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Uncertainty in Law and Its Negation: Reflections

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UNCERTAINTY IN LAW AND ITS NEGATION: REFLECTIONS

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For this issue of the *Review,* the editors invited me to reflection. In response, I wish to consider some aspects of a problem that has bothered me over the past quarter-century. This problem arises from radical subjectivism and its effect on the legal order. I believe that something is radically subjective in law when one norm is considered as valid as any other, or when one perception of facts is thought as valid as any other, for the reason that any objective principles for determining validity are either inadequate or considered meaningless tautologies, masking the subjective preference of those with power to invoke them in decision. The legal process then is simply a name for containing contradictions and intractable conflict, a form of denial of chaos to keep us secure in the illusion of an orderly universe.

I.

The Problem of Hearing Only Our Own Voices

In George Bernard Shaw's play *St. Joan*, the maid was burned to death as a heretic by the lords temporal after the lords spiritual tried and convicted her of heresy at The Inquisition. She had heard voices of saints spoken directly to her as a soldier and not through the Church. Accused of a terrible pride and self-sufficiency, Joan asked, "Why do you say that? I have said nothing wrong. I cannot understand." The Inquisitor replied that the Athanasian Creed laid down damnation for those who cannot understand. Being good and

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simple is not enough, for the "simplicity of a darkened mind is no better than the simplicity of a beast." She answered, "There is great wisdom in the simplicity of a beast, let me tell you; and sometimes great foolishness in the wisdom of scholars."

Threatened by fire, she recanted, believing that her voices deceived her. "I have dared and dared; but only a fool will walk into a fire: God, who gave me my commonsense, cannot will me to do that." The English who captured her protested, but the Inquisitor said, "The law must take its course, Master de Stogumber. And you know the law."

Her recantation freed the maid only from excommunication. She then learned that she still was damned to the dungeon and perpetual imprisonment for her sins. In terrible anger, Joan snatched the recantation and tore it to shreds. "Light your fire: do you think I dread it as much as the life of a rat in a hole? My voices were right."

They excommunicated her as a relapsed heretic and cast her out, abandoning her to the secular power. The English Chaplain, who had cried all along for her execution as a political threat, shouted, "Into the fire with the witch." As she was led to the stake, the Inquisitor mused, "One gets used to it. Habit is everything. I am accustomed to the fire: it is soon over. But it is a terrible thing to see a young and innocent creature crushed between these mighty forces, the Church and the Law."

In viewing the play, one is transfixed by a long moment of onstage silence, accompanied by only the offstage flickering of a fire and the voices of the sated crowd. The silence is broken by someone frantically howling and sobbing. It is the English Chaplain, the one who most outspokenly shouted for her burning. Wretching and clutching at the air he cries, "I meant no harm. I did not know what it would be like." The Earl of Warwick tells him to calm down, for it was not his doing. But the English Chaplain's response makes the first point of my personal reflection about the exercise of power and the law:

> I let them do it. If I had known, I would have torn her from their hands. You don't know: you haven't seen: it is so easy to talk when you don't know. You madden yourself with words: you damn yourself because it feels grand to throw oil on the flaming hell of your own temper. But when it is brought home to you; when you see the thing you have done; when it is blinding your eyes, stifling your nostrils, tearing your heart, then—then—. . . O God, take away this sight from me!

The Master Executioner reported to Warwick that the Maid was entirely consumed by fire, except her heart which would not burn.

Edmund Burke opposed the destructiveness of the French Revolution for reasons that seem reflected in Shaw's play. In his lengthy epistle explaining why,[1] he wrote that lofty abstractions often mask baser elements of greed, envy, vengeance, self-righteousness, or personal power under claims of right. Burke preferred action and arguments from self-interest. He urged continuity in institutions. He thought revolutions based on abstract notions such as the "Rights of Man" allowed these destructive forces to lurk as deceptions hidden in the language of action. In the study of law we try to penetrate similar verbal abstractions that hide the vices. We resist "indoctrination" and demand students to work out responsibly their own moral premises. We anticipate the need for independent competence without illusion in representing clients no doubt also having human vices. As Holmes said, we need to tempt the dragon out of its lair on the plain to see its breath and count its scales before deciding what to do with it.

We want to think that law exists "out there" as a coherent system of clear rules that determines decision outcomes through self-contained legal reasoning, apart from the context or circumstance of the question. We are often beguiled by voices from the market place preaching "the practical." Problems or disputes may be, and most often are, rationally indeterminable. The law professor, however, is expected to identify rules or skills coherently, then work them through for the students' benefit, as if solutions to problems in real life can be determined by naming rules or doctrine. Law students pay attention, believing "the practical" means how to apply a particular rule to a set of facts, almost magically, as if doctrine is coherent and identical facts always are given or can be found. Often, it does not seem to matter that much mischief may hide beneath the plains of doctrine or that patterns do not form uniformly in practice.

Can you see a rule or a skill in action? You might see people acting in word and deed, but can you attribute life to a rule? William Crosskey used to ask his Constitutional Law students, "Did you ever see a 'living' document?" Can you taste a rule or feel a skill? Can you experience what they are? Do they exist "out there"? Do they have any meaning aside from the solution or avoidance of human disputes, keeping people from fighting, or maintaining "ordered liberty"? Must rules be logically coherent and certain in themselves? Why? Why do we think they should? If we infer rules and skills from patterns of decisions made by legitimate authority

1. *See* E. BURKE, *Reflections on the Revolution in France,* in THE HARVARD CLASSICS.

for the overriding need to maintain and understand public order, then how do we give recognition to the validity or rightness of the content of those patterns or of the skills used to keep order? Why should a totalitarian system of order be treated in law differently from a democratic system? Do we regress into solipsism, where each person (whether a citizen or dictator) hears only her own voices of right? The personal power of decisionmakers listening to their own voices with their own knowledge, or bending to the power of others, may explain more than the lucidity of a coherent body of norms in shaping and restraining that power.

The Quest for Certainty

To understand our predicament, we must begin with the Greek distinction between *physis* and *nomos* and a resulting skepticism toward the Platonic or religious ideal. The physical universe—*physis*—is thought to yield certainty in its scientific laws, determined by necessity. The moral or normative universe—*nomos*—is thought to operate by human convention, under laws clear and coherent because they are backed by sanctions from the state or from the gods. In the Platonic ideal, truth, justice or right reason are forms, applying alike to the physical and the moral universes. Truth and justice in operation are conceptions of reality measured by how well they conform to such ideal forms or types, just as propositions of science describe physical reality mirroring the forms of being. To the extent that existence mirrors this ideal essence, it represents the reality of Truth, Justice, Beauty, Virtue or the Good. We struggle to escape the confusion this tradition has perpetuated by distinguishing, yet maintaining sameness in, these two universes of reality. Always we return to form or structure to seek certainty in linking our own voices to Truth through some mythical or metaphoric ideal type.

So long as common morality, religion or understanding of "natural rights" provided common standards within a society to form a social contract that more or less furnished ideals to guide private life, a system of liberty could work in practical government. The idea of right or liberty is defined by what the state cannot do, as in the negative limitations in the Bill of Rights. We have adapted this Greek notion of limit or restraint to protect the people's immanent substantive freedoms, freedoms which existed prior to the state and reside in each of us, leaving us with the awesome power to govern ourselves. Limitations on state power simply allow those natural rights, indestructible by definition, to be. The Greeks had a mythical construct for relating "virtue" to the universe. If a person

became too virtuous, too god-like, too ambitious, and went beyond the pale, the gods would become jealous of this hubris of the claim of a mortal to become a god. They would then send the Fates and Furies to pursue and punish that person as a reminder of the limits beyond which mortals should not go.

The scientific model, recalling the Greek distinction between the physical and moral universes, introduced the difference between fact and value, but the idea of limits remained for both. In the physical world we distinguish between subjective value judgments and scientifically constructed paradigms that determine the objective laws of physical and biological truth based on the scientific method, ensuring replication. We erroneously seek the same construct for the social order and especially for the legal order. Through value-neutral principles we have presumed that an objective, coherent, and just order can be maintained autonomously and applied fairly to all. So we pursue what science by nature cannot provide.

It is clear from the principle of uncertainty in the field theory and quantum mechanics developed by Werner Heisenberg, and more recently, chaos theory, that the scientific method may be just as subjective at the frontiers of science as are value judgments in the social setting. Conceptions of esthetic form, poetic images, mythical constructs and other forms of creative thought that esteem symmetry might determine the direction of the scientific method at the frontiers and lessen our absolute confidence that all scientific truth is objectively discoverable. Our skepticism leading to subjectivity at the scientific frontiers is matched by suspicion that the possible harmful consequences of science outweigh the benefits, as in the use of nuclear energy. It is a moral choice after all, with no certainty or coherence.

Paralleling our scientific processes, erroneous application of the scientific method projects a mechanistic universe through behavioral research into seemingly objective explanations of human and social conduct. When the method is applied to a normative system such as law, confusion easily leads to thinking that norms must be value-neutral to have validity. They never are. A value-neutral, mechanistically applied *corpus juris* backed by the legal certainty of sanction from the positive law of the state is thought to differ from the subjective element of personal value and power to be eschewed. We do not know how else to justify judicial review of legislation or choices involving substitution of one's value preferences for another's in the guise of legal norms. As long as a positivism prevailed—where an objective legal norm backed by coercive sanction from the state could be constructed and generally observed—

then an objective normative system might be distinguished from a subjective system of morality with continuity and security. The proper spheres of autonomy and private morality could be kept apart from those of legal norms. Certainty and order could prevail as metaphors for a secure universe. Law restrained entry into the private domain where natural rights could flourish in common.

We soon came to reject natural law as a basis for common understanding of rightness, ironically, because we became too skeptical and fearful of the subjective whim of judges who listened to their own voices. We became cynical of the reasons judges gave for placing restraints on acts of a temporary majority thought to be a democratic expression of legitimate policy made into law. We suspected them of imposing their personal preferences as if they were a super-legislature. Yet, to others, positive law enacted by temporary majorities (just as judge-made common law) is often contradictory, incoherent or offensive to a sense of fairness or right. Over the long haul the courts are needed to protect against abuse. Hence, they need critical evaluation of doctrine and operation to help shape decisions to intervene and override positive law. Hamilton reflected (as did Aristotle) the fear of mob-instinct, although the fear of oligarchy or tyranny is just as great. Judges using law have not been thought wise enough to make better judgments about what is good, or best, than elected representatives. So, to avoid a greater harm, we leave the bargaining to the give and take of representative government, thinking judges should defer, unless required to intervene by principles we generally find in constitutional limitations, to the political branches. These limitations themselves are revised constantly by resort to other knowledge and changes in society. Our criticism of these limitations for lacking principle, coherence or clarity only increases the confusion and encourages subjectivism—where one view is as good as any other. The growth of the positive welfare state and government action itself generates challenges against official conduct. The character of the Rule of Law becomes confused with assertions of affirmative entitlements rather than restraint on power, loosening the moorings of limits to power made possible by counter-assertions of power.

With legal realism we asked judges and other decisionmakers to measure and appraise actual decisions in terms of their cumulative effect in operation, without excessive regard to doctrine or to the rhetoric of the language of decision. The resulting instrumentalism in service of any policy also severed the conception of law from its ends. Attempts at reconnecting the ends and means of the law

through value-oriented jurisprudence emerged as the holocaust gathered and as Chief Justice Stone, with some help, wrote his famous fourth footnote to *Carolene Products,*[2] which suggested a moral and constitutional difference between legitimate social and economic experimentation through majoritarianism in the states and illegitimate threats of a temporary majority against a powerless, discrete and insular minority. The people's representatives were free to experiment in the states to avoid social disasters and to intervene actively, but legislation still was not necessarily valid without connection to some overriding values held and shared through constitutional interpretation and new political activism. Some rational grounds to meet various evils are always found. Raw preferences always find masks in some rational explanation. These subjective preferences are made legitimate by judicial deference to the political branches. Thus, critics found judicial blessings—even in inaction—to these preferences.

Our suspicions about the power of the state and the intrusive and active power structure it supports in favoring subjective preferences led us to a renewed call that positive enactments or state action be tested for validity against secondary norms that might express fundamental principles through new constitutional limitations or some other guide from the social order. Judges then needed to find guidance from some source other than plain texts. Ultimately, the question was begged because we cannot easily tell what objective principles, other than pure power or equilibrium in power relationships, determine the validity of emerging constitutional or fundamental norms such as privacy or the right to life. We were led back to the traces we found in "plain words in their context." Moreover, we had traveled a long way down the road of doubting the legitimacy of legislative and governmental processes that seemed more to reflect official sanctioning of bargains among private interests than expressions of our overriding public interest. But how could the judiciary place limits when to do so without objective standards implies the controlling impact of judges' subjective preferences? We are just as wary of judicial formulas for second-guessing the legitimacy of legislative processes as we are of the processes themselves. We are driven to seek explanations to legitimize the bargaining among factions.

Judicial activism by the Supreme Court did for a time shape a new set of norms through due process and equal protection con-

2. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

structs to test the validity of legislation or state action created by bargains among factions or special interest groups. The international human rights movement simultaneously brought new external experience to light, consciously making human rights anywhere in the world the shared problem of all. Legal philosophers such as John Rawls and Ronald Dworkin sought moral theories to guide legal decision, or law, by reconnecting it with a sense of justice, fairness and right. But in the meantime the use of economic analysis of law blossomed. Almost in reaction to subjectivism, uncertainty, and the ideologies of welfare economics, a more rigorous demand has grown for coherence and certainty in producing and spreading benefits and burdens efficiently. The need for new security using economic theory is as baffling as the search for any certitude. The critical literature, including student case notes in law reviews, reinforces the clamor. It sings a chorus of criticism of legal decisions or doctrine for the "failure to provide a coherent and clear" test for this or that principle of law. It cares less what the principle is than that it be certain, consistent and efficient. If it is not, it is flawed. Economic analysis at least is rigorous and coherent, if its premises first can be accepted.

New restraints against state intervention now are being reimposed by activist judges, but this time the trends favor market forces, deregulation and, once again, economic liberty, as well as restraints on deprivations of fundamental rights. As corporations are protected in commercial speech as well as political speech, as state support for religion has grown, as the national deficits have pressed for restraint in social programs, and as United States technology and industry have lost ground in the international marketplace, a renewed interest in power is taking place among the branches of government, between the national and state governments, and between the public and the private sectors.

We perceive the changes that already have taken place only dimly. The late longshoreman-philosopher, Eric Hoffer, once wrote that change occurs first, then revolutions, but that change seldom occurs by revolution. His instincts, drawn from common people, simply reiterated what Crane Brinton had written earlier. We are now confronting global change. In coping, our systems of law, public order and legitimacy seem in disarray and in flux. The law seems to be evolving to reflect private power arrangements through dated myth structures drawn from frontier notions of libertarian ideals and skepticism of government. The vastly complex and interdependent network of political, social and economic decisions and their consequences seems to baffle the law and other professions as well. The legal profession seems drawn toward subservience to, rather than

persuasive in shaping or informing, the forces of public and private power now at work. The profession seems aggressively entrepreneurial in service of power. It seems to operate less as an independent and autonomous counterbalance to power and more as a classic European model, despite the separation of powers in our constitution, in merging parliamentary and corporate supremacy over the legal system. Perhaps that subservience works best, as the Japanese or even European economic and political forces have sought to demonstrate by merging public and private cooperation. If so, we are striving once more to seek certainty in an Austinian notion of law as internal sovereign command, order and sanction by those in effective control within the state.

II.

The validity of this resurgence of Austinian positivism emanating from both private and state responses to radical subjectivism has not gone unquestioned. The demands for coherence and certainty in rules have led to at least four negative reactions. These have occurred simultaneously in the last few decades with increasing potency.

Negation of Authority

The first is the rise of the destructive urges directed against the authority of the state for various injustices. Introduced first through various social upheavals, they drew the national government into active economic and social enterprise. The intensity of negative protest gained force in the more recent calls for civil disobedience in the wake of the holocaust, the civil rights movement and the war in Southeast Asia. These urges are aided by earlier demands for liberation within former colonial spheres such as India, Latin America and Africa, by more recent liberation movements, and by world-wide terrorism directed against the legitimacy of the coercive power of the state. Amidst the chaos, cries are plainly heard from within for order and security, for coherence. Wanting their own freedom, the people want orderliness from others. This powerful negation of authority simultaneously reinforces the need, paradoxically, for a strong state to keep order. For law, it means a call for command and discipline. A revival of John Austin's jurisprudence,[3]

3. The novitiate will be rewarded by J. AUSTIN, THE AUSTINIAN THEORY OF LAW (W. Brown ed. 1983). *See also* J. AUSTIN, LECTURES ON JURISPRUDENCE (3d ed. 1869); J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (2d ed. 1863); C. CLARK, PRACTICAL JURISPRUDENCE, OR COMMENT ON AUSTIN (1883).

valid or not, is curiously encouraged by such assaults. In the United States, the pragmatic powers of analysis, coupled with Freud's notion of *thanatos,* have fixed, by tranference, the destructive focus on the abstraction of governmental authority. Especially, various negations place blame to expiate the anger and revulsions over the assassinations of the 1960's, the despair over the initial decision to succeed to colonialist regimes in Vietnam (and anger that we did not prevail once a decision was made) and the feelings of betrayal and rage at a President chased from office by allegations of the exercise of unanswerable power contrary to our entire legal tradition.

The loosening of our respect for the conventional construct of the rule of law and national authority, which allowed the legal system in the United States to work reasonably well, occurred at the same time that the original Bill of Rights restraints on the national power were being made applicable to the states. Since those applications are essentially negations of state power in addition to preexisting negations of federal power, the civil rights and other movements, following an initial burst of creative statesmanship, produced a host of secondary advocates based upon the construct of denial. The idea of holding states accountable under the Bill of Rights, thought to be forms of negative limitations on state power, produced many well-educated advocates who used legal limitations in arguing for restraints on state power and state action as substitutes for a common morality, like the negative of a photograph. This process also has produced a proliferation of subjective notions of the substantive content of morality or social justice that ought to prevail in law, and has loosed assaults on various injustices such as consumer abuse, environmental pollution, and deprivations of human rights. The respect for objective norms based upon regularity in official conduct has been weakened while the resulting cacophony produces the fear of chaos. In the absence of a new construct, atomistic behavior with moorings in particular social or moral philosophies and religion has become the order of the day, both in the private and the public sector. Many tongues produce confusion in the legal order and a common language of discourse is sought in many movements equally discordant.

Displacement by Subjective Visions

Some dramatically characterize the trends just described as legal nihilism or the negation of the exercise of legitimate power without the assertion of substantive theory in its place. As Michael Polanyi so cogently has noted, nihilism, whether real or imagined, leads

inexorably to authoritarian responses and to the rise of ideology. The second phenomenon which gave rise to our particular predicament thus emerged from the conversion of subjective moral judgment into ideology. Whether derived from the twentieth century revolutions based on socialism or Marxism, on the human rights movement, or on a resurgence of neo-conservatism, the intellectual roots of such movements are well described in European and Latin American literatures. Symbolic of that literature, and resulting in the negation of law and value, are Neitzche's moral and ethical superiority, Dostoyevski's novels and short stories and the works of the phenomenologists, existentialists and structuralists. All ask similar questions. Post-Marxist thinkers—Habermas, Foucault and Berger and other non-legal critical scholars—have gained influence in legal scholarship which finds them to be useful analytic tools.

If there is no common basis for law or morality other than through a subjective or ideological construct, then the question is not what values underpin a particular legal system, but how one's subjective preferences may be infused with power, strategy and tactics throughout the general community or imposed by coercion. The lawyer-advocate has long used various techniques based on pragmatic ideas of progress, the frontier and change. These have been associated with the romanticism of the defender of the poor and downtrodden, the fighter for civil rights, the human-rights warrior and the social reformer, who use courts and law as instruments of social change. In this construct, law as a secular system has no normative content that is not ultimately subjective. If God is dead, all things are morally possible. The main claim to legitimacy or validity rests in process; namely that the advocates who represent a particular morality or a particular social philosophy fight and prevail as warriors and advocates in an existing decisionmaking process, akin to chivalry, aimed at changing official behavior or custom by fighting injustice, admittedly a subjective construct. Once, however, the subjective advocacy model of changing the social structure is an accepted way of life, the natural reaction is that sauce for the goose is sauce for the gander. If the objective validity of the normative system tacitly is rejected by those who seek to change it, then radicals holding an opposite belief might just as well produce a similar claim by an activism with subjective preferences even more firmly rooted within the vices of common life. The dialectic of thesis, antithesis and synthesis that seemed to move outward from the subjective to an objective world-view could work for the radical right just as well as for the Marxist left!

Troubled, of course, by the first amendment's protection of an aggressive, adversarial press drawn to the negative drama of attacks on symbols of authority or power (consider the media's obsession with terrorism), or the protection of corporate speech, the jurisprudence of a free society has sought to avoid radical atomism and the potential legal chaos of subjectivism. Neo-natural law provides relief for some thinkers. Certainly in the writings of Alexander Bickel and other thoughtful academics-turned-conservative, the value of neutral principles, principled reasoning or value-neutral analysis again becomes an end in itself. Better ways than judicial activism, however, are necessary to protect those who present urgent social and jurisprudential problems from subjective or ideological perspectives.

The dialectic might move in either direction. Michael Perry is now rethinking constitutional interpretation based upon a sacred text morality. John Rawls has distinguished between the two rules of morality, one being a form of categorical imperative drawn from a Kantian notion, and the other being derived from the utilitarianism of maximum efficiency within a group. The distinction by Ronald Dworkin between policy and principle in his thinking about natural law, the earlier work of Edgar Bodenheimer in asserting a scientific method for determining what norms are widely accepted throughout communities everywhere, and the ideas of constructing a proper theory of constitutional interpretation, have all lead to endless subjective visions and voices, each seeking recognition. For example, Lawrence Tribe's work is based purely on his own visions of a just constitutional order, as he is proud to confess. To be taken seriously, theory must recognize the reality of subjective judicial activism. On the other hand, it must create a way of accommodating these choices with the vast changes and contradictions within a society living under a 200-year old constitution.

Limitations on the majority in a democratic society when made applicable to the states, through Bill of Rights provisions, have only inflamed skepticism about federal judicial activism. Reading the Constitution literally or textually, we find no apparent reason for a distinction in principle between constitutional limitations for violations of so-called fundamental rights through the due process or equal protection provisions and for similar limitations to social and economic measures enacted by the majority which interfere with so-called freedom of contract or economic liberties protected in earlier times. Explanations arise from the social and political contexts. So we are ultimately driven to construct a process of unwritten, organic constitutional development through an incremental movement of

cases and precedents through judge-made constitutional law. Once we have rejected the plain language of the Constitution or made legitimate changing the meaning of its words, what basis for criticism is there in evaluating decisions emanating from the Supreme Court other than subjective criteria drawn from one's own moral or social philosophy?

The process of radical advocacy at both extremes and the political process of governmental shifts in position with respect to important controversies have posed the question of which side will win or which ideology will prevail at the margin, within the increment, as cases are brought and decided. The direction the dialectic takes at any given time seems subjectively imbedded in the politics which drive the direction. Stability and continuity lie within that process. Any activism or discourse which seeks to change the system or demystify it only makes legitimate the proposition that anyone's subjective normative position is as valid as any other's and that the only game in town is in winning. Since intellectually we have come to reward this type of thinking, how strange it does seem to see it used by groups in law school communities and elsewhere in society when the vehemence of their attacks implies that they very well might lose. More likely, we are beginning to address the root problem of confusion and contradiction in the intellectual underpinnings of the normative system that has dangled the Platonic myth, in its various disguises, before us for so long.

Reconstruction Through Economics

The third recent criticism and attempt to answer part of the problem comes from the school of law and economics which examines the use of efficiency models in our collective or individual decision processes. Skeptical of allowing legal rules or norms to make market choices which ought to be made by individuals or firms, the law and economics, or the economic analysis of law, advocates have in effect proposed criteria of efficiency to evaluate a whole host of legal rules. Modern juris-economic thought conceives of a legal rule as an asset that depreciates over time, leading eventually to uncertainty and decisional entropy. New rules created on that premise either proliferate, creating further fissures in the legitimacy of any system of objective, normative rules emanating from the state or the courts, or seek to displace obsolete rules by oversimplification. Viewing a legal precedent as an asset to be depreciated provides a way of understanding how legal precedents come into being, are excepted to, and go out of existence. The economic analysis of law provides

rigorous analytic tools for drawing distinctions between models of efficient conduct, where choices in the marketplace are made, and models of equity—moral choices—where inefficient but necessary social values may be reflected through legislative or judicial protection of fundamental values. Even the legislative process is viewed by some economic analysts as private bargaining for "rents" of office by representatives, at others' expense, resulting in "naked preferences." The practical effect of economic analysis—whether viewed as rigorous distinction or crass description—often is the negation of existing rules or of the legitimacy of statutes, without replacement by objectively better rules or statutes the public may understand and accept. The loosening of all relationships between an objective normative system and selfishly determined outcomes, whether they be market efficiency or equity, in effect is a public choice to reallocate the power to decide in favor of the private sector.

Many rules of law are but reflections of balance among various values or purposes which may include efficiency but may include other interests as well. Indeed, who doubts that rules of law are metaphors, artificial constructs, thought necessary to guide officials in the decision process? As Laswell and McDougal pointed out in the early 1940's, applying rules by traditional doctrinal analysis and legal reasoning simply begs the question of what the decision outcome should be. There is nothing new in the critical legal studies assault against the myth that objective, rational and neutral rules determine outcomes. The economic analysis model with both its constructs of depreciation of normative thought and its analysis based on market choices, including the advocate's role in appraising market efficiencies or monopolies, is likewise a negation of an objective normative system generally. The intellectual model bears resemblance to the original conception of the rule of law as a limitation on the exercise of sovereign power against individual liberty or groups of individuals in a state. If law represents the sovereign command of the state under the Austinian model, backed by sanctions and self-restraint, then the economic analysis of the rules of law, derived from such authoritative pronouncements, simply leads to the negation of the state's entry into the particularized micro-cosmic decisions of each individual in the marketplace, whether of ideas or of goods and services. Such a notion of law negates any objective normative system—except efficiency as a basis for legal decision—and relies almost entirely upon the fact that rational individuals themselves are the best deciders of values and subjective norms.

This view of rules based on their depreciation or absence assumes that the free choice individuals subjectively make is better than a

common set of objective norms in an autonomous legal system where rules determine outcomes through classification schemes (and ought to) only where, for reasons of policy or right, a moral choice between allocating burdens and benefits must be made. However, the analytic model of negation or depreciation of existing norms itself contains normative value choices of the marketplace, mainly in the allocation of power, whether direct or tangential, over decisions. Accepted, the model of the market place puts in motion the cumulative effects of a multitude of private decisions whose consequences imply a wholly different set of objective normative values that may contradict, paradoxically, the initial attempt to free the individual for choices. As Lester Thurow has stated, economic theory does not explain how macro-economics can be internalized in micro-economic decisionmaking. Legal theory might.

Criticism Turned Against Itself

The critical legal studies movement over the last decade is the fourth direct challenge to the connection between the rule of law and power relationships, including the problem of individual autonomy in a community. In the tradition of phenomenology after Hurserl and Heidegger, the new thinkers also need the social sciences to understand human behavior. Various scalpels of criticism are honed from European traditions. One branch, called "deconstructionism," after the literary critical writings of Derrida and other post-structuralists, is struggling to offer constructive alternative visions, but its critique is criticized as utopian. To "deconstruct" a structure that gives meaning to what is not present (e.g., that assigns meaning to abstractions such as "consideration" or "the Founders intentions") is difficult to apply to the discourse of law. Radical critical discourse, however effective, seems to offer no better solutions in action than those of the economic and social libertarians, but the discourse loses meaning amidst the proliferation and new formalisms of its own voices. It seems peripheral to action, for what does criticism offer to guide what we shall do when its critical theory is turned to itself? This question is inescapable when a philosophical rather than literary examination of Jacques Derrida's deconstructionism, as recently conducted by Henry Staten in his study of Derrida and Wittgenstein,[4] clarifies our understanding of its limits. Deconstruction is a textual labor, not a system of concepts or action. Traversing a text, we must retain the track of the journey or

4. *See* H. STATEN, WITTGENSTEIN AND DERRIDA (1984).

risk falling back into a naive objectivism. In late Athens, Socrates similarly encountered the angry young disciples who "smashed and grabbed," using his own method without preserving or transforming it. They acted on it in pushing him to the hemlock. Greater poignancy today emerges from the critical thinkers who retain hope through demystifying the present metaphors we used to undergird the rule of law with almost tragic belief that a better way will spring up, somehow, magically from the discourse. It reminds us of Holmes's view of Marx as a naive romantic who thought the world would be a better place after but one more revolution.

I believe we are in one of those periods of epochal change where our ways of looking at and understanding the law and its normative place have not kept pace with the actual changes that have occurred around us. We can glimpse these changes through global patterns of the flow and control of information, wealth, technology, people, power, violence and deprivation. The critical studies movements help us to understand the dimensions and content of these changes, as deconstructionism does in using language more critically to transform this understanding. As a learned profession, we are amazingly closed to open inquiry, and would be better off to listen. Relatively few in the legal profession, aside from a few law professors, judges or lawyers, even attempt systematically to construct better ways of linking our understanding of law though other knowledge. It is easier to develop destructive criticism and easier still to negate that by a move to authority. Even most law teachers find it difficult to integrate scientific and normative thinking or to read about knowledge from new sources. We already have too much to do. Yet we will need this substantive understanding ultimately and should struggle to seek it here in our universities.

We have more to offer the hopeful public service instinct of the next generation of law students than the abstract summaries of rules, procedures, and skills that meet the demand for perceived vocational qualifications. We also have better alternatives to create than only negation where liberty contradicts itself, as happened in Central and Eastern Europe after World War II. The moral crisis in the profession demands better educational vision. If we hand our heritage to others with power, they will not hesitate to use it. Ironically, then, the voices each of us hears to construct our own separate visions of justice or the common good will not sing in harmony. They will be so cacophonous that the ensuing power struggles will yield spent moral energy to the other forces at work in this massive transformation. Order will be made to prevail over such chaos. Law

as we know it may then become even more unabashedly the instrument of pure power. Even if it does, our sense of balance and our long-run common interest require more from the academy than either acquiescence or self-flagellation. We may need to stare chaos in the face, as Staten recently wrote:

> [S]uppose the scene before me, always threatening to get out of control now that the hardness of the law has been questioned, exploded into its characters and left me completely disoriented, before apparent chaos and anarchy? "Then I should say something like 'I have gone mad;' *but that would merely be an expression of giving up the attempt to know my way about.*"[5]

While I do not wish this condition nor do I ultimately believe the result will be so, we must pay attention to the new voices to hear their questions. The danger to those of us who profess law is that the hopeful voices will find no support, even from themselves, once they have crossed the Rubicon to negate its mythical construct. In a power struggle, they are more likely to lose than to win, and paradoxically they seem to despair because they are without illusion. I see no reason to accept self-destruction like a scorpion that, ringed with fire, stings itself to death. I would not place the critical thinkers with St. Joan either, as innocents being burned at the stake for remaining true to their own voices. Far from being exiles, they should be with us and presumed responsible. I think of them also in the secular tradition of both David Hume and the Enlightenment, at once skeptical and yet too inclined to act on abstractions. And I am reminded of ancient Zeno, clutching the proof that an arrow subscribing to a certain logic would never reach the targeted tree, but knowing, always, that it does.

III.

As I end my second law deanship after more than twelve years combined, I have begun to see the vision of our tradition more clearly through Burke's eyes than through those following Rousseau and the French Revolution. It is interesting to me that Burke asked the same questions that some of my colleagues now ask. He wrote in 1790:

> History consists, for the greater part, of the miseries brought upon the world by pride, ambition, avarice, revenge, lust, sedition,

5. *Id.* at 160.

> hypocrisy, ungoverned zeal, and all train of disorderly appetites, which shake the public with the same
>
> —"troublous storms that toss the private state, and render life unsweet."
>
> These vices are the *causes* of those storms. Religion, morals, laws, prerogatives, privileges, liberties, rights of men, are the *pretexts*. . . . You are terrifying yourselves with ghosts and apparitions, whilst your house is the haunt of robbers. It is thus with all those, who, attending only to the shell and husk of history, think they are waging war with intolerance, pride, and cruelty, whilst, under colour of abhorring the ill principles of antiquated parties, they are authorizing and feeding the same odious vices in different factions, and perhaps in worse. . . . I do not deny that, among an infinite number of acts of violence and folly, some good may have been done. They who destroy everything certainly will remove some grievance. They who make everything new, have a chance that they may establish something beneficial.[6]

Perhaps we are left in the wake of criticism against this mythical autonomous system of objective legal norms with what we have always experienced in practice, namely, that individuals seek power and self-interest through many guises, including the courts, knowledge and rules of law that always contain elements of ideology and result-oriented politics. However, a general criticism against values and principles that undergird the entire process may produce in legal scholarship a form of entropy or paralysis instead of a major affirmative attempt in jurisprudential thought. Even Wittgenstein's view of language games sought to preserve the affirmative common usage at the same time it moved beyond, by the play. The task for us is to come to grips with the pervasive problem of negation. If we do not face it, and begin to affirm a common understanding of substantive content, then the legal system will continue to grow alien to the human condition. The question is whether it is already simply an instrument in the hands of those who can claim the most influence and be most powerful in manipulating the existing system for the private ends of themselves or their clients or the public ends of the state.

I have supported diversity, skepticism and the argument from self-interest for the practical reasons of wanting always a way for the new to enter and because I am too wary to wish to destroy the vessels that hold our past experience. With Karl Llewellyn, I reject the argument of exclusion that "if a, then not b," preferring the

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6. E. BURKE, *supra* note 1, at 275-76, 376.

argument of inclusion, "if a, then also b." Through diversity made legitimate by links to all knowledge, the new should always be allowed to enter from the outside. The other should always be present. We should trust that colleagues with differing views will not harm us, even if there is risk. We should believe in students as the new generation, even if some will disappoint us. Every person's own vision of justice is of value, especially when reciprocally accepting the other. If we must risk erring, we should err on the side of tolerance and generosity. If we have only questions, at least we can listen. We need to listen to the questions of others, such as those Leonardo da Vinci asked hundreds of years ago in his notebooks when he forsaw chaos unloosed by science. The courageous still ask such questions, as destructive forces are seen instantly and daily when television brings the world into the perceptions of our innermost sanctuaries. We ask what madness is unleashed by the hubris of killing off those who speak with different voices? We always return to St. Joan or Antigone for their lasting appeal to those different voices and the courage it takes to listen to them.

As with most who are ending one service and beginning another, I am especially pleased by the dedication of this issue to me and for my friends and colleagues who have gladly contributed. It is an ending with a vision of a new beginning in the company of a world community of scholars who are privileged in a free society to be able to think about these things and to argue passionately about our destination.