

# The Paradox of American Critical Legalism\*

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**Abstract:** *Duncan Kennedy's essay is a reprint from his recently published book. We hope to draw attention to Kennedy's work among students of European integration since we believe his analysis to be relevant both to the specific debate on the impact of European integration upon private law and to comparative legal study in general. European legal scholarship has only recently begun to examine the problems of private legal integration. The late appearance of private law in the integration arena is due to a primarily instrumental understanding and strategic use of law in the European market-building project: only once legal 'barriers to trade' were eliminated and national regulatory law replaced by Europeanised norms, did the degree to which the core institutions of 'private' law had been (indirectly) affected by the integrationist logic become apparent. Comparative legal research, however, has benefited from this awakening of interest. European Commission projects have widened the scope of and intensified comparative studies in Europe. Equally, experience gained from the 'Integration Through (Public) Law' project has led to a new private legal debate on the impact of national traditions, the concept of legal cultures and the social functions of private law. Accordingly, whilst Duncan Kennedy's deliberations on the history of American legal thought and the differences between American and European legal cultures are generally to be commended for their sensitive treatment of the specificities of the civil law system and the common law heritage, they are equally of particular topical concern since in addition to highlighting America's 'utter faith and utter distrust in law,' they also investigate the fundamentally different approaches adopted towards 'the project law' within each of the member states of the EU. If European private lawyers are to come to terms with the problems of integration and convergence, they must first tackle these deep-seated divergences between their own national legal cultures.*

## I Introduction

This Paper has two goals: first, to contribute to the comparative law enterprise of distinguishing what I will call 'American critical legalism,' an odd combination of utter faith and utter distrust in law, from Western European attitudes; second, to explain the difference by identifying the 'viral' strain of ideology-critique in American legal thought.<sup>1</sup>

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<sup>1</sup> The strain whose relation to the 'body' of thought is the theme of the whole of my recent book, *A Critique of Adjudication* (Harvard University Press 1997).

In Europe, until recently, the stakes in general ideological conflict have been higher than in the United States. Liberals (social democrats) and conservatives have defended the centre against a communist left and a fascist or authoritarian right that have actually held and have continuously threatened to take power. In the United States, neither communist nor fascist positions have been more than marginal to debate. On the other hand, in the United States, the stakes of judicial law-making have been much higher than in Europe, because both in private and in constitutional law the courts have played a major role in general political life. Both liberals and conservatives have pursued major law-making projects through the courts. A good part of the total corpus of law has no direct legislative basis, and a good part of this law bears the unmistakable marks of the liberal and conservative agendas.

A first consequence of this American context of centrist politics with judicial importance is that disputes about the rule of law have been somewhat different in the two political cultures. Far more in Europe than in the United States, the rule of law has been an important element in the debate between the liberal/conservative centre and the communist and fascist extremes. The centre has affirmed the rule of law as the heart of its programme, along with human rights and representative democracy based on free elections. It has developed the legislation/adjudication dichotomy, through the politics/law, objective/subjective, and democratic/professional accountability distinctions, as a powerful normative position.

The extreme left and right have tended to endorse the rule of law, and human rights and free elections as well, but only in principle, while blatantly disregarding them in practice. The centre has fought the extremes both by celebrating the abstract value of legality and by celebrating its actual, however occasionally compromised, realisation in the Western democracies. This way of looking at it is occasionally important in American politics, where the extreme left and right exist as imaginary whipping boys in conflicts within the centre. But except for brief moments in the 1890s, 1930s, and late 1960s, the threat to the rule of law (and human rights and majority rule) has been understood to be a threat from abroad.

Internally, the rule of law has figured prominently mainly in the continuous debate generated by alternate liberal and conservative appropriations of the court system as a vehicle for their conflicting projects within the centre. The American system of separation of powers has meant that liberals have controlled the legislatures and conservatives the courts for long periods of time, and vice versa. When this divided control happens, legislatively dominant conservatives attack liberal judges for judicial legislation, and liberal jurists defend what they are doing as no more than fidelity to law. When the roles are reversed, liberals critique the conservative courts as *sub rosa* legislators, and conservatives mount a defence.

Confronted with the American critical legal studies (*cls*) critique of the rule of law, Europeans who do not reflexively assimilate it to earlier Marxist critiques tend to explain it by reference to the historical innocence of Americans. Because we have not experienced either fascism or actually existing socialism, we 'crits' are naively willing to play with fire by questioning a central pillar of humane politics in the modern age of barbarism.<sup>2</sup> This idea is not absurd, though of course it cannot serve as a defence against any particular substantive argument. The securely centrist, first peripheral and then imperial, but continentally isolated American political culture has provided a Galapagos-like enclave for bizarre intellectual mutations.

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<sup>2</sup> A. Carrino, *Ideologia e coscienza: Critical Legal Studies* (Edizioni Scientifiche Italiane 1992), 45–51.

But the innocence thesis leaves out of account that the mainstream of American legal culture is intensely committed not just to the abstract idea of the rule of law as political icon, but to something that looks to Europeans perilously close to rule by judiciary. It has been common to argue that this American tendency to turn political into legal questions is explained by the absence of either a political or a class culture that makes stability likely.

In other words, Americans have to be judge-centric because if they did not have a common civic religion of law their heterogeneous society might fly to pieces. Far from being innocents who can afford to play with fire, Americans are bonded to legalism by historical fears that are no less intense, though different from those of Europeans. The left/modernist-postmodernist (*left/mpm*) critique of law seems crazy in the United States, not because it ignores the 'historical lesson' that questioning fundamentals leads to communism or fascism, but because it seems to renounce the universal liberal and conservative ambition to rule through, and fear of domestic chaos in the absence of, judicial supremacy.

Though the *left/mpm* critique is aberrational in this way, it is representative in another. It is an extension of the intense preoccupation of American legal culture with the techniques of critique of substantive legal regimes and of the judicial opinions that rationalise them. Here again the contrast with Europe is stark and widely accepted as such, but the elements for an explanation are complex. There is no question that critique is taught as the foundation of legal education through the case method and institutionalised in legal academia as an element in any conventionally acceptable scholarly performance.

The question is why Americans see the substance of law and the judicial opinions that explain and justify it as pervasively problematic, in spite of their culturally unshakeable commitment to rule not just by law but by judges. Another way to put this is to ask why Dworkin is the emblematic modern American legal theorist. Remember that as with his forebears Cardozo, Llewellyn, Fuller, and Hart and Sacks, the essence of his position is that a judge can be faithful to the rule of law in even the 'hardest' case. But even though she won't have to legislate, she can't expect her opinions, even in cases that would be regarded in Europe as routine applications of the method of coherence, to be accepted as objective, demonstrable, or noncontroversial. By contrast with Europe, Dworkin's ideal American judge seems to have infinite power and responsibility but practically no authority at all, if by authority we mean a cultural understanding that the rules she makes are presumptively valid because outside politics.

## **II Civil Law Versus Common Law**

As to the critical side of this odd combination, a first European reaction tends to be that critique flourishes because substantive law is relatively speaking irrational, that is, substantively incoherent in fact, logically undeveloped, and at the mercy of institutionalised judicial discretion. The simplest European explanation is the naive Continental one that locates these traits in the common law, as contrasted with a Code.

The formal theory of the civil law is that the judge makes law only in the restricted sense of having to formulate a norm for the case, never in the sense of contributing a decision that will be a source of law for future cases. The next judge is supposed to ignore what happened in the prior case, and decide a similar case in the opposite way

if his own interpretation of the Code requires it. But he is to have no expectation that his version will be given weight in the future. There is much less possibility of legal conflict than in a common law system, just because there is much less law.

At the same time, there is much more law in the sense that civilians imagine that many more issues than in common law countries have been resolved by the democratically elected sovereign legislature. Furthermore, this law is made through a process that promotes coherent statutory regimes rather than the ad-hocery and incoherent compromise that emerge from both the legislative and the case law processes in the United States.

European legislation, in this naive view, benefits both from the ideological – politically coherent, however ‘subjective’ – basis of the party system and from the high level of European juridical technique. The basic civil codes reflect the ideology of nineteenth-century Liberalism, worked out by brilliant professors rather than by legislative committees.<sup>3</sup> Modern social legislation may be conceptually incompatible with these foundations, but it likewise reflects a coherent social democratic response to classical Liberalism, worked out by only somewhat less distinguished professors of moderate left persuasion.

This means that the judge who has to interpret the law through the method of coherence has a lot of coherence to work with. She may have to do the ideological work of nineteenth-century classical Liberalism on one day and the ideological work of social democracy the next, but except on the rare days when the statutory materials suggest that she has to do both at the same time, she will do the bidding of the law rather than appeal to her personal political philosophy (let alone her personal ideological views).

American comparativists and eccentric Europeans have, to my mind, quite effectively debunked this fundamentalist understanding of the distinction between the two systems. It does not seem worth it to review the work that begins with Rudolph von Ihering,<sup>4</sup> gets an American start with John Dawson,<sup>5</sup> and continues in the work of writers like Sadok Belaid<sup>6</sup> and Mitchel Lasser.<sup>7</sup> For my purposes, it is enough to point out that neither rule by judiciary nor critique is any more popular in England, the Great Cybele of the common law, than it is in France or Germany. Perhaps we can attribute the English positivist notion of the law ‘running out’ to the vagaries of common law, but beyond that English legal culture seems neither judge-centric nor critical, but merely formalist. The distinction between the code and the common law may be the starting point for our comparison, but it certainly can’t be the sole explanation of the Americas paradox.

### III British Law Versus American Law

Of course, there is an English explanation, smug rather than naive. It is that the arrogation of the power of judicial review ‘set the American courts afloat on a sea of

<sup>3</sup> F. Neumann, (edited by Herbert Marcuse) *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (Free Press 1957), 22–68.

<sup>4</sup> Rudolph von Ihering, ‘The Heaven of Legal Concepts,’ in M. Cohen and F. Cohen, *Readings in Jurisprudence and Legal Philosophy* (Little Brown 1951), 678

<sup>5</sup> J. Dawson, *The Oracles of the Law* (University of Michigan Law School 1968).

<sup>6</sup> S. Belaid, *Essai sur le pouvoir créateur et normatif du juge* (L.G.D.J., 1974).

<sup>7</sup> Lasser, ‘Judicial (Self-) Portraits: Judicial Discourse in the French Legal System,’ (1995) 104 *Yale L.J.* 1325.

controversial value judgments, and it became plain that in exercising these wide powers to monitor not only the form and formalities of legislation but also its content, the courts were doing something very different from what conventional legal thought in all countries conceives as the standard judicial function: the impartial application of determinate existing rules of law in the settlement of disputes.<sup>8</sup>

Judicial review generates the American 'nightmare' view of adjudication, which is that, either very often or always, the expectation that the judge will be an 'objective, impartial, erudite, and experienced declarer of the law' is 'doomed to disappointment.' The 'cynical view,' clearly the author's own, is that 'if your Constitution has made law of what elsewhere would be politics, it has done so at the risk of politicising your courts.'<sup>9</sup> H.L.A. Hart goes on to explain both legal realism and what I have been calling the American version of coherence, in which the judge never has to be a legislator in the strong English sense, as responses to the original sin of the US Supreme Court Justices of 'availing themselves of conventional myths about the judicial process to pass off their personal political and economic doctrine of *laissez-faire*' and then, a couple of generations later, of engaging in liberal 'crypto-legislation' like the abortion decision.<sup>10</sup>

Hart took a dim view both of the realist version of the "nightmare" and of the countervailing attempt to construct coherence theories that would make it at least imaginable that the judge could avoid being a legislator. I will be defending a modernist/postmodernist version of the nightmare view. It is important to the defence that American critical legalism is the product not just of judicial review but of a variety of other characteristics of American legal culture as well. For this reason, it is hard for American legal theorists to imagine that if only Chief Justice Marshall had been more responsive to 'conventional legal thought in all countries,' we could have stayed out of trouble. Indeed, the American exceptionalist response to Hart might be that these unusual cultural factors, along with the unusual practice of judicial review, led to breakthroughs in legal thought, as well as into the nihilist and romantic dead ends he identifies.<sup>11</sup>

To help explain the American case, we can add to common (as opposed to civil) law the American experience of federalism. Until the rise of the European Community, with its complex programme of legal harmonisation, only a handful of European comparativists (for example, Rodolfo Sacco<sup>12</sup>) had worried about the existence of conflicting judge-made rules derived in different jurisdictions from identical code provisions. But every American state supreme court will at least cast a glance at solutions from beyond its boundaries, and legal academics who want to write about any private law subject have to be comparativists at least to the extent of 'counting the authorities.'

A second consequence of federalism was that the federal courts had to decide what role to play when called on to arbitrate state/federal conflicts. It is important to see how shallow Hart's view was: even if the US Supreme Court had declined to strike down federal statutes as violative of the federal constitution, it would have had to

<sup>8</sup> Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream,' (1977).11 *Ga. L. Rev.* 969, 971

<sup>9</sup> *Ibid.*, 972.

<sup>10</sup> *Ibid.*, 972-973.

<sup>11</sup> Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law,' (1994) 42 *Am. J. Comp. Law* 195, 205.

<sup>12</sup> 'Legal Formants: A Dynamic Approach to Comparative Law I,' (1991) 39 *Am. J. Comp. Law.*, 343.

decide what to do about its explicit jurisdiction to decide cases in which a state was a party, and about conflicts between state and federal law. This kind of public law jurisdiction, like that of the European Court of Justice today, involves questions that are politically charged without there being any question of judges being asked to apply 'higher' law against legislative preference.

The sense that conflict and choice are pervasive and inescapable also owes a lot to the historical circumstance that American jurisdictions imported their law from England in the first part of the nineteenth century, in an ideological context that emphasised the broadly 'liberal' character of American society, by way of contrast with the relatively 'feudal' and 'technical' British regime. The experience of reception has been kept alive through the present by the creation of new states, with local judiciaries and no common law, as Europeans settled westward.

Another factor distinguishing the United States from Western Europe (Hart's 'all countries') is that beginning early in the nineteenth century the legal profession, including the judiciary, was far more socially and politically heterogeneous than in the Old World. When Alexis de Tocqueville described the lawyers as an aristocracy, he was referring to their status and power, not claiming that they were an 'estate' in the European sense, with all that would imply of quasi-hereditary entitlement and powerful internal norms defining what is and what is not legal. American lawyers and judges had a relatively experimental and instrumental attitude toward law, in part because many of them were upstarts, whether self-made reactionaries or maverick populists. It was understood from the beginning that it was politically important who got to be a judge.

For Hart, 'the most famous decisions of the Supreme Court have at once been so important and so controversial in character and so unlike what ordinary courts do in deciding cases that no serious jurisprudence or philosophy of law could avoid asking with what general conception of the nature of law were such judicial powers compatible.'<sup>13</sup> His implicit answer is: with no general conception. But, of course, it is not that the decisions were important and controversial but only that they were 'unlike what ordinary courts do' that raised the question. In the contexts of federalism and reception, and the social and political heterogeneity of bench and bar, it was far less clear than it still is in England what counts as ordinary.

#### **IV Nightmare on Main Street**

The simultaneously critical and 'believing' character of American legal consciousness, its paradoxical combination of scepticism and faith, owes a lot to the historically contingent juxtaposition of three factors. The ideological stakes of judicial law making have been high, both in constitutional and in common law cases, at both state and federal levels; the resources of legal tradition have been relatively meagre given the novel questions posed; and the political sympathies of judges have shifted dramatically over time, rather than remaining stably conservative. For these reasons, and whether we see it as original sin or as the occasion for insight, the important but legally problematic judicial opinion is everywhere in American legal culture.

High stakes, a thin tradition, and shifting judicial personnel have meant that ideological opponents of particular decisions or trends of decision have had a strong interest in and some hope of discrediting the judicial reasoning that supports the

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<sup>13</sup> Hart, 'American Jurisprudence,' 971, *loc cit* n 8.

outcomes they find obnoxious. This kind of attack began early in the history of the Republic when federalist Supreme Court judges developed the doctrine of final judicial review itself, along with a law of strong national powers in the federal system, against continuous opposition from Jeffersonian and Jacksonian lawyers. At the end of the period, there was a dramatic reversal of positions, as the pro-slavery forces became advocates of federal power to enforce the Fugitive Slave Law. Then the Supreme Court, in the Dred Scott decision, made a major pro-slavery intervention in national politics by striking down the Missouri Compromise.

After the Civil War, state and federal courts played major roles both in the development of a (relatively) pro-employer common law of labour relations and in setting constitutional limits to social legislation. In the 1930s, the United States Supreme Court invalidated a good part of the first New Deal.

After World War II, the political structure of the situation reversed again, as relatively liberal Supreme Courts confronted more conservative state and federal legislative majorities on a vast range of issues. The Court invalidated some legislation sanctioning members of the American Communist Party, and then attacked the executive practice and statutory law on legislative districting, the rights of criminal defendants, racial segregation, and abortion.

In private law, state supreme courts 'revolutionised' tort law in general and landlord/tenant and consumer law in particular, without striking down any appreciable number of statutes, but not without producing a massive reaction of business interests and their legal advocates. When the conservatives began to regain control of the courts in the 1970s and 1980s, the liberals 'shamelessly' reversed position once again, becoming enthusiasts for *stare decisis* and attacking judges such as Robert Bork and Antonin Scalia as judicial legislators in the sheep's clothing of strict construction and original intent.

The vast majority of attacks on particular judicial decisions and on courses of decision have been based on the idea that there was a correct legal outcome that favoured the political position of the critic. Critics of John Marshall's early commerce-clause opinions argued that the correct interpretation of the constitution required a states' rights outcome. Legal academic critics of *Brown v. Board of Education* argued that the change in the law could not be justified on the basis of 'neutral principles.' Since the Court reached a legally incorrect outcome, it was engaged in judicial legislation. This was judicial legislation in the strong sense of imposing its 'value judgments,' or ideology, on the populace in contravention of what was required by the rule of law.

Of course, each controversial judicial intervention has its supporters as well as its detractors. In the liberal view, *Brown v Board* was right not because the judges had no choice but to legislate, so that whatever they decided would be inescapably political in the sense of 'raw legislative preference,' but because it was the legally correct outcome. We remain participants in a familiar morality play in which the question is whether the judges' personal ideology or 'partisan politics' will overcome their oaths to interpret the law rather than overthrow it.

## V Adjudication Critique in the Context of High Stakes

What is most striking about American legal culture is not that court decisions in politically charged cases produce these passionate arguments about what the law 'really' requires. It is that the context of controversy has also produced, and here Hart

was basically right, a particular, nationally specific form of internal academic critique of legal reasoning. Whether liberal or conservative, defenders of particular courses of decision against the charge of judicial legislation have had to respond not just by explaining that the decision was legally correct within the discourse of legality, but also by explaining how adjudication in the abstract, or in the particular case, can be different from legislation, even though it is interpretation rather than mere application of legal norms.

At the turn of the century, the United States experienced a long period of conservative judicial and liberal legislative control, one that looked as though it might go on forever. Most liberals simply continued arguing that each specific conservative judicial decision was judicial legislation because there was a right legal answer that the court disregarded in favour of its own subjective ideological preference. But some liberals 'couldn't take it anymore' and began to argue that the problem was that there were no correct legal answers to these questions. This was the moment of the American mutation, the 'birth of the virus.'

These liberals combined the positions of the German and French 'free-law' theorists with the English positivist position that judicial legislation is inevitable when the law 'runs out.' It was particularly likely to run out in the politically controversial cases that judges were then deciding in what looked like blatantly conservative fashion. Whatever they said they were doing, according to this new breed of critic, judges in these cases made choices. Indeed, the general belief that there were correct answers misled the judges themselves, forcing their biases to express themselves 'unconsciously.'<sup>14</sup>

My project is to attempt to develop and extend this American form of internal critique. To my mind, it is mainly through this project, rather than through philosophy or political theory, that American intellectuals have been participants in the larger, worldwide long-running project of *left/mpm* critique. American legal theory is one of the quasi-autonomous enclaves, like Western Marxist theory, phenomenology and hermeneutics, and now literary theory, where this project has developed like a Sartrean 'worm at the heart of being.'

## VI Summary Genealogy of the Critique of Judicial Ideology in Adjudication

*Cls* has had the project of resurrecting the critical strands in pre-World War I legal progressive thought and in legal realism, so that we could claim a tradition for our own highly controversial positions in domestic legal academic debate, while at the same time finding a place in the larger development. It is not my goal here to make this past 'live again' in its irreducible historical particularity, but I do want to clarify the present situation by identifying a genealogy for particular elements in the modern synthesis. I claim only that writers like Holmes, Wesley Hohfeld, Henry Terry, Arthur Corbin, Walter Wheeler Cook, Felix Cohen, Robert Hale, and Llewellyn invented the basic techniques and ground-level propositions of today's practice.

<sup>14</sup> For example: 'Following the prevailing fashion in judicial opinions, [this opinion] proceeds to its conclusions chiefly by a process of deductive reasoning from apparently fixed premises supposed to be established by prior cases. The fact that in the last analysis the decision really turns upon notions of policy entertained – consciously or unconsciously – by the members of the court is thus thrown into the background.' Cook, 'Privileges of Labor Unions in the Struggle for Life,' (1918) 27 *Yale L.J.* 779, 783. See also Corbin, 'Offer and Acceptance, and Some of the Resulting Legal Relations,' (1917) 26 *Yale L.J.* 170, 206; Pound, 'Mechanical Jurisprudence,' (1908) 8 *Colum L. Rev.* 605.

Their attitudes toward these inventions, the way they fit them into their more general legal and political and cultural postures, were various. None of them seems at all similar, overall, to us, who claim to be their descendants. In particular, none of them seems to have what we would now call a critical project, as opposed to a critical practice. They often invented critical techniques as part of ground-clearing operations for their 'reconstructive' efforts, their own ideas about how judges could escape the dilemma of being politically central without a respectably rational judicial method. To this day, their posterity includes the scholar who develops an elaborate critique of earlier attempts to rationalise a field, and then offers his or her own alternative. The alternative sinks without a stone, but the critique not only effectively does in its object but survives as a model for future destructive operations.<sup>15</sup>

There are two parts to the realist heritage: the critique of the coherence of the private law regime of contracts, property, and torts, and the critique of the assumed ideological neutrality of judicial decision making in hard cases. The critique of the coherence of private law doctrine was the outcome of the attempt to rationalise the common law, after the demise of the writ system and in the light of the most sophisticated European thinking. It had two strands, which we might call 'nihilist' and 'contradictionist.' The nihilist was best summed up by Terry, the most brilliant late-nineteenth-century tort theorist, who spent his life trying to figure out the coherence of this new legal field. His last work on the subject was published in 1903, and it provided a motto for all that followed (not to speak of a prefiguration of Henry Hart's famous recession from his third Holmes lecture):

'There is no general rule for determining what legal duties exist, what acts are commanded or forbidden by law. Much labour and ingenuity have been expended in the attempt to find some general criterion of legal right and wrong, some general basis of legal liability. But in vain; there is none. Various acts are commanded or forbidden for various reasons, generally on grounds of expediency; and they are different in different places and periods. In this respect, the law presents itself as having a purely arbitrary or positive character, and the duties that exist in any particular system of law must simply be separately learned'.<sup>16</sup>

But the absence of a 'general rule' was not the end of the story. The contradictionist side of the critique of doctrinal coherence started with the proposition, implicit in nihilism as I just defined it, that the European theorists of the codes were wrong and their critics were right. Neither European nor American public or private law could be described as individualist (or classically Liberal) in fact. Stronger yet, individualism as applied to law could not generate a coherent legal regime. The next move seems never to have taken place in Europe, though this impression may be wrong, and the move may in fact have been made but crushed by resurgent orthodoxy and the political fears I described above.

This move was to assert that there was no way to resolve particular gaps, conflicts, and ambiguities in the existing regime without resorting to 'policy,' that is, to a choice, in the particular context, between the conflicting ideals of individualism and 'interdependence' (or 'collectivism,' or 'altruism') or, within individualism, between the ideal of private autonomy and the ideal of state protection against fraud and coercion. As I argue elsewhere,<sup>17</sup> 'policy' turns out to be the vehicle for consciously or

<sup>15</sup> For example, Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories,' (1980) 89 *Yale L.J.* 1063.

<sup>16</sup> Terry, 'Legal Duties and Rights,' (1903) 12 *Yale L.J.* 185, 188.

<sup>17</sup> D. Kennedy, *A Critique of Adjudication*, *op cit* n 1, Chapter 7.

unconsciously transposed versions of the general ideological debate between, for example, liberalism and conservatism. The much milder position of the first generation of progressives was that the choice between policies was 'legislative.'

So Terry was wrong when he asserted that 'the law presents itself as having a purely arbitrary or positive character, and the duties that exist in any particular system of law must simply be separately learned.' One doesn't have to learn the rules separately, because in the contradictionist view they are highly organised rather than purely arbitrary. It is just that they have a dualist rather than a monistic logic. Here is a canonical example:

The ethical problems involved in the law of contracts result as I see them from four elementary ideas:

- The Tort Idea, i.e. that one ought to pay for injuries he does to another. As applied to promises this means that one ought to pay for losses which others suffer in reliance on his promises.
- The Bargain Idea, i.e. that one who gets anything of value by promising to pay an agreed price for it ought to pay the seller the price he agreed.
- The Promissory Idea, i.e. that promises are binding in their own nature and ought to be kept in all cases.
- The Quasi-Contractual Idea, i.e. that one who receives anything of value from another ought to pay for it unless it came to him as a voluntary gift.

These ideas, which at first seem trite and wholly harmonious, are in fact profoundly in conflict. The first and fourth proceed from the premise that justice is to be known after the event, and that it is the business of the court to correct whatever consequences of voluntary intercourse between men may be found to have turned out unjustly. The second and third proceed from the premise that justice is to be known before the event in transactions voluntarily entered into, and that it is the parties' business to settle the justice and injustice of the voluntary transactions at the start. The conflict between these two standpoints is perennial; it can be traced throughout the history of the law of contracts and noted in nearly every debatable contract question; there is no reason to think that it can ever be got rid of or to suppose that the present compromises of the issue will be any more permanent than the other compromises that have gone before.<sup>18</sup>

<sup>18</sup> Gardner, 'Observations on the Course in Contracts' (1934), reprinted in L. Fuller/R. Braucher, *Basic Contract Law* (West Pub. Co. 1964), 151. The father of contradictionism in law appears to have been Rudolph von Jhering, *Geist des Römischen Rechts* (Breitkopf und Hartel 1852–1865). Some major works of realist and postrealist contradictionism, as I see it, are Llewellyn, 'What Price Contract – An Essay in Perspective,' (1931) 40 *Yale L.J.* 704; Fuller, 'Consideration and Form,' (1941) 41 *Colum. L. Rev.* 799; Kessler and Fine, 'Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract,' (1964) 77 *Harv. L. Rev.* 401; Macaulay, 'Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts, and Credit Cards,' (1966) 19 *Vand. L. Rev.* 1051; and G. Gilmore, *The Death of Contract* (Ohio State University Press 1974). The crit and quasi-crit variants are well represented by Kennedy, 'Form and Substance in Private Law Adjudication,' (1976) 89 *Harv. L. Rev.* 1685; Olsen, 'The Sex of Law,' in D. Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon 1990), 473; Mensch, 'Book Review,' (1981) 33 *Stan. L. Rev.* 753 (reviewing P. Atiyah, *The Rise and Fall of Freedom of Contract*); Brest, 'The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,' (1981) 90 *Yale L.J.* 1063; R. Unger, *The Critical Legal Studies Movement* (Harvard University Press 1986); Michelman, 'Justification (and Justifiability) of Law,' in J.R. Pennock/R. Chapman (eds) *Justification: Nomos XXVII* (New York University Press 1986), 71; Gordon, 'Unfreezing Legal Reality: Critical Approaches to Law,' (1987) 15 *Fla. St. L. Rev.* 195; and Singer, 'The Reliance Interest in Property,' (1988) 40 *Stan. L. Rev.* 611.

Our culturally specific form of ideology-critique of judicial opinions in cases that couldn't be resolved by mere deduction followed from this critique of coherence. A judge's explanation of his or her choice of an answer to a question of law doesn't work, in the very specific sense of failing to establish that the rule interpretation was required by the materials, or was the interpretation that fit them best, or whatever. But it is obvious that the choice between the two rules had a significant effect on the outcome of an ideologised group conflict. The only rational basis for making a decision seems to be to consider and evaluate those effects on ideologised group conflict, and to choose between the arguments of the two ideological camps present. The decision is 'inevitably' a question of 'policy.' Because the choice is inadequately explained by the opinion, and because the rational consideration of its effects inevitably involves 'policy,' and because policy issues are open to ideological controversy, it is plausible that what the judge did in the case was to legislate his or her ideological agenda (not to be confused with agendas that are 'personal' in the sense of ice cream tastes or love of blue-shirted litigants).

My view is that there is an actual, dramatic, historical moment when this critical strategy was first formulated. It occurred in 1894, when Oliver Wendell Holmes published his article, 'Privilege, Malice, and Intent.'<sup>19</sup> In discussing recent English and American labour and common law anti-trust cases, he wrote this sentence: 'The ground of decision really comes down to a proposition of policy of rather the delicate nature concerning the merit of the particular benefit to themselves intended by the defendant, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue.'<sup>20</sup> The rest is history.

Part of this type of critique appeals to 'universal' standards of consistency that are supposed to be convincing to anyone and everyone, regardless of context and commitment. It is an internal textual critique of the particular opinion, exposing the chain of reasoning as internally flawed in a way that nullifies its very particular claim of necessity. There is no claim to have identified a 'smoking gun' in the text that reveals the judge's 'bias.' Indeed, the technique works best on opinions that present themselves as utterly outside ideological discourse.

For example, Holmes critiqued opinions that relied on the legal maxim *sic utere tuo ut alienum non laedas* (use your property in such a way as not to injure the property of others) as question begging.<sup>21</sup> The question to be decided was which of two parties would be allowed to injure the other without compensation. Hohfeld criticised a specific set of opinions about labour/capital conflict on the ground that they falsely assumed that one kind of right entailed a quite different one.<sup>22</sup>

<sup>19</sup> 'Privilege, Malice, and Intent,' in *Collected Legal Papers* (William S. Hein, 1985), 117 (originally appearing at (1894) 8 *Harv. L. Rev.*1.

<sup>20</sup> *Ibid.*, 128.

<sup>21</sup> *Ibid.*, 120: 'Therefore, decisions for or against the privilege, which really can stand only upon [policy] grounds, are often presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas* which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.'

<sup>22</sup> Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,' (1913) 23 *Yale L.J.* 16. See Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld,' (1982) *Wisc. L. Rev.* 975.

In 1935, Felix Cohen summed up the results of two generations of this kind of analysis:

'In every field of law we... find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy. Corporate entity, property rights, fair value, and due process are such concepts. So too are title, contract, conspiracy, malice, proximate cause, and all the rest of the magic 'solving words' of traditional jurisprudence. Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Molière's physician's discovery that opium puts men to sleep because it contains a dormitive principle.'<sup>23</sup>

The mocking self-confidence of this passage hides its real weaknesses. As we will see, it is not so easy to distinguish between concepts that meet Cohen's requirement of definition in terms of fact or ethics and those that don't. But what I want to emphasise here is that though general, in the sense of applying across all of law, this critique is in the mode I will call 'minimal.' It is minimal because it carefully avoids two much stronger but opposite critical claims. (1) It does not assert that judicial opinions never convince us that the result was legally compelled, or that law 'by its nature' can never determine an outcome, or that because of 'social construction' law is 'inevitably' an ideological construct, or anything of the sort. (2) Nor, conversely, does it assert that legal reasoning yields a constrained outcome on the side of the question of law that the judge rejected. There is no claim that he or she has violated (whether intentionally or not) the duty of interpretative fidelity.

The second step in the argument is of a different character. It consists of pointing out the distributive stakes in the decision, its impact on ideologised group conflict. In other words, once it is established that the judge has exercised state power without an adequate legal explanation, we inquire, *cui bono?* The appeal is to common knowledge once a rough empirical analysis has shown what the stakes behind the technicalities really were. Here also there was a breakthrough, summed up in two sentences of Robert Hale:

'The market value of a property or a service is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others. To hold unequal bargaining power economically justified, merely because each party obtains the market value of what he sells, and no more and no less, is to beg the question.'<sup>24</sup>

Hale opened up a whole field of analysis, showing that the most apparently unproblematic background rules of property, contract, and tort were 'really' sophisticated regulatory interventions through which the state conditioned the outcomes of economic conflict.<sup>25</sup> Since, according to the hypothesis of contradictionism, this set of rules had no 'logic,' could not be derived from a coherent theory of economic individualism, the way was opened to choosing among possible interpretations with a view to these distributive consequences. As with Cohen, there was a weakness – the absence of a definition of unequal bargaining power.

<sup>23</sup> 'Transcendental Nonsense and the Functional Approach,' (1935) *Colum. L. Rev.* 809, 820.

<sup>24</sup> 'Bargaining, Duress, and Economic Liberty,' (1943) *Colum. L. Rev.* 603, 625–626.

<sup>25</sup> Kennedy/Michelman, 'Are Property and Contract Efficient?' (1980) 8 *Hofstra L. Rev.* 711.

The third step is the assertion that the issue in the particular case (not in every case) 'is inevitably one of policy.' This means that the legal materials and legal reasoning could not resolve the question, could not constrain the judge, in a way that would permit him or her to decide without reference to ideologically contested arguments.

This step is given credence by step a, in which it was demonstrated, by appeal to widely or universally shared standards of rationality, that the opinion failed to establish any kind of legal necessity. (It used a false argument.) But the internal critique cannot, of course, establish that it was impossible to write an opinion in the particular case that would indeed have generated a sense of closure or constraint on the side of the actual outcome.

The fourth step is no more than an assertion: given that the judge offered no convincing legal explanation, and that a rational ground of decision would have had to take account of the impact of the rule on ideologised group conflict, does not it make sense to think that ideology played a part? The meaning of ideology in this context might be vulgar and specific – pro-labour judges make pro-labour decisions – or more refined. And the critic might charge the judge with something like having an ideological commitment, or merely with what I called elsewhere an ideological 'preference,'<sup>26</sup> as in Holmes' 'economic sympathies,' for example.

The turn-of-the-century critics were usually trying to persuade their audience that particular pieces of controversial, conservative, judge-made law were judicial legislation, and that they were wrong. They tended to favour an attitude of judicial deference toward legislative majorities and a frank consideration of the inevitable 'legislative' factors by judges doing common law judicial rule making. But they did not, contrary to the current pop academic view of legal realism, equate the legislative with the political. Their analyses of particular cases showed flaws in the reasoning process, and strongly suggested ideological, along with other 'subjective', influences, but offered some form of 'policy analysis' as the alternative. There was no assertion that adjudication was irredeemably ideological.<sup>27</sup> This was true even of such notorious 'bad boys' as Jerome Frank,<sup>28</sup> Thurman Arnold,<sup>29</sup> Joseph Hutcheson,<sup>30</sup> and Max Radin,<sup>31</sup> all of whom were mainly debunkers of the 'myth of certainty.'

This position allowed an alliance with the liberal critics who believed that there were correct – liberal – answers to the hot legal questions of the day but that conservative judges couldn't be expected to reach them. Over the years, some members of both groups of critics supported proposals such as abolishing judicial review, codifying large areas of law, creating administrative agencies outside judicial control, electing judges to short terms, and radically easing the constitutional amendment process.

But whether or not such changes occurred, success of the critique of adjudication per se was quickly understood to threaten further consequences. If judge-made law, at least in these controversial cases, is necessarily based on legislative considerations, then

<sup>26</sup> Cf. D. Kennedy, *A Critique of Adjudication*, *op cit* n 1.

<sup>27</sup> Cf. Cohen, 'Transcendental Nonsense,' *loc cit* n 23; Cook, 'Privileges of Labor Unions in the Struggle for Life,' (1918) 27 *Yale L.J.* 779. On Holmes, cf. Grey 'Molecular Motions: The Holmesian Judge in Theory and Practice,' (1995) 27 *Wm. & Mary L. Rev.* 119

<sup>28</sup> J. Frank, *Law and the Modern Mind* (P. Smith 1970).

<sup>29</sup> Th. Arnold, *The Folklore of Capitalism* (Blue Ribbon 1941); Th. Arnold, *Symbols of Government* (Yale University Press 1935).

<sup>30</sup> Hutcheson, 'The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision,' (1929) 14 *Cornell L.Q.* 274.

<sup>31</sup> Radin, 'The Theory of Judicial Decision, or, How Judges Think,' (1925) 11 *A.B.A. Journal* 357.

it is arguably invalid, because it is the legislature that should make legislation under the rules of majority vote and democratic accountability. If many people regarded both the liberal and the conservative law that judges have made in politically important cases as presumptively invalid in this sense, this conclusion might change our political culture.

The American mutation, the emergence of an internal critique of adjudication, is therefore an obviously dangerous fact. Both liberals and conservatives have an interest in legal authority in general, as part of the general liberal/conservative commitment to the rule of law. And they have had divergent particular interests in legal authority as a support for the specific legal agendas they have pursued through adjudication when they controlled the judiciary.

I think it quite common to see the history of American thought about law in the twentieth century as a protracted debate about how to deal with the 'viral' tendency of internal critique, with the positions ranging from flat rejection to compromise to flat endorsement. In the course of the debate, the practice of opinion writing, its defence as legitimate law making, and the critique itself, have gone through many transformations and elaborations.

The course of the debate has been powerfully influenced by its situation as a distinct part of the general debate between left and right. The critique has been an evolving part of the general left-wing attack on particular rules and on the power of judges in general, and in itself logically unconnected to leftism.

The first point is historical: the originators and developers of the critique have used it over and over again against particular conservative victories in the courts and generally against rule by judiciary. They have chosen, naturally enough, to tailor the evolution of the critique, its defence and development, to their left-wing projects. Almost all the classic instances of internal critique, of assertion of the inevitability of 'policy,' and of imputation of ideology are directed by liberals or radicals against conservative rules and judges.

But there is a whole left-wing legal culture that rejects the strategy represented by the critique, embracing the maximalist position that what is wrong with judges is that they reach the wrong legal results. According to this position, in one case or another the Constitution and statutes and common law gave the victory to the left, but the judges snatched it away through spurious legal argument.<sup>32</sup> There is also a small part of the conservative legal culture that embraces the critique.<sup>33</sup> I do not think this means they have 'made a mistake' about the true implications of their general ideological positions (more on this later). For the moment, I simply assert that there is nothing intrinsically liberal or conservative about the critique.

There is an extension that we need on the table now. The realists and their *cls* successors expanded opinion-critique beyond the demonstration that there was a logical flaw. Even a judicial opinion that contains none of the famous errors of formalism may be supremely unconvincing as a demonstration of constraint. In particular, many opinions are unconvincing because although of impeccable internal logic they don't confront obvious responses to their arguments.

In *The Bramble Bush*<sup>34</sup> and in his famous article 'Canons on Statutes,'<sup>35</sup> Llewellyn

<sup>32</sup> Cf, for an example, Richards, 'Constitutional Legitimacy and Constitutional Privacy,' (1986) 61 *N.Y.U. L. Rev.* 800 (on *Bowers v Hardwick*).

<sup>33</sup> As an example, R. Posner, *Problems of Jurisprudence* (Harvard University Press, 1990), 124–143.

<sup>34</sup> *The Bramble Bush, or, Our Law and Its Study* (Oceana Publishing, 1960).

<sup>35</sup> 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed,' (1950) 3 *Vand. L. Rev.* 395.

developed this notion through what I would call a 'structuralist' formalisation of the arguments and counter-arguments for broadening and narrowing precedents and statutes. He summed up his theory of precedent in language that applies, *mutatis mutandis*, following the progress of the virus, to his theory of statutory interpretation and to the *cls* theory of policy argument:

'What I wish to sink deep into your minds about the doctrine of precedent, therefore, is that it is two-headed. It is Janus-faced. That it is not one doctrine, nor one line of doctrine, but two, and two which, applied at the same time to the same precedent, are contradictory of each other. That there is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful. That these two doctrines exist side by side. That the same lawyer in the same brief, the same judge in the same opinion, may be using the one doctrine, the technically strict one, to cut down half the older cases that he deals with, and using the other doctrine, the loose one, for building with the other half'.<sup>36</sup>

Let me quickly point out that Llewellyn was a contradictionist without being a nihilist (he believed in the Rule of the Singing Reason), and that he did not link the argument-bites he identified in precedential and statutory argument to the liberalism and conservatism of his time. Llewellyn was not a 'crit'. Moreover, I am simply presenting his conclusion, obviously a controversial one, and even more controversial when extended beyond argument from authority to policy argument in general.<sup>37</sup> My point for the moment is only that when a judicial opinion deploys stereotyped argument-bites without acknowledging that there are equally plausible stereotyped counterbites for each, it fails in a way analogous to that of the logically flawed opinion.

But it is only a matter of analogy. Unlike 'pure' internal critique, the claim that opinions are unconvincing because they wilfully deny what I will call the 'semiotic' character of their own arguments cannot rely on universally or even widely accepted standards of rationality. Whether legal discourse can be said to have this stereotypical organisation is open to argument, and for any given opinion there are no clearly agreed standards of 'convincingness.'

When it is true to the minimalist programme, this form of argument eschews any claim that all opinions must necessarily be unconvincing because written in legal prose. Likewise any claim that the judge is a sinner because he or she betrayed interpretative fidelity and reached the 'wrong result.' The form is: this opinion seems open to a response that nullifies it, not through internal critique but by confronting it with its mirror image on the other side. Given that there is no apparent basis within law for choosing between opinion and mirror image, and given that the two opinions represent opposing ideological positions on an issue of group conflict, it seems plausible to suppose that ideology influenced the judge's choice.

The body fights the virus. With respect both to the question of the coherence of particular bodies of law and to the question of judicial method in hard cases, 'reconstructive' efforts are constantly under way. The minimalist critical response is to make an internal critique of each reconstruction as it comes along. The goal is to show that this particular account of how judges can be neutral does not work. The account has left room for ideology, or it imposes contradictory demands, or whatever. The critical project builds through time both through specific instances that demolish

<sup>36</sup> *Op cit* n 34, 68 (emphasis in original).

<sup>37</sup> For this extension, cf. D. Kennedy, *A Critique of Adjudication*, *op cit* n 1, Chapters 6 and 7.

specific reconstructions and by additions to the repertoire of repeatable critical routines. First-year law students today can learn and use Holmes' specific critique of *sic utere tuo* and Hohfeld's critique of the derivation of claims from privileges.

On this basis, there are ongoing ideological disputes between critics and defenders of particular groups of legal rules (labour law, race law, local government law, antitrust, professional responsibility, international law).<sup>38</sup> The critics work to problematise the rules by problematising the judicial opinions and academic writing that explain them; the defenders try to produce new and better explanations. There is a quite distinct dispute about whether the critiques successfully problematise the very idea of judicial neutrality. Neither side is likely to just 'win.' As in other ideological battles, the very definition of stakes and outcomes is contested.

There is no extant theory that threatens to end the current ideological conflict about method by compelling a consensus about how judges can and should be neutral. Indeed, the current multiplicity of contradictory theories of neutrality seems a powerful, though of course not conclusive, refutation of all of them. I am an admirer of their work of mutual critique. I endorse Dworkin's critique of Richard Posner<sup>39</sup> along with Andrew Altman's critique of Dworkin<sup>40</sup> and Fiss' doubtless forthcoming critique of Altman, and Posner's critique of Fiss (if there is one) and on around the circle. This is not musical chairs but more like a game of 'Penelope,' in which each writer simultaneously weaves his own and unweaves others' work.<sup>41</sup>

I would summarise the situation as follows. On the one hand, in American legal culture, the gradual accumulation of quite specific critical routines means that opponents can direct a formidable technology of delegitimation at judicial law making in situations of ideologised group conflict. It is difficult to write a convincing judicial opinion, an opinion that generates the experience of legal constraint, in any case where the opponents of the chosen rule decide to deploy this technology. Judicial law making through adjudication is under heavy suspicion of being disguised ideology.<sup>42</sup>

On the other hand, if the project of legal necessity is a Golden Bowl, no one has found the fatal flaw that would allow us to shatter it with a single blow. Successful critique is 'local,' even when the locality is a whole theory of judicial neutrality. Even locally, the endless recurrence of determinacy is as much part of our experience as its endless dissolution in critique.

## VI The Continent versus the United States

Continental legal theory is uncannily 'other' for an American, perhaps because just about everything in our legal culture is present in theirs, often translated word for word, but nothing seems to have the same meaning. Of course, there is a Continental critical tradition in legal theory. Here is a typology, doubtless seriously distorted

<sup>38</sup> *Ibid.*

<sup>39</sup> Dworkin, 'Is Wealth a Value?' (1980) 9 *J. Legal Stud.* 1191.

<sup>40</sup> Before we begin Suzanna Sherry's respectful but total demolition of Cass Sunstein's new book, *Legal Reasoning and Political Conflict* (Oxford University Press 1996), we learn that she is 'working on a book about social constructivism and law.' Suzanna Sherry, 'Law and Order,' *New York Times Book Review*, September 8, 1996, 17.

<sup>41</sup> Altman, 'Legal Realism, Critical Legal Studies, and Dworkin,' (1986) 15 *Phil. & Pub. Aff.* 205.

<sup>42</sup> 'The language was the work of Chief Justice William Rehnquist and four other appointees of Presidents Reagan and Bush. The alignment was unfortunate, suggesting devotion to an ideological agenda rather than legal principle.' Editorial, *New York Times*, March 29, 1991, S. 1, p. 22.

because I am much more familiar with Italian thinking than with that of any other European country.

External critiques. An external critique accepts the notion that the law as a whole, or some part of it, is coherent, but criticises it either because it has a suspect origin or because it has bad effects. The first type shows that coherence derives not from a legitimating external factor, such as the popular will or the abstract concept of justice, but from a delegitimizing factor. The two most popular delegitimizing outside factors are liberal individualist ideology and capitalist relations of production. An effects-oriented external critique concedes (or affirms) coherence and then develops an analysis of the bad social consequences that flow in fact from the rules. External critiques can be from either the left or the right. Of course, one can pursue an ideological and a materialist external critique of origins at the same time, and combine both with a critique of effects, as in classical Marxism.<sup>43</sup>

*Global internal critique.* One can distinguish two types of global internal critique: analytical and sociological. The analytical are critiques of the rule form, perhaps best illustrated by Hans Kelsen's insistence that every rule application is the creation of a new norm, or by the various applications of Wittgenstein, Derrida, and so on. The sociological critique is the theory part of the European left programme for a regulated market, mixed economy, and welfare state. It is perennially in battle with the 'formal' approach to law, supporting antiformal legal reform, an antiformal theory of interpretation, and ultimately an alternative epistemology for legal theory.

*The formal versus the social.* The formal and the social confront each other at many levels:

The Formal	The Social
Private law and the market (property, contract, and tort law, implicitly conservative)	Public law and administrative agencies (labour and regulatory law, Implicitly liberal)
Liberty and individual rights	Needs and social right
Legal rules	Legal standards
Abstraction and deduction ( <i>una bella dogmatica</i> )	Context and facts (an excellent empirical study)
A pyramidal logic of norms	A holistic logic of social organisation
Strict separation of judicial and legislative powers	The adaptation of powers to situations (e.g., labour courts)
Legal positivism and legal science	Scientific positivism and sociology
Tradition	Modernity
Certainty and stasis	Flexibility and evolution
Etc.	Etc.

*Comments:* First, the formal and the social are opposed both to fascism and to the Leninist theory of the dictatorship of the proletariat – they share faith in rights, majority rule, and the rule of law. The advocates of the social are no less committed to interpretative fidelity than the advocates of the formal (in Italy, they appeal to the general clauses of the 1948 Constitution affirming human rights and the protective role

<sup>43</sup> The best example I know of is P. Barcellona, *Formazione e sviluppo del diritto privato moderno* (Jovene Editore, 1995). For a description and critique of the American versions of these approaches, see Kennedy, 'Paternalist and Distributive Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power,' (1982) 41 *Maryland L. Rev.* 563, 575–583. For a critique of the Marxist versions, cf. D. Kennedy, *A Critique of Adjudication*, *op cit* n 1, Chapter 11.

of the state). Second, each side considers the existence of the other an imperfection – each imagines that the incoherence of modern law, its patchwork combination of formal and social elements, could and should be cured by its triumph over the other. The aspiration is for coherence, even if our fallen state is incoherence. Andre-Jean Arnaud's wonderful 'Les juristes face à la société' is a lament for the suppression of the social in French legal science, rather than a critique of the dichotomy.<sup>44</sup>

Third, as I noted above, the judicial role is unproblematic as long as it is possible to situate each particular question within a subcategory of doctrine that is coherent according to one model or the other. Fourth, with some Italian exceptions, the major players in the battle between the formal and the social are the intelligentsias of political parties, which try to impose one vision or the other through legislation (rather than through judge-made law), and legal academics, but not judges.

There is a strong resemblance between the Continental social current and American liberal legalism. First, they are politically aligned and can fruitfully borrow one another's doctrinal and institutional innovations. Second, in each case, the practitioners take law seriously, in the sense of aspiring to win their ideological battles by being legally correct. Third, ideas like context and facts and a diffuse confidence that social science favours progress are shared, as in Earl Warren's famous appeal to Kenneth Clark's study of black schoolchildren to refute the idea that separate could be equal.

The most important difference is that the social current is both more and less critical than American liberal legalism. The social current is in a continuing battle not just with conservatism but with a whole conservative way of looking at law, the self-consciously formal. The formal doesn't exist in the United States except as a form of reaction, because legal realism killed it off and promoted a hybrid in which policy argument is included as a supplement to deductive reasoning in both liberal and conservative appellate opinions.

For this reason, European leftists can see the social as antagonistic to the formal at many more levels than the merely doctrinal, whereas American liberals and conservatives mix and match the identical social and formal elements in their legal writing and theory (Warren and his liberal successors resort on a regular basis to civil libertarian formalism). Liberal legalists differ from conservatives only in their preferred outcomes and in their diffuse supralegal 'vision of the good society' based more on 'compassion,' less on 'self-reliance,' and so forth.

But Continentals don't make the kind of internal critique and hopeful reconstruction of judicial opinions that is the bread and butter of American critical legalism. As a consequence, they haven't developed the particular practices and techniques, transmitted from generation to generation through the case method and the Socratic classroom, that define American legal culture. And so they haven't had to defend against the realist and *cls* projects of generalising and radicalising those techniques in viral form.<sup>45</sup>

<sup>44</sup> A.-J. Arnaud, *Les juristes face à la société du XIXe siècle à nos jours* (Presses Universitaires de France 1975). See also S. Rodotà, *Repertorio di fine secolo* (Laterza 1992). There may be an aspiration to overcome the dichotomy, but by informal means.

<sup>45</sup> Two European tendencies that are not 'critical' but have something in common with the American viral strand are the 'école de Bruxelles,' see Ch. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Russell Weaver (University of Notre Dame Press, 1969) (but it is wedded to practical reason for all its preoccupation with the semiotics of *topoi*), and the 'scuola di Sacco' in Italy, see Sacco, 'Legal Formants'. *loc cit* n 12, (but Sacco is a classic external critic in that he believes that 'legal formants' determine legal rules through the vehicle of indeterminate legal dogmatics).

The consequence of radicalisation has been, about every other generation, a deep challenge to the possibility and even the desirability of the kind of coherence that the Continentals still take for granted within the formal and within the social. As someone engaged in one of these periodic challenges, the Continental social current sometimes seems to me less critical even than American conservative legalism, because it has never had to confront and adapt to the successes of a native movement of minimalist internal critique. Such a movement would force Continental critical theorists to defend the social not just against the formal and against Marxist external critique, but against an internal critique that might look something like this.

First, each mode is present in the other, so that when an outcome seems to follow from adopting one mode or the other, it is probably because someone made the mistake of overestimating that mode's determinacy. The question whether anything follows from putting oneself inside the formal mode as opposed to the social, or vice versa, involves all the complex questions of legal theory that I broached in the discussion above of the realist critique of adjudication.

Second, the conflicting elements of each are present in each of us, so that we are dealing with a contradiction between our own views, rather than an opposition between groups.<sup>46</sup> Advocates of the social, no less than of the formal, worship an Idea of Reason that doesn't work to solve problems in the way they think it does, but that does work to reinforce the social power of its votaries.

I am not at all sure that this is right, or for that matter, that Continental critical legal thought is helpfully analysed in terms of the formal/social dichotomy.<sup>47</sup> But I am quite confident that the type of analysis I've just attempted, combining minimalist internal critique, nihilism, and contradictionism, is typical of American *cls* and not at all common in Europe.

## VII Britain Versus the United States

We are now in a position to ask why the American mainstream, typified by Dworkin, has rejected the English solution of 'frank' recognition that the judge is a willy-nilly legislator when the 'law runs out.' It seems obvious to me that the answer is that, given the viral strand in American legal thought, the admission would threaten to delegitimize 'too much' of American law – 'too much' in the sense of too many doctrines, given the critique of judicial law making in every field of law. And 'too much' in the sense of too important, because judges' decisions in hard cases settle so many ideologised group conflicts in which liberals and conservatives have big stakes. In other words, the stakes in the debate about judicial method, loosely between the realists and their successors and all the generations of American reconstructors, from Cardozo to Llewellyn and Fuller through Hart and Sacks to Dworkin, derive from the stakes of liberals and conservatives in judicial law-making power.

<sup>46</sup> Cf. Kennedy, 'Form and Substance in Private Law Adjudication,' *loc cit*, n 18, 1710–1711.

<sup>47</sup> For a somewhat more filled out version of the critique in the text, cf. Kennedy, 'Comment on Rudolph Wiethölter's 'Materialization and Proceduralization in Modern Law,' and 'Proceduralization of the Category of Law,' in Ch. Joerges/D. Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos 1988). I critique, summarily, the distinction between private law and regulatory law in Kennedy, 'The Political Significance of the Structure of the Law School Curriculum,' (1983) 14 *Seton Hall L. Rev.* 1. On the public/private distinction, cf. Kennedy, 'The Stages of the Decline of the Public/Private Distinction,' (1982) 130 *U. Pa. L. Rev.* 1349'.