COMMENT ON RUDOLF WIETHÖLTER'S "MATERIALIZATION AND PROCEDURALIZATION IN MODERN LAW", AND "PROCEDURALIZATION OF THE CATEGORY OF LAW"

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Professor Wiethölter's question in these two essays[1] is normative: What is the proper "role of law" in modern welfare capitalist society? We assume that judges, lawyers and legal scholars will at least for the time being operate the mechanisms of law, and will have a great deal of leeway as to how they shape the content of legal norms at all levels of society. The question is a very general one: What project should they pursue in the exercise of this power?, or perhaps, In what spirit should they pursue their interpretive task?

W pursues his normative inquiry in a way familiar to Anglo-Saxon lawyers: he asks whether the jurisprudence of the Constitutional Court provides indications of possible futures for legal rationality. While he doesn't ever suggest that the trends in court decisions definitively establish the proper role of law, neither does he discount them as mere positive data. And he finds in them a utopian kernel.

The habermasian strand:

W sees three approaches to the problem of the role of law: market theories, systems theories, and the practical philosophy of the critical school represented today by Habermas. It is interesting that he is "respectful" of all schools. His attitude is nuanced.

First, he seems to see his project as capable of restatement in systems terminology (who knows, perhaps even as Law and Economics); it is sufficiently independent of the critical approach so that it should be interesting to all parties, and it does not require endorsement of those aspects of the critical approach that claim to invalidate the systems and market approaches. Nonetheless, his allegiance to practical philosophy is unequivocal.

1 Materialization and Proceduralization in Modern Law, in: G. Teubner (ed.), Dilemmas of Law in the Welfare State, Berlin-New York 1985, 221-249 (cited: I); Proceduralization of the Category of Law, supra p. 455 (cited: II).

Second, the "proceduralization" project is clearly influenced at crucial points by the habermasian distinction of system and life world. He seems drawn to the habermasian notion that, in the period of the social welfare state, "law as medium" threatens to strangle the life world by subjecting the family, the school and the village solidarity network to arational bureaucratic routines. Yet W is careful to distance himself from any notion that the problem is to defend or develop the "law of the life world" (law as institution) against "systems law" (law as medium).

Modernist aspects:

"Proceduralization may be a way of... enduring the coldness of modernity while enjoying its fruits" [I, 221].

The background theme of W's work is one that will be familiar to American crits: it is the theme of the failure, death or exhaustion of legal reason, associated in a kind of unholy Trinity with the two other themes of the loss of social cohesion and the stalemate of politics. These are sounded throughout, and they provide the starting point of his whole enterprise. It is worth noting that both in the U.S. and among the Germans who spoke at Bremen, these themes are occasional; it is W's greatest strength to my mind, perhaps just because I agree with him, that the situation of "postness" is so important that it can neither be assumed nor treated as just an aspect of our situation. It is "it", as far as law is concerned.

"The key problem becomes - and not today for the first time - the presumability (restorability) of fundamental consensus on goal orientations, modes of procedure, organizational forms, institutional forms of »peaceful coexistence« (nationally and internationally). Is »rational identity« (still) possible for a complex society? What share does »law« retain" [I, 222-23]?

"[A] (more exactly any) search for philosophical ultimate justifications as recognizable and practicable social theories - along the lines of classical speculation on overall orientations, from the same mould and binding for all - must necesarily and permanently remain hopeless, or at least unsuccessful in practice" [I, 225].

"Of these there has remained, in the passage through idealist and materialist schools of philosophy in the 19th century under the banner of »positivism«, only the problematic material, i.e. , the old questions and a search for new answers" [I, 228].

"The centre [it doesn't matter of what debate] would... be occupied by those approaches that, as it were, treat the former major alternatives as »exhausted«" [I, 231].

"Present day models and projects have behind them so to speak, all the historical experiences with »subject failure« as well as with »institutional failure«. Current verbal coinages here are »market failure«, »failure of politics«" [I, 232].

"Catastrophic lows and heady highs are, as it were, in turn withdrawn from the market; creative self-destructive functions on free markets are replaced by power arrangements, through non-aggression pacts between the major combatants" [I, 232].

"It is no wonder that recent planning research has concentrated on the so-called paralysis of political and administrative planning processes" [I, 233].

"In a triangle of practical politics and theoretical critique of irreconcilable camps of opinion and interests, so much mutual situational stalemate pressure has since accumulated that almost literally nothing can now take place by way of major, planned change, even if (or better, precisely because) everything is essentially possible (or at least, much is necessary). It is no wonder in such a situation that »en bloc« legal programmes are no longer possible; that neither »formal« nor »material« programmes can determine *social proportionality*. . ." [I, 234].

"A »mediation« of ideas (norms, values, guidelines, plans, programmes) and interests (needs) is still largely to be regarded as impossible" [I, 245].

"The paradox of law in our time in a nutshell is: for the substantive demands on law (i.e. for »positive conflict norms«!), which both are indispensable and need to be limited, we have neither criteria nor venues nor procedures, which are what we first of all and most of all need" [II, 502].

"What is meant is a claimed but not delivered (not deliverable, historically failed) reconcilability of the two experiences of »sociological natural laws« (namely: law as nature-system-order and law as history-reason-constitution) by the rational subject istelf. Key words are the overlaoded subject, the free-wheeling subject, the surpassed subject, the internalized subject, the particularized subject, the over-strained subject, the impoverished subject" [II, 503].

"»[D]istribution« (»allocation«) of law/freedom as freedom/law is, then, the uncompleted legal programme of the uncompleted project of modernity" [II, 504].

"For the adjustment of clashing interests in such purposive programmes (more precisely, for the measurement of »purposes« themselves!) there are admittedly (as yet?!) no criteria, no venues and no procedures as

»law«. Social substitute measures in this field can be observed under such names as »balancing« and »basic principle of proportionality«" [II, 504].

"Here there seems to be a trend for the long-continued debate on so-called »failure of the market« and/or »failure of politics« to approach a consensus today that at bottom it is »failure of law« that is involved. . . .More precisely, they are concerned. . . with finding replacement institutions for the - now seen as permanent - break down of »law« as the neutral (impartial) third party which, originally as God or nature and later as order, market or freedom, promised a world of fair »allocations« and »distributions« but was unable to keep the promise" [II, 505].

"A historical developmental curse seems here so to affect work, class, and systems divisions that a total social synthesis, a rational identity for modern societies, is hard now to seize. For with growing rationality in ever smaller and more decentralized units, the irrationality of the »whole« is growing increasingly recklessly" [II, 508].

Proceduralization:

The basic idea of proceduralization is that the court is to act as interest arbiter, but to do so by defining the broad conditions of interaction of the institutions that claim a right to decide and a share in the proceeds of decision. The notion is close to identical to that popularized by Hart & Sacks under the name of "institutional competence".

It should be noted that like Hart & Sacks, W assumes that proceduralization follows the full "socialization" of legal criteria, meaning the subjection of the 19th century classical groundrules of laissez-faire to critique and reform designed to make outcomes more favorable to traditionally oppressed, exploited or simply weak parties.

Proceduralization means retreat from the attempt to develop rules of proper conduct, or social control policies, that lower courts can apply to regulate who can do what. I.e., it means retreat both from a "materialization" strategy in which courts make rules of law to settle the relative shares or interest outcomes, and also from a "formalization" strategy in which courts try to formulate rules that are both just in themselves and self applying. The question is not "who can do what", but "according to what procedures will the parties negotiate the division of the relevant pie"?

In practice, this turns out to mean that the court faced with strong competing claims, say of the legislature on the one hand and business on the other, or of labor and management, will deny full victory to either side. Rather, the court will establish a general area of discretion for each institu-

tion according to its competence, and keep it within its sphere through loose general norms of reasonableness or proportionality cast in the form of balancing tests. Once again, this formula is familiar in the American constitutional law of the first amendment, equal protection and substantive due process.

A very significant limit on the court's action in this role is that it is not to upset the basic balance (or stalemate!) of the current poltical/economic situation. No one gets everything. No one gets nothing. I think W sees this limit as following from the failure of law, because that event means that courts don't have, at the moment, a neutral legal method that would allow them to decide unequivocally for either side - basic issues are "undecidable", and furthermore the society is constituted so that it would be dangerous to do anything destabilizing.

Yet both articles are paradoxically hopeful that this approach will produce two quite dramatically upbeat events:

Substantive hopes:

W's substantive program seems to be twofold: the maintenance of the delicate balance between the institutions of the bureaucratic welfare capitalist democratic system (systems maintenance with very high stakes) and the defense of areas of automony against bureaucratization through legality. Despite the disclaimer already mentioned, this is defense of the "life world" in the limited and qualified sense that various functioning institutions get to negotiate and decide outcomes without being subjected to "material" control by the courts. This program has practical implications - for example, an emphasis on casting legal rules as prohibitions rather than as mandates.

Professional hopes - revival of reason, legality and lawyers:

There is nothing too enthusiastic here. Wiethölter recognizes the odds and also has an extraordinarily chastened idea of the possible rationality of proceduralization. Basically, lawyers suggest lots of possible ways to structure conflict resolution, and then we try some of them out. The residual meaning of "rationality" is that we choose among these structures as best we can under a vague criterion of practical success combined with a sense of justice.

The program of proceduralization renounces in advance the classic legalist apology for injustice: that "intractable particular realities" are at fault rather than doctrine, which remains rational and therefore admirable even if it produces bad results. Mere legality deserves the encomium of rational-

ity only if it refuses to suppress or elide the demand that "law" ultimately relate to "justice". I think W's basic position on what makes a legal norm or a legal outcome "valid" is pure pragmatism, in the mold of William James or Richard Rorty.

Nonetheless, "I hold firm to the legal realization of a legal rationality that must look for and find its project in the mediatability of normative universality and real circumstances (or die out as »law«)" [II, 509]. What is odd here is that at the very end of his paper in this volume, W shifts quite suddenly from the assertion that law is *dead* to the assertion that law is *dying*, and might be resuscitated through the project of proceduralization. A similar shift occurs in the last paragraph of his earlier article:

"Future legal work will have to take this phenomenon of dissociation of normative (universally rational) justifications from (practical and technical) situational assessments of and solutions to, everyday practical problems as its major task, or else it will die a slow death as »legal« work" [I, 249].

Since law is not dead after all, but merely dying, it turns out that judges, lawyers and, strikingly, legal education, have an enormously important role to play:

"»Proceduralization of law« might be the contemporary manifestation of a bourgeois society which, while it does not (yet?) give up its institutional hopes (synthesis of individual and societal needs, reconciliation of achieved »culture« and realizable »interests«), does start to follow different paths to that institutionalization" [I, 249].

I want to reemphasize that this is grandiosity in the ruins, so to speak. Proceduralization is the "renewal of linkage with the history of »bourgeois« political philosophy", but it is renewal in the form of a plurality of "social learning projects" [II, 510]. The ultimate justification for the lawyers' activity in the tragic gap left by the "failure" of everything from the subject through the market to the state is simply hope that we can create a "logic of reconstruction". In the background lurk "positive crisis theories" according to which "though coexistence of capitalism, democracy and bureaucracy may be wrecked in historical catastrophe, there is no practical alternative" [I, 247].

Critique:

What strikes me about these articles is their combination of learning, sophistication, irony and pessimism with paradoxical faith in and hope for law. W's stance appeals to me on all these counts. Moreover, I suspect that he has thought of and could answer these criticisms.

Proceduralization in practice would be a mere formalization unless it provided at least a constructive way to think about two dilemmas. The first is that, in a real case, W's critical but ultimately resigned acceptance of the structural legitimacy of existing vested interests may be incompatible with an outcome that seems just either to the losing party *or to the judge*. Second, even accepting the legitimacy of vested interests, it may be that the injustice of a particular act falling unquestionably within the "sphere" that proceduralization allocates to an interest may be so glaring that the judges want to intervene at the expense of appearing to slip into "materialization".

If proceduralization is not a formalism, in the "Legal Process" mode, then W needs either to develop criteria for dealing with such situations that meet the tests for rationality or "bindingness" associated with classical and also social ideas of law, or to theorize the existential situation of a judge who is supposed to be bound but unable to experience his situation that way. W seems quite aware that neither "balancing" nor "the principle of proportionality" are responses to this challenge. The problem is that they appear to dissolve juristic method into politics.

Yet given the radical anti-formalism of W's approach to validating legal norms (essentially, if it generates a sense of justice and will work practically, it is valid) it is hard to see how he could move beyond "balancing" and "proportionality" to any method that could distinguish the judge from the legislator. As a first consequence, it is hard to see how his reformulation of the judicial role saves law from "death by merger" with politics.

In the U.S., the search for "principles", when it is conducted at W's highly sophisticated level, takes place always in the shadow of the institution of judicial review, and of the critique of its anti-democratic character formulated by some of the leading legal realists (Frankfurther, Hand) during the battles over Supreme Court invalidation of social legislation. W uses the jurisprudence of the German Constitutional Court as his main source of material, and that Court, in his vision, legitimately adjudicates between the legislature and contending social forces such as labor and business. Yet he seems completely unconcerned with the consequences of permitting a constitutional court, even one with an explicitly recognized power of judicial review of legislation, to second guess on political grounds the political decisions of the representatives of the people.

Again, in the American context, the "problem" of judicial review arises precisely from the kind of critique of classical juristic method that W presupposes throughout these essays. The American theory of popular sovereignty, separation of powers and judicial review was predicated his-

torically on a jurisprudence that made easily a distinction between law and politics that now seems problematic.

At the same time, the American commitment to the Supreme Court's power to do *someone's* idea of substantive justice against the legislature seems stronger than ever. Though liberals and conservatives have had alternating periods of activist and passivist judicial ideology, there is always a strong faction urging the Court to assert itself. Naturally, there is a flourishing academic industry producing explanations of why the Court can be activist because it is performing a distinct legal function when it strikes down legislation. And there is a competing industry that produces devastating critiques of these new theories as they appear.

Against the American background of generations of stalemate in this debate, the clarion call for a return to law as principles and criteria that ends "The Proceduralization of Law" seems a panicked, backward response to the challenge. If one takes seriously W's earlier death of law, failure, exhaustion rhetoric, and also the intensely pragmatist suggestions about how legal doctrine can validate itself, this call must be unanswered. Given its unconvincing character, W should have spent some time on solutions for the judge that go beyond wishful thinking, or abandoned the attempt to be a law creator in the classical tradition. (I chose the second path myself, whence, I'm sure, an element of bias in my critique).

My critique may be misguided. But to the extent it is valid, it raises an issue that was never far from the surface throughout the Bremen Conference. W's optimism that law and lawyers might play a truly heroic role in the completion of the "project of modernity", a role no less powerful and dignified than that law and lawyers played earlier in the "history of »bourgeois« political philosophy", is doubtless partly a generational matter. Professor Wiethölter strikes me as a scholar balanced precariously between the 1950's and the 1990's. But I *suspect* (I cannot assert) that his posture has something to do with what seems on superficial acquaintance a general absence in Western Europe of the particular kind of radicalized critique of law represented by legal realism and then critical legal studies in the U.S.

Let me quickly say that American realism, as Joerges points out in his essay[2], is in a very real sense an adaptation of late 19th and early 20th century legal developments in Germany, an outgrowth of the Free Law School, and wholly familiar in that guise. What is not generally understood in Europe is that it was a particular kind of radicalization of the Free Law

2 "Conference Proposal", in: Materials on the German Traditions in Sociological Jurisprudence and Critique of Law, prepared for the American participants of the conference by K. Plett, Institute for Legal Studies, Madison, Wisc. 1986, 4 et seq.

School, and as such quite different in its implications. I hope it will make my point clearer if I distinguish four moments in the critique of law.

Moments in the critique of law:

1. The first moment is that of Jhering's "Heaven of Legal Concepts" and Felix Cohen's "Transcendental Nonsense", in which internal critique reveals that many crucial legal abstractions once thought to determine the content of particular subrules do not in fact do so, because their application involves circular reasoning or vagueness, so that the legal order as a whole is underdetermined in many spots.

The critique of "formalism" directed at particular concepts, like "property" or "contract" or "title" or "causation" is a crucial moment, but not the end of the story. It opens holes in the fabric of law, but it invites the re-rationalization of the whole on a new basis.

2. The second moment is that of "social law" and the "decline of the rational coherence of private law". In response to the critique of formalism, a defender of the status quo might concede that the legal system is radically underdetermined *in its own terms*, and yet affirm that its particular provisions are the logical working out of non-legal general principles and practical imperatives of individualism or capitalism.

The problem with this approach is that over the last century the legislatures of the bourgeois democratic countries have modified many particular rules to make them "reflect" a "social" orientation. "Social" means collectivist or communitarian or egalitarian, in contrast to the individualist ideology of the existing private law rules.

Pro-tenant or pro-union or pro-consumer or pro-environment rules that violate the principles of freedom of contract and of autonomy in the use of private property are not "anti-law", or "lawless", despite the protestations of formalist conservatives. But they do, in this version of the "death of law", destroy the inner consistency or coherence of the legal corpus. This makes the resolution of new cases a matter of choice between opposing premises, rather than a rational process of working out the implications of a single consistent set of premises. In Germany, this attitude is typified by Franz Wieacker. Note that it explicitly or implicitly associates the original Code, in a civil law country, or the common law, in the Anglo-Commonwealth-US countries, with coherence and rationality, in the liberal mode, while putting the onus of disintegration on legislative and electoral politics.

3. The third moment, which I associate with Lukacs and Unger, is the attempted radicalization of these first two critiques in the mode of abstract

antinomies. The thesis is that the problem of formalism is not merely an internal difficulty of specific legal concepts (e.g., "title", "causation"), and that the problem of opposing premises is not merely an historical development caused by the piecemeal, incomplete character of the law making successes of progressive forces.

If the problem of formalism were specific to particular concepts, we could see its demise as increasing our freedom to innovate, while at the same time challenging us to re-rationalize. If the problem of social law were merely its piecemeal intrusion of a contradictory logic, we could work either to maintain the integrity of doctrinal fields as yet still consistent, or work to transform the whole system to conform to a new global social logic. In each case, law can continue to be most of what it has always been, although concededly neither internally self-defining (because underdetermined), nor wholly coherent (because invaded piecemeal).

The global antinomy approach is to argue that the legal form cannot provide in fact the neutrality, objectivity or rationality that are attributed to it in descriptive or normative theories that give it a central place in defining a legitimate political and social order. Because, say, the factual predicates for behavioral norms cannot be determined in a neutral fashion, law application cannot be neutral. Note that this type of critique is mainly useful in political philosophic debates, in which "law" figures as a more or less undifferentiated entity, as a building bloc in a legitimating or critical theory. It is not surprising that it has relatively little impact on legal consciousness, as opposed to political or philosophic consciousness.

The fourth moment in the critique of law:

While each of the first three critiques is familiar in Western Europe, it is my impression that the fourth is familiar only in the U.S., and constitutes the specific legacy of realism. Let me say that I am not at all sure of this impression, being quite ignorant about European legal academic culture. To make matters worse, my asserted fourth critique is my attempt to generalize from an American *critical practice*, rather than a summary of an extant critical theory.

The fourth critique is radical, like the third, but the emphasis is on the substantive rules of law, rather than on the legal form in the abstract. The realists engaged in a doctrine-by-doctrine practice of exposing indeterminacy and normative contradiction *within the core areas of private law supposed to represent the coherent elaboration of classical liberal first principles.*

In the area of commercial contract law, for example, the realists produced doctrinal work analyzing the requirements of offer and acceptance, the writing requirement, the parol evidence rule, the doctrines of duress, consideration and mistake, and the rules of damages. This work addressed a body of law that had at least for a brief period been understood to represent (classical) liberal legal doctrine at its most rational and coherent.

What was original about it was that it rejected that understanding, along with the companion notion that legislative "social law" was a threat to doctrinal coherence. Rather, the realist critical practice was to show, for doctrine after doctrine, that the actual body of supposedly coherent liberal common law contained rules and cases reflecting both individualist and "social" philosophies.

Sometimes the point was that there were conflicting common law rules in different jurisdictions; sometimes the cases within a single jurisdiction dealing with a single doctrine were in conflict; sometimes the conflict was between two doctrinal subareas within a larger field; sometimes the courts and commentators had proposed conflicting doctrinal theories to explain the same set of results. Always, there was conflict and choice understood in extra-doctrinal terms.

In other words, the jurist had to exercise judgment and make commitments even with regard to what had seemed the most obvious propositions within the core of legal rationality. Indeed, the occasions of conflict requiring choice and therefore judgment were so numerous that it was possible to construct two quite opposed bodies of pure contract law (Williston vs. Corbin), one "individualist" in bias and classical in methodology, the other unmistakably "social" in substance and modern in method. Both versions could make elaborate claims to support in case law and doctrinal writing, and both could claim a measure of coherence and elegantia juris. Consequently, judges and scholars must choose between them on grounds that are ultimately extra-jurisitc.

Let me say again that I am abstracting from a practice, not summarizing a theory. In so much as the realists purported to theorize about law, they stayed largely within the bounds of the three forms of European critique I've already discussed, or they were preoccupied with integrating legal philosophy with the emerging postivist social sciences of economics, sociology and pyschology, and with developing a pragmatist interpretation of concepts like "the public interest". My view is that their practice of doctrinal critique took the particular, unrationalized direction that it did for reasons applicable only to the United States of the period from 1895 to 1935.

Possible explanations of the fourth moment:

Before I offer my explanation, let me mention some alternatives. First, the fourth critique does not derive from a common law as opposed to civil law consciousness, since the fourth critique has never caught on at all in England. This does not rule out the possibility of a more subtle theory of the influence of common law thinking in the peculiar circumstances of the U.S.

Second, the fourth critique *may* be to some extent a product of federalism, since some of the conflicts that the realists exploited and some of the "social" tendencies internal, say, to pure contract doctrine might not have existed in a unitary jurisdiction. But there is actually a more rigid separation of sovereignties within the community of Europe than in America, so that consciousness of the plurality of possible outcomes *might* be greater there than here.

A third possibility is that the judges (many of them elected!) who produce the mass of American legal opinions possess a legal culture or political values that make them unable or unwilling to elaborate the essentially classical liberal first premises of a rational contract law. Under these circumstances it is not surprising that a lot of "social law" snuck into the citadel, later to be exposed by the realists as evidence of incoherence. The realist critique would then be inapplicable to the more coherent European doctrinal core.

Fourth, it is at least possible that the European experiences of fascism and communism have produced a set of attitudes in the Western European liberal legal academic intelligentsia that make the fourth critique just too painful even to listen to, and manifestly extremely dangerous if true. By contrast the comparative historical innocence of the U.S., the perhaps illusory but perhaps realistic sense that democratic institutions are unshakeable, makes it seem all right for Americans to play with fire, with who knows what results. Note that during and after the Second World War the leading American realists worked hard to purge their work of even a whiff of "nihilism".

It is possible that the fourth critique is basically wrong or misguided, so that the relevant explanatory discipline is the sociology of academic error. (Perhaps it gained credence in the U.S. because of the relatively low level of technical legal culture there). Finally, there is the possibility that the fourth critique is so much a part of day to day Western European culture that it is rarely mentioned, and tourists consequently tend to miss it.

An American exceptionalist explanation of the fourth critique:

My proposal takes off from one of the cliches of comparative legal sociology: that American culture is intensely legalistic. Law and lawyers are everywhere, and, as Tocqueville pointed out and we never cease to repeat, political disputes tend eventually to become legal disputes.

During the period from about 1895 to about 1935, political conservatives with what now looks like a highly formalist legal theory controlled the U.S. Supreme Court. Their greatest accomplishment was to make it a matter of federal constitutional law that the state and federal legislatures must not violate the abstract concepts of freedom of contract and respect for property rights. In other words, they based the conservative resistance to "social law" on the very European ground that it contradicted liberal first principles, and on the uniquely American ground that these first principles were enforceable against the legislature through judicial review because they had been written into the Federal Constitution.

There were numerous responses that progressive intellectuals used against this conservative position. But for our purposes, one is of great importance. The legal realists argued often that a particular piece of social legislation modifying common law rules in a "social" direction was perfectly compatible with, indeed a mere extension of analogous existing common law doctrines. In other words, they countered the claim that the Constitution prohibited social legislation by the claim that:

(a) Far from being an internally coherent working out of classical liberal first principles, the common law already contained masses of judge-made "social law". (That is, they argued the fourth critique).

(b) These "social" common law rules could not possibly be incompatible with the Constitution, since even the conservatives agreed that a basic premise of the whole constitutional enterprise (including the provisions protecting contract and property rights) was that the common law was the very embodiment of human freedom.

(c) If much existing law was both "social" and compatible with the constitutional protection of property and contract, then it followed that new law could likewise be social and still pass constitutional muster.

(d) Indeed, if the common law of a particular doctrinal area contained rules and principles drawn both from classical liberal and from "social" ideologies, with no meta-principles beyond "good judgment" or "prudence" to guide choice in new situations, then it was particularly appropriate for the democratically elected legislature, rather than the

judges, to have the final say in deciding how any particular doctrinal area should balance the two tendencies.

The critical bite of this version of realism, its threat to traditional ideas of law's autonomy and rationality, was often obscured by the offering of various kinds of positive social science as substitutes for juristic method. But its challenge has not been met, despite generations of attempts at reconstruction, some very much like that of W.

The challenge has a positive and a normative dimension. Normatively, the issue is to distinguish legal rationality from that of politics and morals in general, thereby justifying some form of judicial review, and, incidentally, our participation in the social and political benefits that flow from the historic prestige of legal rationality. The positive challenge is to understand the ways in which legal consciousness has been false consciousness, and to trace, with whatever normative orientation, the consequences of legal mystification for the outcomes of group conflict in our societies. Emotional appeals to the guild consciousness of the legal profession seem to me of limited usefulness in these endeavors.

Is there a fifth moment of critique?

In David Kennedy's essay for this volume, he discusses critical legal studies and "post-modern legal studies" as post-realist phases of American legal thought. I will not attempt to summarize his findings or offer my own interpretation of these developments. Suffice it to say that it is possible that the various kinds of work under those rubrics will constitute a fifth moment of the critique of law. But it is also quite possible that we will come to see them as icing on the realist cake (not such a terrible fate). Dusk has not yet fallen; the owl of Minerva is perched on a tree limb with his head under his wing.