHTSSOZIOLOGIE. GESAMMELTE AUFSÄTZE UND REDEN, vol. 1, 321 and 351 (Otto Kahn-Freund & Thielo Ramm eds., 1976), as well as the documentation in GERT BRÜGGEMEIER, ENTWICKLUNG DES RECHTS IM ORGANISIERTEN KAPITALISMUS. MATERIALIEN ZUM WIRTSCHAFTSRECHT, VOL. 1: VON DER GRÜNDERZEIT BIS ZUR WEIMARER REPUBLIK, 295-319 (1977) and David Kettler, *Legal Reconstitution of the Welfare State: Latent Social Democratic Legacy*, 21 LAW & SOC. REV. 9, 29-34 (1987).

[75] See*, e.g.*. FRANZ L. NEUMANN, ÜBER DIE VORAUSSETZUNGEN UND DEN BEGRIFF EINER WIRTSCHAFTSVERFASSUNG (1931), reprinted in: FRANZ L. NEUMANN, WIRTSCHAFT, STAAT, DEMOKRATIE. AUFSÄTZE 1930-1954 , 76 (Alfons Söllner ed., 1978).

[76] HERMANN HELLER, RECHTSSTAAT ODER DIKTATUR?, (1930). From the wealth of secondary literature, see *Ingeborg Maus, Hermann Heller und die Staatsrechtslehre der Bundesrepublik*, in: INGEBORG MAUS, RECHTSTHEORIE UND POLITISCHE THEORIE IM INDUSTRIEKAPITALISMUS, 173 (1986).

[77] WOLFGANG ABENDROTH, ZUM BEGRIFF DES DEMOKRATISCHEN UND SOZIALEN RECHTSSTAATES IM GRUNDGESETZ DER BUNDESREPUBLIK DEUTSCHLAND (1954), reprinted in: FRANZ L. NEUMANN, ANTAGONISTISCHE GESELLSCHAFT UND POLITISCHE DEMOKRATIE. AUFSÄTZE ZUR POLITISCHEN SOZIOLOGIE, 109 (1967).

[78] But by no means exclusively: Thus UDO REIFNER, ALTERNATIVES WIRTSCHAFTSRECHT AM BEISPIEL DER

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

Even in his early writings, Offe characterized the reciprocal dependency between the private-capitalistically organized economy and state-administrative control strategies as an arrangement particularly susceptible to crises, without tying his analyses to prophecies about medium or long range effects of the diagnosed crisis potentials.[79] It is hardly possible to draw from his later works political-strategic perspectives for a democratic-social state transformation of capitalism – the (relative) successes of the "welfare state" have apparently brought the development of the "social state" to a standstill.[80] Habermas had already in the early Seventies (earlier and more decisively than Offe) reformulated the conflict potentials of late capitalist societies as legitimation problems[81]: By means of market complementing, substituting, and compensating measures, the state (the administrative system) had succeeded in keeping latent the instabilities of the market system and also the classical conflict between capital and labor. It is true that, in so doing, the political-administrative system had to react to highly contradictory requirements, which tended to exclude rational political action ("crises of system integration") and brought in their wake both legitimation and motivation crises ("crises of social integration"). But the forms in which these new crisis potentials were expressed (in the so-called "New Social Movements") limited themselves to a diffuse negative "dissentism" – the social state project, as Habermas formulated it later, had fallen into a situation where nothing was clear but its own intransparency.[82]

These sparing references to two authors[83] may suffice to make understandable why the legal scientific efforts to contrast the social model of liberalism with a "materialized" alternative model were carried out only tentatively and incompletely. N. Reich attempted to translate the Habermas-Offeian analytic of state action into a theory of economic law.[84]

VERBRAUCHERVERSCHULDUNG, (1979), has developed a materialist-social state theory of civil law which in a "social interpretation, is intended to exploit symptomatic breaks of post-formal legal development" and lead to a "market economy compensating" use of law (66, 91); see the detailed examination in CHRISTIAN JOERGES, VERBRAUCHERSCHUTZ ALS RECHTSPROBLEM. EINE UNTERSUCHUNG ZUM STAND DER THEORIE UND ZU DEN ENTWICKLUNGSPERSPEKTIVEN DES VERBRAUCHERRECHTS, 24-30, 37-40, 46-49, 52-55 (1981).

[79] See particularly: CLAUS OFFE, STRUKTURPROBLEME DES KAPITALISTISCHEN STAATES, (1972).

[80] See, *e.g.*, Claus Offe, *Competitive Party Democracy and the Keynesian Welfare State: Factor of Stability and Desintegration*, 15 POLICY SCIENCES 225 (1983); *Korporatismus als System nichtstaatlicher Makrosteuerung*, GESCHICHTE UND GESELLSCHAFT 10 (1984), 234 – On terminology see also the references in Ulrich K. Preuss, *The Concept of Rights in the Welfare State*, in: DILEMMAS OF LAW AND THE WELFARE STATE, 151, 152-154 (Gunther Teubner ed., 1986).

[81] JÜRGEN HABERMAS, LEGITIMATIONSPROBLEME DES SPÄTKAPITALISMUS, (1973).

[82] Jürgen Habermas, *Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien*, in: JÜRGEN HABERMAS, DIE NEUE UNÜBERSICHTLICHKEIT, 141 (1985).

[83] For a compendious representation of the entire discussion encompassing legal science, political science, and economics see Heinz-Dieter Assmann, *supra*, note 73.

[84] NOBERT REICH, MARKT UND RECHT, 64 (1977); Norbert Reich, *Zum Verhältnis von Markt und Recht als Gegenstand*

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

G. Brüggemeier, who had been the most decisive in pursuing the idea of a normative-analytic program for the specification of a constitutional theory of the social state (*Sozialstaat)*[85], became (exactly for that reason) ever more reticent in the presentation of his proposed models.[86] To put this another way: Just as the welfare state triumphed not only over "classical" capitalism, but also over the social state idea, so did its "mixed economy" and its social policies rob the idea of an economic and labor democracy of all hopes of realization.

2. The Materialization of Formal Law

The dogmatism of Marxist analyses of state, and also the uncertainties involved in a social state-motivated reconstruction of society's developmental foundations have furthered the readiness to leave analysis of law's social dependencies to one side, and instead to concentrate on law itself. Of course, this "return to law" hardly means a rehabilitation of conventional doctrines and methods. The critique of formal law had already shown[87] that substantive premises concerning the formation of social relations enter into its principles and constructions, that idealized conceptualizations of social reality ("*Sozialmodelle*") could be exposed through questioning the correctness guarantees of formal law.[88] At the same time, the renewed critique of the theory of legal method revived the insight[89] that canons

---

sozialökonomischer Theoriebildung, 63 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE (ARSP) 485 (1977). For a critique see Dieter Hart & Christian Joerges, Verbraucherrecht und Marktökonomik. Eine Kritik ordnungstheoretischer Eingrenzungen der Verbraucherpolitik, *supra*, note 8, 83, 168-177; Assmann, *supra*, note 73, 185, 251 and implicitly Norbert Reich himself: STAATLICHE REGULIERUNG ZWISCHEN MARKTVERSAGEN UND POLITIKVERSAGEN. ERFAHRUNGEN MIT DER AMERIKANISCHEN FTC UND IHRE BEDEUTUNG FÜR DIE ENTWICKLUNG DES VERBRAUCHERSCHUTZRECHTS, 133-139 (1984).

[85] Entwicklung des Rechts im organisierten Kapitalismus, *supra*, note 74, 17-29; *Privatrechtstheorie als Aufgabe*, 64 ARSP 87 (1978); Probleme einer Theorie des Wirtschaftsrechts, *supra*, note 8. Rudolf Wiethölter did propose a similar program of a "material constitutional theory as social theory of society with a reconstruction of our legal development as social development", but then did not carry it out in this form (see *Thesen zum Wirtschaftsverfassungsrecht*, in: DER KAMPF UM DAS GRUNDGESETZ. ÜBER DIE POLITISCHE BEDEUTUNG DER VERFASSUNGSINTERPRETATION, 158, 161 (Wolfgang Abendroth *et al.*, eds., 1977).

[86] The momentarily final result are "components" for the model of an "organization constitution" which distingushes itself negatively from the liberal contract constitution but still does not let itself be aggregated into a positive model; see Gert Brüggemeier *Wirtschaftsordnung und Staatsverfassung – Mischverfassung des demokratischen Interventionskapitalismus – Verfassungstheorie des Sozialstaates . Drei Modelle der Verflechtung von Staat und Wirtschaft? – Eine Problemskizze*, in: RECHTSFORMEN DER VERFLECHTUNG VON STAAT UND WIRTSCHAFT, 60 (Volker Gessner & Gerd Winter eds., 1982).

[87] See, *supra*, A I 1, note 12.

[88] See the often-cited study by FRANZ WIEACKER, DAS SOZIALMODELL DER KLASSISCHEN PRIVATRECHTSGESETZBÜCHER UND DIE ENTWICKLUNG DER MODERNEN GESELLSCHAFT, (1953) (justified inquiry about Wieacker's terminus in JÜRGEN SCHMIDT, VERTRAGSFREIHEIT UND SCHULDRECHTSREFORM. ÜBERLEGUNGEN ZUR RECHTFERTIGUNG DER INHALTLICHEN GESTALTUNGSFREIHEIT BEI SCHULDVERTRÄGEN, 17 (1985)).

[89] See, *supra,* A I 3, note 23.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

of legal interpretation simply are not capable of bridging the gap between statutes and their application.[90] Thus it was a logical step to analyze legal theories and doctrines for their social-theoretical premises, and to seek in judicial decisions the corresponding "fragments and set pieces of theories", which (as extra-legal constructs) influence development and application of law.[91] This technique of analysis goes beyond the "classical" theories of method, the jurisprudence of interests (*Interessenjurisprudenz*) method (which advocated strictly observing the "value decisions set by the legislature"), and also beyond the balancing recommended by the so-called valuation jurisprudence (*Wertungsjurisprudenz*); at the same time it loosened the boundaries of legal, political, social theoretical, and moral discourse. It showed that the inconsistencies of liberal doctrines were still at work without being openly acknowledged, but that in the literature, and above all in judicial decisions themselves, the material antipodes of classical-liberal doctrines were ever more clearly unfolding.[92]

Yet this interpretive process soon encountered the limits of its productiveness. First, the reconstruction of social-theoretical premises presupposes that the legal material fits into the set of premises to which the interpreter wished to relate it. True, it is surprising to observe that the classical paradigms (including all their incoherencies) prove in practice to be uncommonly resistant to change, that they are reformulated again and again, without resolving the old antinomies.[93] Yet the critic balks as soon as he should turn positive and explicate the social-theoretical content of "materialization tendencies". The results of

---

[90] See HUBERT ROTTLEUTHNER, RECHTSWISSENSCHAFT ALS SOZIALWISSENSCHAFT, 187-208 (1973); HUBERT ROTTLEUTHNER, RICHTERLICHES HANDELN. ZUR KRITIK DER JURISTISCHEN DOGMATIK, 1-60 (1973).

[91] DIETER HART, ALLGEMEINE GESCHÄFTSBEDINGUNGEN UND JUSTIZSYSTEM. ZUM VERHÄLTNIS VON VERTRAGS- UND ÖKONOMIETHEORIE, 9 (1975).

[92] This was demonstrated on many of the central materials of civil law such as contract law, tort law, and the law of unjust enrichment Otherwise reference should be made to economic law monographs which each have their own approaches: CLAUS OTT, RECHT UND REALITÄT DER UNTERNEHMENSKORPORATION. EIN BEITRAG ZUR THEORIE DER JURISTISCHEN PERSON, (1977); WOLFGANG R. WALZ, STEUERGERECHTIGKEIT UND RECHTSANWENDUNG. GRUNDLINIEN EINER RELATIV AUTONOMEN STEUERRECHTSDOGMATIK, (1980).

[93] This is the leitmotif of the critique on the "ordoliberal" theory of the interdependence of (competitive) "economic constitution" and (democratic) "state constitution"; (see RUDOLPH WIETHÖLTER, PRIVATRECHT ALS GESELLSCHAFTSTHEORIE?, FESTSCHRIFT FÜR LUDWIG RAISER, 645 (1974); Dieter Hart, *Zur Instrumentierung des Wirtschaftsrechts am Beispiel der Wirtschaftsverfassung*, 140 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 31 (1976); Jürgen Gotthold, *Neuere Entwicklungen der Wettbewerbsrechtstheorie*, 145 ZHR 286 (1981). – The term "ordoliberal" is untranslatable, but for its legal conception there are several American equivalents: The ordoliberal theory can be characterized as an attempt to lay claim to the Basic Law for a legal defense of the liberal model against social state transformations, as a "freezing into the legal system (of) the whole structure of laissez-faire" as Kennedy ascertained for the US in the late classical period (Form and Substance in Private Law Adjudication, *supra*, note 36, 1733-1756). – In FRIEDRICH AUGUST VON HAYEK, DER WEG ZUR KNECHTSCHAFT (THE ROAD TO SERFDOM, 1944), ERLENBACH-ZÜRICH 1952; DIE VERFASSUNG DER FREIHEIT (THE CONSTITUTION OF LIBERTY, 1960), (1971), American neoliberals and German ordoliberals of the "second generation" have a common theoretical legacy.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

judicial decisions appear as an "unsystem" of mutually contradictory principles, of rules and rule limitations, of exceptions and counter exceptions; at the very latest when one no longer concentrates on merely a single author, legal doctrines prove to be an inextricable tangle. Just as the working out of a material constitutional theory of the social state runs aground on the "new intransparency", so falters the positive explication of materialization tendencies.

A second difficulty with which the program of materialization of formal law has struggled in vain, resulted from the effort to restructure legal programs and their administration in a manner corresponding to the social contents of materialized law. The alternative to the generality of the classical-liberal statute is the particularity of the "measure law" (*Maßnahmegesetz*), the alternative to the determinacy of its rules and their operative facts are indeterminate general clauses and abstract principles, the alternative to mechanical subsumption under fixed rules is the production of "correct" outcomes (i.e., just social conditions). With the formula "political administration" R. Wiethölter[94] and D. Hart[95] have attempted to draw the contours of this triple reorientation. The formula was intended to obligate interventionist regulations to the realization of substantive political goals; at the same time, it was meant to characterize the task of the judiciary in dealing with general clauses. True, such notions were presented not as descriptions of a currently observable (or even likely) reality, but (nevertheless) as a thoroughly *possible* model. It is thus justified[96] to pepper them with questions about the cognitive (social-scientific, planning-theoretical) competencies of judiciary and administration, or about the suitability of judicial procedures as implementation instruments for political programs, and above all to confront them with their own premises: Around which programs should the administration of law orient itself, if the legal system must integrate a whole multitude of contradictory program elements? And how should the political administration achieve these necessary integrations, if the "materialized" constitutional theory has not even begun to be sketched out?

---

[94] Rudolph Wiethölter, *Wirtschaftsrecht*, in: Görlitz, *supra,* note 16, 531, 532.

[95] DIETER HART, VOM BÜRGERLICHEN RECHT ZUR POLITISCHEN VERWALTUNG, 274 (1974).

[96] See: EIKE SCHMIDT, VON DER PRIVAT- ZUR SOZIALAUTONOMIE, 153, 155-159 (1980); Gunther Teubner, *Verrechtlichung – Begriffe, Merkmale, Grenzen, Auswege* in: VERRECHTLICHUNG VON WIRTSCHAFT, ARBEIT UND SOZIALER SOLIDARITÄT. VERGLEICHENDE ANALYSEN, 289, 313, (Friedrich Kübler ed., 1984), (English version: *Juridification – Concepts, Aspects, Limits, Solutions* in: JURIDIFICATION OF SOCIAL SPHERES. A COMPARATIVE ANALYSIS IN THE AREA OF LABOUR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW, 3, 19, Friedrich Kübler ed., 1987) and Dieter Hart himself: ZUR KONZEPTIONELLEN ENTWICKLUNG DES VERTRAGSRECHTS, 66, 77 (1984).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

3. The Normative Critique

The most thoroughgoing revisions of the materialization idea were made by Habermas in reinterpreting the crisis potentials of late capitalism as conflicts between system and lifeworld, between system integration and social integration; the development of his dualistic legal category has brought it to a (preliminary?) conclusion.[97] Most areas of civil, economic and administrative law (and also labor law) are regarded by Habermas as "organizational instruments" for the economic system, whereby the law is combined with the control media of the economy (money) and the administrative system (power) in such a way "that it too takes on the role of a control medium". Certainly the differentiated subsystems remain bound to the lifeworld; the law must preserve, as a "medium", through legal institutions ("legal norms, which cannot be sufficiently legitimated through the positivistic reference to process"[98]), a connection to the "legal consciousness of everyday practice". Despite this dependency, civil and labor law (at least) gain a peculiar stability through their functional mode as "media". Habermas presents the relationship of lifeworld and economic system as an exchange relationship, in which the individuals "as employees" receive their incomes and "as consumers" satisfy their needs for goods.[99] It is not clear why these individuals should interest themselves for the functional modes of the economic system and its legal control, as long as the social state-supported "*new equilibrium between normalized employee role and upgraded consumer role*"[100] continues to be maintained to a tolerable degree. It is precisely in the ("materialized") legal areas which aim for social participation and compensation, as well as in family and school law, that the crisis potential presents itself more dramatically, because this law intervenes in "communicatively structured networks", not just in areas which are already "formally organized *anyway*".[101]

Habermas' dual interpretation of law as medium and institution has found little acceptance from jurists.[102] And in fact it is difficult to understand how those "functional imperatives" of the economic and administrative system can be recognized and rediscovered in the law. The current (self-)critique of the materialization idea begins precisely with the

[97] See already JÜRGEN HABERMAS, LEGITIMATIONSPROBLEME IM SPÄTKAPITALISMUS, *supra,* note 81, 9, and then in THEORIE DES KOMMUNIKATIVEN HANDELNS, *supra*, note 18 (VOL. 1 HANDLUNGSRATIONALITÄT UND GESELLSCHAFTLICHE RATIONALISIERUNG), 332, VOL. 2, 229 and above all 487*.*

[98] JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS, *supra,* note 18, Vol. 2, 536.

[99] JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS, *supra*, note 18, 571, 510.

[100] JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS*, supra,* note 18, 514 (emphasis in original).

[101] JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS*, supra,* note 18, 539 (emphasis in original).

[102] See Wiethölter, *supra*, note 13, 30.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

observation[103] that legislatures never achieve more than particular, temporary regulations which are unsystematic and in need of constant correction, that the courts cannot be restricted to purely economic rationality, but also grants social protection, that precisely civil and economic law have to do neither with "natural market phenomena" nor a systematically regulated economy, but rather with quite differently organized and legally prestructured fields of social action. In this network, a legitimate "law as institution" and a "law as medium" not needing such grounding can scarcely be distinguished. The normative problematic of the materialization process appears rather to consist in the fact that no meta-criteria are available for decisions between the internally contradictory statutes and legal principles, and law production itself does not bind itself to procedures, which could obligate the legal claims of groups and individuals to follow "reasonable" argumentative procedures – I will return to this interpretation below.[104]

II. The Inconsistencies and the Indeterminacy of Law

The German social state discussion focused on the concrete conditions and perspectives for a transformation of the liberal-capitalistic "system". It might be interesting to examine the fate of comparable projects in the US since the reformism of the New Deal. However, recent American critiques of law have chosen to focus on other interests.

1. Post-liberal Law

Following his general critique of liberalism, which set out the premises of the liberal-social philosophical tradition and attempted to demonstrate the necessary insolubility of its problems as formulated[105], Roberto M. Unger turned to the role of law in the liberal legal tradition in a way that comes closest to the (in Germany) familiar patterns of the construction of social models and the reconstruction of steps of legal development.[106] Unger discovers in "superliberalism" two features which compel revision of the classical-liberal notions of order and undermine the rule of law: An interventionism in previously state-free areas, which entangles the government in redistributive, regulative, and planning tasks, thus transforming it into the welfare state; a "gradual approximation" of state and society, which is expressed in the recognition and treatment of private

[103] See, *supra,* 2 at note 93.

[104] See, *infra*, C I 1.

[105] See, *supra*, A II 1; Unger's liberalism critique belongs to the repertoire of the CLS-movement, but not, characteristically, his later examinations, such as the one drawn on here.

[106] UNGER, *supra,* note 33.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

organizations as political actors and transforms the liberal state into a "corporate state".[107] As a result of these transformation processes, the structures and the style of law change. The state interventions must be substantively grounded, they now relate to complex and variable contexts; the perception of new tasks occurs in confrontations and negotiations with powerful "private" actors. Under such conditions, a general-abstract rule system becomes dysfunctional. The law must reach to flexible regulatory forms – "open-ended standards and general clauses", it is instrumentalized and conceived as such – thereby losing the appearance of systematic closure. The utilization of law for concrete regulatory tasks forces the shift to policy-oriented, purposive legal reasoning, to procedural and substantive notions of justice, and to a particularistic balancing of interests.[108]

Unlike Max Weber, Unger by no means interprets these anti-formal tendencies of modern law as a regressive decay process, but rather as a reaction to the conflicts between the promises – "the view of the ideal" – and the experiential "actuality" of liberal societies.[109] He seeks – and finds – in welfare state-corporative post-liberalism the first steps towards overcoming liberal formalism's abstract notions of justice through particularistic-concrete intuitions of justice, towards replacing legalistic social relations and social authority structures with relations of solidarizing responsibility ("solidarity is the social face of love").[110] Of course, the future chances of these alternatives remain uncertain, and the question of how the replacement of the "association of interests" by a "shared purpose of the generating principle of social order" is to be conceived remains (for the moment, at least) unresolved.[111]

We can summarize as follows: Modern law has become more contradictory and indeterminate precisely because the liberal forms of social domination cannot be maintained and the post-liberal structures are not in a position to still controversies over the future of the social order.

2. Indeterminacy

Unger's analyses radicalized the critique of the classical model of law application which has been common in Germany since the Free Law School, and also the skepticism vis-à-vis the coherency of a materialized law, which had already appeared to Max Weber as "all too

[107] UNGER, *supra,* note 33, 193.

[108] UNGER, *supra,* note 33, 193-200.

[109] UNGER, *supra,* note 33, 153.

[110] UNGER, *supra,* note 33, 206.

[111] UNGER, *supra,* note 33, 214, 238-268; see, *infra*, C II 1.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

tangibly in the vast majority and precisely in many principally important determinations as a product and technical medium of interests compromise".[112] But Unger's analyses remain tied to the notion that replacing liberal with post-liberal legal structures indicates changes in the principles of social organization and relations of domination, and they are borne by the hope that a "method of common meaning or of interpretive explanation"[113] can overcome the antinomies of liberal social philosophy. In the structuralist-inspired CLS writings, little remains of these "constructive" elements of Unger's analysis.

Certainly one can find in the early works of Duncan Kennedy (drawn upon here once again because of their style-setting significance) astoundingly rigid distinctions which overlap with Unger's analyses of the development of classical liberalism to post-liberal law: Since the turn of the century, a new type of legal thought has replaced classical individualism. This process of replacement has changed the structures of formal law and the methods of law application, and led to recognition of anti-liberal values and ideas (about the reciprocity of legal relations, the justification of regulative interventions, and paternalism[114]). But all these statements are meant as observations of legal discourse; they merely indicate alterations of the general legal consciousness. Kennedy leaves the relationship of this discourse to "social reality" unspecified[115], the question of the developmental basis of classical legal consciousness and the reasons for its transformation remain open.[116] Nevertheless, the analysis concentrating on legal discourse does assert a specific dependency of the modern legal consciousness upon the classical. Its fundamental contradictions have not simply been forgotten, nor have they been overcome; instead, they have continued to unfold. In particular, the anti-individualistic elements of modern law have only won ad hoc victories against the injustice, immorality or irrationality of individual results (effects) of formalistic legal rules.[117] The resulting growth in the significance of principles and legal purposes in the law application process has completely undermined its liberal interpretation, without producing a constructive alternative. Ultimately, the insolubility of the substantive and methodical incoherencies of modern law results from the fundamental contradiction's very nature: If both principles, individualism and altruism, were inscribed within the individuals themselves, both sides of the contradiction would continue to be simultaneously perceived as indispensible values.[118]

---

[112] WIRTSCHAFT UND GESELLSCHAFT, *supra*, note 15, 502; see Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 571 (1983).

[113] UNGER, *supra*, note 33, 246 (a "program of institutional reconstruction", Unger, *supra*, note 112, 601).

[114] *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1733-1737.

[115] *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1738.

[116] *The Structure of Blackstone's Commentaries*, *supra*, note 36, 220.

[117] *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1732.

[118] "The opposed rhetorical modes lawyers use, reflect a deeper level of contradiction. At this deeper level, we are

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

The assertion that contradictions and inconsistencies have infected the law discloses the significance of the much discussed thesis of the "indeterminacy" of law. One widely held understanding of this thesis concentrates on its implications for law application and the predictability of judicial decisions: Creative lawyers can always find what they need within the totality of "valid" precedents and potentially applicable laws, and construct their case accordingly by manipulating the arsenal of legal interpretive techniques in one direction or another. Yet this reading of the indeterminacy thesis is trivial. It can be objected that, in practice, despite all uncertainties, experienced lawyers can predict with sufficiently confidence the outcomes of legal controversies[119], that the vast majority of legal questions are handled as matters of routine[120], and moreover that uncertainties can be reduced via extra-legal mediation procedures. All this is true. But the observation that de facto "hard and easy cases" all find a resolution does not refute the thesis that the incoherencies of law are expressed in contradictory rules and principles, and that no rational standards are available for the decision in such cases of collision, that the "balancings" with which such decisions are motivated cannot be "justified" substantively, but only through the necessity of reaching some form of decision.

3. Deconstructionism

Despite his theoretical agnosticism vis-à-vis the relation of law and society and the social causes for changes in law, one nevertheless finds in Kennedy's works references to structural correspondences between classical law and the laissez-faire economy[121], and between the unfolding of the contradictoriness of the law in the mixed economy and the bureaucratic welfare state[122]; and despite his fundamental normative skepticism, Kennedy pleads for an ad hoc paternalism which relies on intuitive and empathic insights into needs for protection, which doesn't shy away from the risk of misperceiving such needs because

---

divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society ..." (*Form and Substance in Private Law Adjudication*, *supra*, note 36, 1685). Even after his retraction of the "fundamental contradiction" (note 46), Kennedy repeated this thesis. *Freedom and Constraint in Adjudication: A Critical Phenomenology* (note 46), describes a judge who wants to bring his "progressive" attitudes into effect, and in so doing immerses himself in the messages of the legal texts, contemplates his entanglements in role constraints and networks of expectation and ultimately, no longer secure in his original intuitions, helplessly falls by the wayside.

[119] See, *e.g.*, Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO LAW REVIEW 917 (1985); but see Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 20 (1984).

[120] See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 UNIVERSITY OF CHICAGO LAW REVIEW 462 (1987); Kennedy Hegland, *Goodbye to Deconstruction*, 58 SO. CAL. L. REV. 1203 (1985).

[121] *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1745.

[122] *Form and Substance in Private Law Adjudication*, *supra*, note 36, 1776.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

of the distance between the legal actor and affected individuals or groups, at least not when it involves "mobilized people" capable of expressing their interests and needs.[123]

The deconstructionist wing of the CLS-movement refuses to make such concessions. They concede that the critique of liberal formalism has made clear that the privileging of the subject and his free will vis-à-vis his social context, of society vis-à-vis the state, of the policy of laissez-faire over interventionism, and of objectivity in law application over subjective-irrational value judgments has led to ungroundable hierarchies which suppress their "dangerous supplements". But every systematic attempt to reverse these relations commits the same mistake, because it too must eliminate the contingencies of the social, objectifying and reifying social "reality", and thus proclaiming a supremacy of reason which is simply unwarranted.[124]

These very general reservations against a "materialization" of law have been concretized in analyses of individual segments of "legal thought". G. Frug's discussion of the "ideology of bureaucracy in American law"[125] begins with a critique of the hopeless attempt of formalistic conceptions of bureaucracy to deny the discretionary elements of bureaucratic action (of state administrations and private corporations). Frug then identifies four new ideals for the (re-) organization and control of bureaucracies (the expertise, the judicial review, the market and pluralist models), analyses their affinities[126] and measures them against their self-proclaimed ambitions and against the ideal of participatory democracy, which Frug describes as a process "by which people create for themselves the form of organized existence within which they live".[127] Yet it is not this – in any event rather pale and abstract ideal – which lends the contours to his critique, but the relation between the objectivistic functional mode of bureaucracies and its "dangerous supplement" – "discretion". Because no conception of bureaucracy has succeeded in taming this discretionary element (whether through formal rules, the specialized knowledge of

---

[123] 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, 638-649 (1982).

[124] See the analyses of the "constructive" elements of Legal Realism in Peller, *supra*, note 62, 2019-2064, as well as Balkin, *supra*, note 62, 770-772.

[125] Frug, *supra*, note 62, 1276. – Frug's classificaltion of group law doctrines to particular "bureaucracy models" corresponds exactly to the type of German analyses discussed *supra* in I 2.

[126] Even here there are agreements: the affinities between the formalist model of bureaucracy and the market mechanisms for the control of managers discovered by representatives of economic analysis would be expressed by German authors through the qualification of the Chicago School as a specific variant of the "materialization" of formal law.

[127] Frug, *supra*, note 125, 1296, 1386.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

experts, judicial review, the market, or political processes)[128], the distinctions which otherwise might appear important among the models[129] are ultimately insignificant.

A second example: C. Dalton[130] likewise begins her deconstruction of contract doctrine with a methodological and social critique of liberalism[131], and identifies a process of transformation which commenced in the late 19th century, was advanced by Legal Realism and later diffused: The requirement of will in the conclusion of a contract is suppressed by the "implied contract", the private structuring of a contract is controlled with help of the duress, substantive unfairness, and unconscionability doctrines, and subjective interpretive methods are overlain with objective ones. German authors have characterized such phenomena as materialization tendencies, i.e. attempted to trace them back to social transformations and simultaneously to comprehend them as normative improvements.[132] According to the deconstructionist reading, the "will theory of contract" was suppressed when (because?) "the realists made it impossible to believe any longer that contract is private"[133], and the substantive control over contracts became possible because (?) the formalistic duress doctrine – above all because of its arbitrary exclusion of "economic duress" – offered flanks all too vulnerable to attack.[134] The lack of interest in the approaches to these problems found in the German materialization discussion, as manifested in such casual remarks, can be explained from the deconstructionist interpretation of the objective elements of liberal contract doctrine as their "dangerous supplement" and from the interpretation of post-liberal reorientations as the vain attempt to escape inherited subjective defects. The German revision of the materialization program had to recognize the disunity and particularity of contract law development and abandoned the idea of a "political administration" of contract law, because of both the excessive cognitive and political demands on legislature and judiciary as well as the normative weaknesses of interventionistic juridification criteria.[135] Dalton observes that "the realist challenge to the "privateness" of contracts has been assimilated and diffused"[136], that the various elements continue to coexist in contradiction. She traces the

[128] Frug, *supra*, note 62, 1382.

[129] Frug, *supra*, note 62, 1360.

[130] Dalton, *supra*, note 62.

[131] Brüggemeier, *supra*, note 12, 1006, 1007.

[132] See, *supra*, I 2.

[133] Dalton, *supra*, note 62, 1012.

[134] Dalton, *supra*, note 62, 1029.

[135] See, *supra*, I 2 and 3.

[136] Dalton, *supra*, note 62, 1014.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

(in principle) ineradicability of these contradictions back to two themes, around which the privileged side and its respective "dangerous supplement" ceaselessly circle – the questions of power ("What is the threat and the promise to me of other individuals?") and knowledge ("On what basis can I share my understanding of the world with others?") in the structuring of social relations – and these questions devolve from the split of self and other, subject and object.[137]

III. Second Aside: The Ambivalences of Juridification and the Indeterminacy of Law

The German materialization discussion proceeded from the discrepancies between the "social model" of formal law and the socio-economic reality of organized capitalism. The program of materialization was the search for a constitution of the *Sozialstaat*, which although prescriptively intended, was not meant to designate an abstract utopia but rather a developmental possibility. The abandonment of this program was compelled by the "intransparency" of the current social conflict situation, the problematic consequences of juridification processes, the uncertainty concerning standards for judging among colliding interests. The result of these revisions comes close to the American thesis that in post-classical law the contradictoriness of formal law has merely continued to unfold, without having been transcended by a coherent alternative. Yet the German thesis (that there are no pre-existing "material" standards for deciding among colliding needs and interests) and the American thesis (that legal decisions remain indeterminate because of the immanent contradictoriness of law) arose from completely different contexts. The social state program had distinguished itself from the thesis that the fundamental contradiction between labor and capital (as analyzed by Marx) also determined the conflict constellations in late capitalism. The revision of this revisionist position did not mean a return to Marxist orthodoxy; it was much more concerned with the development of new forms for dealing with colliding legal claims. To be sure, ab initio the indeterminacy thesis has remarkably little to do with a materialistic theory of law and the state. But the assertion that the post-classical developments continue to circle around the original contradictions of liberal "legal consciousness" presumes a historical continuity between classical and post-classical legal discourse, which could first be broken off by a "fundamental" transcending of its boundaries.

C. The "New Intransparency"

The contrasting of German and American debates about legal formalism and post-liberal legal developments has chosen not to draw upon the respective social, political, and academic contexts to explain these different orientations. But the selection and

---

[137] Dalton, *supra*, note 62, 1000; on the perspectives of this argumentation see, *infra*, C II 3.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

arrangement of the German approaches were guided by interpretations of this background, which can be brought not all too speculatively into connection with the observed differences to the American contributions. The German revival of the traditions that submerged with the Weimar Republic took place in a widespread atmosphere of hope for fundamental change which extended to relevant political actors (parties, unions) – a constellation that hardly played a role by the time the Conference on Critical Legal Studies' was founded (1977).[138] But even after the ambitious projections of social-structural reform in the German discussion had evaporated, and in the course of this process the spectrum of social-theoretical approaches had become broader and more diffuse, the discrepancies between German and American theory preferences and thematic emphases remains striking. A satisfying explanation for these discrepancies must go beyond merely temporary political constellations and connect with more deeply anchored interpretations of the respective situations and histories.

I. Procedural, Autopoietic, and Flexible Law

The German approaches discussed until now have largely agreed in their diagnoses of the legal system's current situation. Positive law is incoherent and the attempt to discover a substantial "unity of the legal order" in the sum of valid statutes and their judicial interpretations is doomed to failure. The boundaries of legal discourse are porous; the actors who, in the process of law production, announce claims and exercise influence, draw from highly heterogeneous sources in the definitions of reality which they transform into legal categories, and their arguments rest "in many cases on ethical, political, economic considerations or on a combination of these which are not the business of the jurist as such".[139] The processes of law production, which formally lie in the hands of "the" legislature, "the" courts, and "the" administration, are materially co-determined through strategic influencing by those "formally external to the process", and the results are often enough simply a legal ratification of extra-legal, audibly or silently arrived at compromises and agreements. Admittedly, these formulations may only imperfectly capture the starting points of the German discussion.[140] Yet the questions about the unity of law, about the specifics of legal discourse, and about the functions of law in the resolution of social problems at least point to thematic emphases in which unsolved problems in the "materialization of formal law" program can easily be rediscovered.

---

[138] See Thomas C. Heller, *A Brief Rejoinder to the Discussion of the CCLS*, 1 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE (ZFRSOZ) 126 (1980); John H. Schlegel, *Notes Toward an Intimate, Optionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES, 1-14 (1987).

[139] Bernhard Windscheid, *Die Aufgaben der Rechtswissenschaft (Leipziger Rektoratsrede of 31. October 1884), in* BERNHARD WINDSCHEID, GESAMMELTE REDEN UND ABHANDLUNGEN, 100, 112 (Paul Oertmann ed., 1904).

[140] *I.e.*: the approaches which are discussed in this volume but which in their overall importance remain most likely marginal.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

1. Proceduralization of the Category of Law

Formal law provided ideological legitimation for an unjust social order, but at the same time it institutionalized morally grounded and indispensible principles. The post-formal developments of law have produced a chaotic multitude of rules and principles. However, these are not only de facto irreversible, they have also increased the substantive justice of modern law. Social models for the structuring of a democratic social state and strategic concepts for its realization are not available, but legal decisions must take a position in regard to competing interests and incompatible interpretations of needs. Klaus Günther's distinction between "foundation and application discourses" *(Begründungs- und Anwendungsdiskursen*)[141] is intended to resolve all these paradoxes. Habermas' communicative moral theory, which Günther takes as his starting point[142], measures the validity of moral norms against the principle of universalizability: " ... the consequences and side effects (of a norm), which (presumably) result from their general observance for the satisfaction of the interests of each individual" must "be capable of acceptance by *all* those affected, and preferred to the effects of the known alternative possible rules".[143] Günther bases his critique of liberal subsumption logic (which falls behind the post-conventional level – already attained by formal law – of a moral universalism emancipated from concrete virtue commandments)[144] upon the differentiation between the "foundation" of the validity claim of norms, and their "application" in concrete contexts (the relevant aspects of the individual case), in which once again the principle of universalizability must be called upon.[145] At the same time, this distinction serves as the basis for his defense of modern materialization tendencies. Günther understands the development of post-formal law as the history of a "recontextualization" of formal law, in the course of which the universalizability principle is extended to the consequences of a rule application, and the injustice of carrying out liberal legal norms in changed social contexts is perceived, and subsequently interpreted in the light of that principle. Accordingly, the readiness to apply rules and principles in a manner appropriate to the situation is expressed by the increasing uncertainties (and also divergencies) in rule application (which show up in legal-systemically incoherent decisions).

---

[141] KLAUS GÜNTHER, DER SINN FÜR ANGEMESSENHEIT. ANWENDUNGSDISKURSE IN RECHT UND MORAL (1988).

[142] See particularly Jürgen Habermas, *Diskursethik – Notizen zu einem Begründungsprogramm*, in JÜRGEN HABERMAS, MORALBEWUßTSEIN UND KOMMUNIKATIVES HANDELN, 53, 127 (1983).

[143] HABERMAS, *id.*, 75.

[144] Günther, *supra*, note 141, 117; see on the following already KLAUS GÜNTHER, MATERIALISIERUNG ALS REKONTEXTUALISIERUNG DES FORMALRECHTS, Typescript (1984); *Preliminary Considerations to a Theory of Procedural Application, in* WORKSHOP ZU KONZEPTEN DES POSTINTERVENTIONISTISCHEN RECHTS, 74 (Gert Brüggemeier & Christian Joerges eds., 1984); KLAUS GÜNTHER, THE CORE OF MORAL UNIVERSALISM IN MODERN LAW, Typescript (1984).

[145] See on this Kennedy, *supra*, note 35, whose critique of liberal law application doctrines concentrates on the idea that the substantive content of rules could be brought to effect through their "application" in concrete conflicts.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

Of course, materialized law itself remains morally deficient, since it attempts to fix the process of recontextualization – whether through detailed regulations, which then constantly prove inappropriate, or through steadily more abstractly composed general clauses, which feign a "capacity to be applied". An overcoming of these deficits is only conceivable to the extent that the reference of legal regulations to their background context is reflexively reorganized, that the application of legal norms in toto is expanded in such a context-sensitive manner that it captures all of the relevant aspects of a situation and takes into account the interests of all concerned parties in an impartial decision-making process.

All this may well be true in moral philosophy. But the non-philosopher is entitled to ask: How are we to conceive of the universalizability principle's mode of operation in the daily struggle about the law, in the real existing processes of legislation and adjudication? Günther rejects Habermas' disjunction between law as medium and institution, a dichotomy, which limits the effect and scope of moral argument.[146] His concessions to the "functional imperatives" of differentiated social systems, to time constraints, to the cognitive limits of adjudication and the political opportunism of the legislature are construed differently: The legal system as a whole is bound to the functional requirements of autonomous social systems and their decisional needs. Yet it is not simply at their mercy, but remains always subject to the foundational claims anchored in the lifeworld.[147] When (and to the degree that) the practical administration of law simply breaks off suitability arguments and contents itself with merely following rules and authoritative decisions, the foundational requirements must concentrate on the legislative process.[148]

The questions of the non-philosophical practitioner are not resolved by such responses. The complex fact questions on which above all high court decisions are often based, are only partly accessible to the jurists involved in the decision-making process and are also too far from the sphere of the lifeworld. The legislative process to which Günther refers is not subject to the foundation constraints deriving from moral principles; the shift of decisional responsibilities to the court tends rather to upgrade the quality of argumentation. Examples in which the foundational level aimed at by Günther is attained (and which also know how to deal with the cognitive bottlenecks and the judiciary's limited possibilities for enforcement) can be identified.[149] Counter-examples are somewhat easier to find[150] – and the contemporaneity of contrary experiences appears symptomatic: The

[146] See, *supra*, B I 3.

[147] Günther, *supra*, note 144, 21.

[148] Günther, *supra*, note 141, 473.

[149] See Wiethölter, *supra*, note 13, 45 (German version), 235 (English version).

[150] See Christian Joerges, *Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples, in* CONTRACT AND ORGANISATION. LEGAL ANALYSIS IN THE LIGHT OF ECONOMIC AND SOCIAL THEORY, 142 (Terence

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

discovery of successful legal conflict resolutions must be dependent upon specific (and not exactly probable) prerequisites. Meanwhile, the legal guarantees of the procedural rules are scarcely sufficient to deter the social actors in the law production process from strategically exploiting their respective advantages. The hints (which can be read from the reconstruction of "successful" examples) as to the institutional prerequisites for the effectiveness of the impartiality principle under and against the "system conditions" would have to be further systematically explained before a judgment is possible about whether "proceduralization of law" can open working perspectives for legal scholarship and practice or merely function as a moral authority.

2. Reflexive Law

Almost all the German authors in this volume feel compelled to align their arguments in the context of the debates between Jürgen Habermas and N. Luhmann, which have been going on now for nearly two decades.[151] This form of comparative discussion and double front demarcation is symptomatic. However, it does not indicate that the Habermas-influenced visions of a proceduralization of law or the system-theoretical approaches oriented around Luhmann have anything to do with established "schools" of thought. The currently observable prominence of macro-theoretical debates in the fora of legal sociology and critique of law may indicate new orientation needs, but their interpretation remains uncertain. On the other hand, they may have simply to do with the fact that empirical legal sociological research has not taken place to the extent once anticipated[152] – but this circumstance has many causes.[153] On the other hand, one can get the impression that the critique of system-theoretical legal theory[154] must take on certain positive,

Daintith & Gunther. Teubner eds., 1986) – Anyone who considers such examples will probably estimate the chances of Dworkin's Hercules to bring the principles of relevant law into a coherent connection (RONALD DWORKIN, LAW'S EMPIRE, 165, 176, 313 (1986)) more skeptically than Günther does (Günther, *supra*, note 141, 483). – Dworkin reacts to the radical skepticism of the CLS-movement's indeterminacy thesis (*supra* B II 2 and 3 as well as C II 2 and 3) with a sort of burden of proof rule: "The internal skeptic must show that the flawed and contradictory account is the only one available" (DWORKIN, *id.*, 274). This answer meets the assertion that there are absolutely no successful examples for the legal treatment of colliding interests and principles. On the other hand, recalling that Hercules failed on Earth, one may demand that legal theory must systematically consider the practical-political limits of its normative ideas.

[151] See JÜRGEN HABERMAS & NIKLAS LUHMANN, THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE – WAS LEISTET DIE SYSTEMFORSCHUNG? (1971).

[152] Just compare the programmatic *Mitteilung der Herausgeber: Zum ersten Heft der Zeitschrift für Rechtssoziologie,* ZFRSOZ 1 (1980), with issues from the last few years of that journal.

[153] See KLAUS F. RÖHL, RECHTSSOZIOLOGIE, 61, 62 (1987); Rüdiger Lautmann & Michael Meuser, *Verwendungen der Soziologie in Handlungswissenschaften am Beispiel von Pädagogik und Jurisprudenz*, ZFSS 685, 697 (1986).

[154] This critique too has an almost twenty year tradition: see Jörg Münstermann, *Zur Rechtstheorie Niklas Luhmanns*, KRITISCHE JUSTIZ (KJ) 325 (1969), and for a recent example Niklaus Dimmel & Alfred J. Noll, *Autopoiesis*

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

identity-bestowing substitute functions, and indicates an acute lack of presentable critical projects.[155]

Efforts at "categorizing" system theory within the familiar framework of political semantics can swiftly find pertinent signals. For system-theoretical legal theory has reinterpreted all the phenomena which had ignited the critique of formal law and legal science and declared all social-critically inspired hopes for change to be naive. The contradictions in law and the indeterminacy of its methods – even in the earlier periods of formalism and conceptual jurisprudence – are simply a normal part of self-referential systems.[156] Political instrumentalizations and materializations of law, even if the social-state juridification tendency must be accepted as irreversible, must respect the limits set by the differentiation of law, economy, and politics as autopoietic systems. A substitution of legal decisions by political-substantive values is impossible to carry through in practice, and can at most lead to a de-differentiation of society. The normative impetus of the materialization notions appears to be just as hopeless as the idea of a proceduralization of law, because only system-specific reflection moralities can be developed in the differentiated systems.[157] In the "porosity" of legal discourse and the displacement of law production to decentralized networks "a new type of episode inter-linking is manifested which adds up to a "wiring" with specific communications circuits"[158]; however, such phenomena do not endanger the autonomy of the legal system, so long as they only change program structures (the way of linking normativity and facticity), while leaving the legal code (the distinction legal/nonlegal) intact.[159]

Can one simply rely on political semantics in "evaluating" these statements? First, one must know whether it is at all possible to bring the system-theoretical observation of the legal system into effect within the legal system itself. If systems operate in a closed, autopoietic manner, one may not imagine such transferences as an actualization by the

---

und Selbstreferentialität als "postmoderne Rechtstheorie" – Die neue reine Rechtsleere, DEMOKRATIE UND RECHT (DUR) 379 (1988).

[155] Gunther Teubner protested against taking over this function and at the same time refused to give off the relevant signals; see GUNTHER TEUBNER, SOCIAL ORDER FROM LEGISLATIVE NOISE? AUTOPOIETIC CLOSURE AS A PROBLEM FOR LEGAL REGULATION, 5-6 (1985).

[156] See Gunther Teubner, *And God Laughed… . Indeterminacy, Self-Reference and Paradox in Law*, *supra* in this volume. From the writings of Niklas Luhmann, see above all: DIE RÜCKGABE DES ZWÖLFTEN KAMELS. ZUM SINN EINER SOZIOLOGISCHEN ANALYSE DES RECHTS, 22, Typescript (1984).

[157] Teubner, *supra*, note 96; Wiethölter, *supra*, note 13, 91.

[158] *Episodenverknüpfung: Zur Steigerung von Selbstreferenz im Recht, in* THEORIE ALS PASSION. NIKLAS LUHMANN ZUM 60. GEBURTSTAG, 423, 437 (Dirk Baecker *et* al. eds., 1987).

[159] *Episodenverknüpfung: Zur Steigerung von Selbstreferenz im Recht, id.,* 442.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

legal system of outsider observations of law[160] itself. However, the observer versed in systems theory still has the possibility of stimulating this actualization by intervening in the legal discourses in which fundamental doctrinal concepts, possibilities of legal regulation and the interpretation of social connections are debated. As soon as he does this, however, he cannot avoid changing the status of his observations. Legal discourse is normative: Those entering it must normatively reformulate assumptions once intended "strictly heuristically".[161] In this shift, the observations of systems theory are transformed in part into normative orientations (e.g., the autonomy of the legal system with its legal/illegal code should be preserved from de-differentiations, the civilizing achievements of relatively autonomous orders should be protected), and partly into defining legal issues (e.g., the law should concentrate on conflicts between the rationality patterns of functionally differentiated sub-systems, convert from thinking in terms of individuals and groups to systemic thinking, conceive of contract law as a reconstruction of social environmental demands). The change in roles from observer to participant requires an orientation that is incompatible with Luhmann's ironic descriptions of the legal discourse.[162] More importantly, however: The social subsystems and their further internal differentiations which the system-theoretical observer wants to obligate to his description of reality and problem definitions, do not themselves participate in legal discourse; the actors in this discourse may intend to adhere to system perspectives, but they cannot thereby substitute for the functions, achievements, reflections of the system. Now admittedly, such an objection simply ignores the thesis (and its justifications) that the social nexus is not at all produced over individuals and groups. But it nevertheless means that the normative elements of legal discourse remain inaccessible to system-theoretical observation and that a normative reformulation of the system-theoretical observations cannot remedy this lack, thus that legal problems and legal discourse ultimately cannot be reconstrued in exclusively system-theoretical terms.[163]

3. Flexibilization of Law

Habermas' reconstructions of the moral contents of formal law and the idea of a moral theoretical grounding for the proceduralization of the category of law overestimates the

---

[160] See Niklas Luhmann, *Closure and Openness: On Reality in the World of Law, in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY, 335, 337 (Gunter Teubner ed., 1988).

[161] Gunther Teubner, *Introduction to Autopoietic Law, in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY, 1, 2 (Gunter Teubner ed., 1988); Luhmann would say: the assumptions which go into the reality constructions of the theory of autopoietic systems (*id.*, 343).

[162] See Teubner, *supra*, note 156, 32.

[163] Klaus Günther sees corresponding difficulties as they here are asserted for the relation of legal theory and legal doctrine in the relationship between the "code" of the legal system and the environmental adaptations mediated via its "programmings" (DER SINN FÜR ANGEMESSENHEIT, *supra*, note 141, 327).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

powers of practical reason; the system-theoretical analyses of the contingencies of law are not radical enough and overestimate the achievements of systems – that (in brief) is the heart of K.H. Ladeur's "destruction" of the "constructive" German projects. Among the German approaches, his alternative of a "flexibilization" of law comes closest to the structuralistically and post-structuralistically motivated skepticism of the American critique of law. Yet Ladeur's alternative remains, as one can recognize by its perspectives, a very German project.

In the center of Ladeur's reconstruction of the beginnings of modern law stands an artificial construct: The subject, autonomous only in epistemological theory, while in reality being both politically dependent on the absolutistic state and psychologically split, programmed by its super-ego to embrace an ethic of renunciation.[164] The law of the "society of individuals" presents itself as a whole as a specific discursive formation which inscribes individuals with the two poles of subjectivity: With the fiction of an epistemologically and morally autonomous subject, and with the control of this subject by a sovereign, by the objective regularities of the social order, by universal moral claims. Ladeur's analysis of the development of modern law is the analysis of the disintegration of this discursive formation. Negative philosophy (Nietzsche, Wittgenstein, and Heidegger) plays the role of forerunner in this effort. However, the critique of the reflection philosophy fixated on the subject belongs in the broader context of changing historical conditions, which since the turn of the century have affected legal discourse focused on the legal subject. Max Weber's theory of formal law heralds this transformation. True, Weber still wished to tie the law to a unitary rationality structure, but in so doing, the two poles of legal subjectivity (the individuality of the legal person and the universality of the personified state) are dissolved. Formal law should now stabilize activity networks (markets/bureaucracies) and the interdependencies and contradictions of society must be constantly "managed" by politicians.[165] However, the disintegration of the "society of individuals" goes beyond Weber's attempts at stabilization. The generalization of legal subjectivity makes possible in the social area the formation of collective actors with incommensurable interests; for the state-political impact on society a diffuse set of strategies develops which cannot be assigned to a uniform pattern, but which takes into consideration economic, political, social, and institutional interdependencies and utilizes them operatively.[166] Under the new conditions of the "society of organizations", law can no

[164] KARL-HEINZ LADEUR, ABWÄGUNG – EIN NEUES PARADIGMA DES VERWALTUNGSRECHTS. VON DER EINHEIT DER RECHTSORDNUNG ZUM RECHTSPLURALISMUS, 121-184 (1984); see Karl-Heinz Ladeur, *Von der Gesetzesvollziehung zur strategischen Rechtsfortbildung, in* LEVIATHAN 332 (1979).

[165] ABWÄGUNG – EIN NEUES PARADIGMA DES VERWALTUNGSRECHTS. VON DER EINHEIT DER RECHTSORDNUNG ZUM RECHTSPLURALISMUS, *supra*, note 164, 135, 149, 208.

[166] ABWÄGUNG – EIN NEUES PARADIGMA DES VERWALTUNGSRECHTS. VON DER EINHEIT DER RECHTSORDNUNG ZUM RECHTSPLURALISMUS, *supra*, note 164, 153; on the situation in Germany in the Twenties and the National Socialist reaction see Karl-Heinz Ladeur, *Sprachformationen und Rechtsparadigma. Eine modelltheoretische Skizze des deutschen Verwaltungsrechts im 20. Jahrhundert, in* WISSENSCHAFT UND RECHT DER VERWALTUNG SEIT DEM ANCIEN

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

longer represent a coherent social order. The "processing rationality of the concertation" of strategic influences, the reciprocal supporting of legal strategies and non-legal ideological practices must take over the "integration" of society.[167]

What qualifies Ladeur's approach as typically German is that he uses his analysis not just for the destruction of "mainstream" notions, but seeks legal formulas for the stabilization of instability, and then concretizes them in interpretive proposals and demands centered on actual concerns of legal policy.[168] The aim is to respect the heterogeneity of legal discourses, the "disorder" of particular laws, and to remain content with "compatibilizations" of their plurality. The law must find its way to experimental forms which open and maintain options; the administration must understand itself as a catalyst for developmental possibilities; legal interpretation (doctrine) must adjust itself to the loss of the unity of law and switch over to the structuration of horizontal interdependencies.[169] Ladeur appears convinced that these formulas not only correspond to necessities and possibilities of thought, but also (e.g., in areas like environmental law) to practical action constraints, or at least (as in media law) the developmental situation of the "relational" society. But how is it possible to go from the discovery of plural discursive formations to "constructive" regulative processes (however openly and plurally structured) without criteria for these processes?[170] And how, if not via law, can it be guaranteed that the

RÉGIME. EUROPÄISCHE ANSICHTEN (Ius Commune. Sonderheft 21), 189, 200 (Erk Volkmar Heyen ed., 1984).

[167] LADEUR, *supra*, note 164, 172, 214; see already Karl-Heinz Ladeur, *in* FRIEDHELM HASE & KARL-HEINZ LADEUR, VERFASSUNGSGERICHTSBARKEIT UND POLITISCHES SYSTEM. STUDIEN ZUM RECHTSSTAATSPROBLEM IN DEUTSCHLAND, 224 (1980).

[168] *E.g.*: *Jenseits von Regulierung und Ökonomisierung der Umwelt: Bearbeitung von Ungewissheit durch (selbst-)organisierte Lernfähigkeit – Eine Skizze*, ZEITSCHRIFT FÜR UMWELTPOLITIK (ZFU) 1 (1987); *Rundfunkverfassung für die "Informationsgesellschaft"? Selbstorganisation von "taste communities" als Alternative zum Markt und zur öffentlichrechtlichen Integration, in* 31 PUBLIZISTIK 147 (1986).

[169] LADEUR, *supra*, note 164, 200, 221; see Karl-Heinz Ladeur, *Perspektiven einer post-modernen Rechtstheorie. Zur Auseinandersetzung mit Niklas Luhmanns Konzept der "Einheit des Rechtssystems", in* 16 RECHTSTHEORIE 383, 422 (1985) (English version: *Perspectives on a Post-Modern Theory of Law: A Critique of Niklas Luhmann, "The Unity of the Legal System", in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY, 242, 272 (Gunter Teubner ed., 1988)). Translated into more concrete contexts: Environmental law must orient itself towards the process-like transformations of its area of applicability (the environment subject to various burdens) and to take care of the coordination, subordination, and compatibilization of various actors and interests. Therefore environmental regulations (threshold values) should be determined in open commission procedures, in which all relevant disciplines and also the respective "founded" counter-positions can be articulated. The legal examination should then limit itself to the weighting of the factors, the establishment of a threshold value and the individual procedural steps, while the administration should be conceded a planning discretion (Karl-Heinz Ladeur, *Zum planerischen Charakter der technischen Normen im Umweltrecht – Zugleich ein Beitrag zum Wyhl-Urteil des Bundesverwaltungsgericht*s – UMWELT- UND PLANUNGSRECHT (UPR) 253, 258 (1987)).

[170] See the argumentation of ALBRECHT WELLMER, ZUR DIALEKTIK VON MODERNE UND POSTMODERNE. VERNUNFTKRITIK NACH ADORNO, 106-107 (1985).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

"relational" society will not simply organize its openness according to the model of anarchic competitive processes?[171]

II. Visions, Disillusionments, Local Practices

The issue of critical perspectives is the neuralgic point of the German-American debate. A series of reasons for these difficulties of understanding have already been offered in connection with discussions of legal formalism and post-liberal developments in modern law.[172] The American critique of formal law bracketed the question of the relation of law and society in order to focus on analyses of legal discourse and its anchoring in the cosmos of liberal traditions. By contrast, German approaches continue to seek adequate reconstructions of the relation of law and society, with which to specify the social functions of law and determine the possibilities for law to exercise an influence on society. These differences have consequences for confrontations with the anti-formalistic tendencies in modern law. In the American analyses, these tendencies are usually interpreted merely as the unfolding of the original contradiction of liberal discourse, while the German contributions bring them into connection with the complexity of social relations, with the integration problems of functionally differentiated societies, with the replacement of the society of individuals by the relational society of organizations. These differences have a paradoxical consequence, both for the critique's ambitions and for the perspectives it sets for itself. In the German approaches, the respective social theoretical assumptions form the starting point for their problem diagnoses; at the same time, they describe the limits of developmental possibilities. Thus, the "proceduralization" of law respects "system constraints"; the "flexibilization" of law is merely intended to keep developmental options open; the autopoietic legal theory proceeds on the assumption that it is pointless to object to the adaptation of the legal system to the functional requirements of functionally differentiated societies. By contrast, the American critique adopts a more radical stance when dealing with the rationality of law, while behaving much more tamely with respect to the overall social context of its projects.

---

[171] Gunther Teubner reacted to Ladeur's critique of reflexive law with "hearty greetings from chaos" (*Anmerkungen zu Ladeurs Konzept des "strategischen Rechts", in* WORKSHOP ZU KONZEPTEN DES POSTINTERVENTIONISTISCHEN RECHTS, 340, 346 (Gert Brüggemeier & Christian Joerges eds., 1984)).

A more friendly interpretation of the concrete regulation proposals offered by Ladeur can point out that implicitly the flexibilization of law is constantly limited by considerations in which Klaus Günther would recognize suitability argumentations and the attractiveness of the universalibility principle.

[172] See, *supra*, A III and B III.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

1. Surpassing Limits in Legal Discourse

Yet these generalizations do not apply to Roberto M. Unger.[173] His aim is nothing less than a new political philosophy with practical transformative intent, one which confronts questions the CLS-movement generally views as insoluble, rejecting normative skepticism, existentialism, structuralism and post-structuralism, and beyond this strives to offer a prospective theory of social transformation processes.[174] In his overall political philosophy, Unger has developed the program of an "expanded or deviationist doctrine" and given an example of how he envisions the contribution of legal science to the renewal of society.[175]

Like all the American authors considered here, Unger assumes that the social world is to be conceived as an artifact, and that consequently forms of consciousness play a key role in understanding and transforming social "reality". Unger insists, however, upon the special significance of law and the functions of legal confrontations. The stability of political and economic institutions are always dependent on the fact that they must present themselves as just, or at least as practically necessary.[176] This dependency could be useful for the critique of law; but the critique only has a chance to be successful if it develops a believable theory of social transformations, regulative ideas for the reconstruction of economic and political institutions and the corresponding legal categories.[177]

Proceeding from this assumption, Unger sketches the institutional preconditions for a democracy which overcomes hierarchies and classes, for the reorganization of governments, for decentralized organization of the economy which would replace the dichotomies of market and state controls – and new legal categories which would correspond to and support these visions of a new society.[178] Unger stresses that the "superliberalism" of this vision is not voluntaristic, but only attainable via multiple, difficult, and also risky partial changes. The task of legal science in this process of transformation would be limited, but also indispensible: It would allow itself to be guided by the regulative

---

[173] See, on the liberalism critique: *supra* A II; and his analysis of post-classical legal developments, *supra* B II 1.

[174] See Unger, *supra*, note 41; LAW IN MODERN SOCIETY, *supra*, note 33; ROBERTO M. UNGER, PASSION. AN ESSAY ON PERSONALITY (1984); the three-volume opus ROBERTO M. UNGER, POLITICS. A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987) is still unavailable to me (April 1988). – From the still sparse secondary literature see Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 327-358 (1985); Peter Goodrich, *Law and Modernity*, 49 MODERN LAW REVIEW 545 (1986); Neil T. Duxbury, *Look Back in Unger: A Retrospective Appraisal of Law in Modern Society*, 49 MODERN LAW REVIEW 658 (1986); Hugh Collins, *Roberto Unger and the Critical Legal Studies Movement*, 14 JOURNAL OF LAW AND SOCIETY 387 (1987).

[175] Unger, *supra*, note 112.

[176] Unger, *supra*, note 112, 582.

[177] Unger, *supra*, note 112, 583-586.

[178] Unger, *supra*, note 112, 586-602.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

ideas for the overall constitution and at the same time show that these ideals need not remain abstract utopias, but rather are built into the law itself and can be more concretely unfolded in legal developments.

Unger has explained these transformatory tasks in the greatest detail with the example of contract law.[179] His argument starts with the original boundaries and the later erosions of the application area of "classical" contract law. Unger interprets the limitation of contract law's validity to commercial interactions (excluding family and friendship relations) as an expression of opposed views regarding the appropriate structuration of private contract action on the one hand (guided by economic egoism) and private community relations on the other. Both areas have ideologically distorted law through the fiction of freedom from compulsion in contract negotiation and the denial of intra-familial power structures. But the opposition between contract and community relations, the mutual dependence of both social spheres and the critique of their ideological distortions inspired an alternative doctrine – the idea of an obligation grounded in social interdependencies. Unger finds corresponding possibilities even within the original application area of contract law. The institutionalization of markets via the legal principle of contractual freedom is eroded by various techniques in the name of fairness commands – with respect to social dependencies, through the differentiation of labor law, or with respect to power inequalities, through discretionary and indirect contract controls. In turn, the opposition between freedom and fairness, between the validity area of contractual freedom and the justification of restraining regulations (an opposition which mainstream contract law doctrines vainly strive to understand as "rules and exceptions"), points to the countervision of an obligation resulting from mutual dependencies. Hopes for the realization of this countervision can be pinned on the normative dependency of interaction forms of community relations and of the fairness command for the structuring of obligations. At the same time, it depends on whether the economic and political institutions transform themselves in the sense of the previously sketched overall social perspectives – it is the task of "deviationist contract doctrine" to normatively anticipate such transformative processes step by step, and thereby to gradually concretize the regulative idea of "superliberalism".

This rough sketch hardly indicates the richness of Unger's analysis. But it permits a few comparative observations. Unger's "deviationist doctrine", by interpreting doctrines as legal conceptualizations of social-political notions of order, is methodically similar to the materialization of formal law program as developed in the context of the social state discussion.[180] In the same way, the demand to relate the development of doctrine to the

[179] Unger, *supra*, note 112, 616-644. – Unger has picked up the habit of dispensing with footnotes. In light of the hypertrophy and the authoritarian gesture of this technique this may be a useful object lesson. But the consequence is that above all the argumentation with judicial developments (which for Unger have a particular significance) remain largely impenetrable even for interested foreign readers.

[180] See, *supra*, A I 2 at note 91, and note 125.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

regulative ideal of a new constitution of society corresponds to German efforts to reconstruct legal developments in the framework of a material constitutional theory.[181] "Deviationist doctrine" distinguishes itself from these approaches by developing its transformative visions more decisively as alternatives to the interdependency structures, principles, and counterprinciples of positive law. Precisely because of these differences, one can read Unger's approach as a possible overcoming of the normative and conceptual bottlenecks into which the German social state discussion has maneuvered itself.[182] But this correction would be more ambitious (and risky) than the self-correction of the materialization program through the idea of a proceduralization of the category of law. The (German) normative orientation around the universalizability criterion should simply clarify the preconditions for the intersubjective validity of moral norms, and the legal program of proceduralization is primarily concerned with the institutionalization of preconditions for "rational" collective will formation and for suitable decisions about colliding legal claims. In contrast to this, Unger appears to entrust to political philosophy a far more extensive anticipation of substantive correctness, and to entrust the law with far more than merely making impartial decisions about colliding interests.[183]

2. Disillusionments

"»Trashing« is wat de meeste Critical Scholars bezighoudt".[184] This description of the CLS-movement (and the irritating question implicit therein) can be understood even without translation from the Dutch: What's the point of critique if modern law is dominated by fundamental contradictions in a manner akin to original sin, and enlightenment about the limits of practical reason reveals every hope for a solution to these contradictions as illusory? The answers offered to this question are not simply generated from the general theoretical foundations of the American discussion. They always reflect more or less comprehensively the conditions framing the critique: The relevance of academic legal discourse for law practice and the "political culture", the function of law in social confrontations, the stability of political conditions and of America's democratic traditions. The answer are thus full of nuance, and that much more difficult for a foreign observer to interpret.

---

[181] See, *supra*, A I 1 at note 85.

[182] See, *supra*, A II 2 at note 93 and A II 3.

[183] See, *supra*, B II 1 at note 110.

[184] Jan van Peteghem, *Critical legal studies: Deconstructie of romantisch kartesianisme?,* 16 RECHTSFILOSOFIE EN RECHTSTHEORIE 187, 189 (1987).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

Mark Kelman has offered one of the most elaborate affirmations of trashing, one which carries it to its logical limits.[185] His message: Critique may not limit itself to attacking social relations as found, and confronting the theories that legitimate these relations. It must just as radically deal with the counter-proposals of "better worlds" or the strategies for their realization – and stand by the consequences. Thus, the trasher registers thankfully that (for example) Unger, in his constructive-transformative visions, would like to get beyond merely emotionally appealing formulas (from which one doesn't really know what they mean); but he maintains a skeptical distance vis-à-vis the idea of a social constitution grounded in morality.[186] The trasher is ready to accept highly critical descriptions of social relations in America and elsewhere.[187] But at the same time he sees the technical and normative dilemmas of all reform efforts aiming at the transformation of social institutions.[188] For the trasher, there remains only the retreat to local practices. As a teacher of law he is involved with doctrines, students, colleagues, in short, a concrete working environment. His critique can unmask the irrationality or the (tragi)comedy of legal scientific rationalizations and thus demonstrate that the scientific discourse endlessly and pretentiously circles around substantial questions, to which the professorial protagonists in fact have no privileged access.[189] Here, trashing appears to find a specific theoretical foundation and a practical perspective. Apparently, the power relations of society are embodied in micropractices, which is where any change of social relations must begin.[190] But the professorial trasher, who with this attitude turns to the business of scientific critique, must nevertheless learn that the object of criticism forces him to exactly those abstract ("high falutin, technical, and ritzy") exercises, whose meaninglessness he actually had intended to expose.[191] Anything goes? Nothing goes: The circle of trashing closes itself hermetically, if relationships as a whole, and even reason itself, are irrational.

---

[185] Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

[186] Kelman, *id.*, 344.

[187] Kelman, *supra*, note 185, 337.

[188] Kelman, *supra*, note 185, 338-340; Here I can only make reference to the debate concerning empirical legal research connected with these reservations: see Frank Munger & Carroll Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 LAW & POLICY 257 (1984); William C. Whitford, *Lowered Horizons: Implementation Research in a Post-CLS World*, WISCONSIN LAW REVIEW (WISC. L. REV.) 755 (1986).

[189] Kelman, *supra*, note 185, 323.

[190] Kelman, *supra*, note 185, 321, 345.

[191] Kelman, *supra*, note 185, 326.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

3. Ways Out

The self-blockade of the critique of law is a stance, which is almost impossible to maintain. Kelman indicates a readiness to buttress reformist positions with arguments in practical confrontations.[192] This would scarcely be anything other than a decisionistic escape. There remains the hope that the destruction of rationalistic discourse could set free utopian-speculative energies. The arguments for this frequently expressed hope[193] vary. Duncan Kennedy, for example, had set up his reconstruction of the contradictions of liberal law in such a way that the counter-principles built into formal law could themselves function as bearers of hope and moreover pled for pragmatic support – however imperfect – of such counter-principles.[194] A methodological variant of the "constructive" turn of radical skepticism is J.M. Singer's attempt to describe a post-modern reasoning which on the one hand overcomes the barriers between legal, political, and moral discourses, and on the other hand liberates itself from the search for ultimate groundings.[195] Finally, a doctrinal example is given by Claire Dalton in her treatment of contract law.

My inquiries concerning these theoretical, methodical and doctrinal contributions repeat themselves:[196] Is it possible to comprehend the "liberal" discursive formation *in toto* as a specific configuration of principles and counter-principles or as a relation between dominant conceptions and their "dangerous supplements"? Does the critique of law's concentration on legal discourse mean that transformation processes are presented in all too abbreviated a form? Can the plea for an alternative discourse do without rationality attributions and renounce all conceptualizations of the functions of law? It must suffice to concretize these queries using Dalton's examination of contract law as an example.

Dalton shows that classical contract law was never fully able to emancipate itself from public regulation claims and establish itself as a truly independent civil law.[197] In light of this, why can't one just say: The idea of the "correctness" of contracts founded solely on

[192] Kelman, *supra*, note 185, 299; KELMAN, *supra*, note 138, 5.

[193] Kelman, *supra*, note 185, 321, note 68 refers above all to Alan D. Freeman*, Truth and Mystification in Legal Scholarship*, 90 YALE L. J. 1029, 1030 (1981): "The point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice ...".

[194] See, *supra*, A II 3 at note 58 and B II 3 at note 123; After the retraction of the "basic contradiction" (*supra* note 46) of course there still remain of these utopias only the authentic moments of spontaneous expressions of freedom (Gabel/Kennedy, *supra*, note 46, 43).

[195] *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1 (1984); see the critique of John Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

[196] See, *supra*, C II 3 at note 130.

[197] Dalton, *supra*, note 62, 1010.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

agreement of the participants' wills was normatively untenable, because it abstracted itself from the social contexts of those expressions of will, and it was also never carried out on a practical-political level? In the post-classical developments of contract law doctrine Dalton sensitively pursues the continued effects of liberal contradictions. Nevertheless: In the methods of contract interpretation, in the developments and systematic extensions of the doctrines of mistake, in the advance of objective substantive controls and in the superimposition onto contract law of de facto contracts, value adjustments due to unjust enrichment, tort law behavioral obligations (and through competition law, anti-trust law, and countless other regulations), previously "extra-legal" conditions of the contract were taken into legal consideration. Are the new "incoherencies", which result from the differentiation of constantly changing and ever more specialized contract law orders adequately comprehensible in the language of the "old" contradictoriness? The modern objectivistic contract law doctrines were certainly never able to successfully dispose of their subjectivistic supplement. But does this observation meet the central difficulties of the attempts made by the state to establish, a priori, the correctness of contract contents?[198] Dalton uses the example of an unmarried partnership[199] to show how she envisions an integration of the themes negated by contract law doctrines. She shows that specific notions concerning the relations between women and men, the division of roles, and sexuality in these relationships, all enter into the various legal constructions of unmarried partnerships. Are the problems of a juridification of unmarried partnerships which this analysis demonstrates, and the perspectives for judgment which Dalton unfolds, merely arbitrary ways of seeing things? I can only read them as convincing arguments against continued failures of perception and as a plea for a recontextualization of doctrine, which would render more appropriate judgments possible.

III. Final Remark

The first German-American exchange of ideas regarding critiques of law and legal sociology in 1980 was not particularly fruitful. The German reporters from the conference, confused by the variety, the joyous experimentation, and the emotionality of the American debates, demanded clarity and asked for reading suggestions; Thomas Heller reacted courteously but with some consternation, and instead of defending the questions of non-empirical, non-analytic, non-pragmatic theory approaches, attempted to explain the context of their emergence.[200] I have not heeded the request to begin by presenting the justification of the

[198] See, *supra*, B II 3 at note 135.

[199] Dalton, *supra*, note 62, 1095.

[200] See Ekkehard Klausa & Klaus F. Röhl & Ralf Rogowski & Hubert Rottleuthner, *Rezensionen eines Denkansatzes: Die Conference on Critical Legal Studies,* 1 ZFRSOZ 85 (1980), and the reply from Thomas C. Heller (Heller, *supra*, note 138).

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press

currents dealt with here vis-à-vis empirical legal sociology, analytical philosophy, or even Marxian state theory, but neither have I paid attention to the context of precisely the American approaches. Instead, I have attempted to depict a certain German current of discussion and to apply questions which emerged from this context to the American contributions. This undertaking is only meaningful if the objects of debate on both sides of the Atlantic are not determined solely by historical and contemporary particulars, if therefore in fact the heart of the matter is a set of internationally "virulent" themes. This in fact appears to me to be the case. My report could have, instead of emphasizing the "internal" discussion connections of the German and American approaches, proceeded from their respective "internal" differences, in order to show transatlantic "constructive" commonalities or to draw connections between normative and cognitive skeptics. It could have pursued the inner-American objections to the various directions of the CLS movement and compared them with the German reservations as well as the inner-German resonance of social-theoretically oriented legal-scientific approaches. Such an approach would provide evidence for the thesis that the here documented German-American debate does not merely reproduce the differences of their respective histories and cultures.

https://doi.org/10.1017/S2071832200017004 Published online by Cambridge University Press