The critical jurist and the moment of theory

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Part 1. The donation

We're in a world – or, to be more GPS specific about location – in a corner of that world occupied by the law section in the basement of Blackwell's bookshop in Oxford. It appears a perfectly regular disciplinary setting … until you take a book from the law shelf and find – on the very first page – that you're reading about 'madness'. Law and 'madness', it seems, are in

> an unstable, disrupting, indeterminate yet constitutive *relation* – the relation between that which is imagined *as law* and that which is withheld or masked *as something other than law* – in order to produce that imagining. (Sarat, Douglas and Umphrey, 2003: 1)

The coupling of these separate orders is designed as a novel event, an unanticipated encounter to seriously unsettle your habit of mind. To be sure, Austin Sarat and his co-editors advise that it is not 'the claim of this volume that law is in some way definitionally "mad"'. And they add – metaphors may have much to answer for – that 'we use the trope of "madness"' to signal the aforementioned 'relation' and 'imagining'. Yet, there is a confident certainty about 'what must be disavowed or

forgotten for law to be sustained'. There might be an 'appearance of [legal] authority' in this world, but it's only an appearance. So, the onus is squarely on the reader to grasp that the authority of law – or, the authority of 'that which is imagined *as law*' – is contingent upon an exclusion of 'madness'. The reader, now perhaps unsettled, is given little option: join the line for 'madness' and against the law, or else!

If this were the whole picture, those of us legists who want to learn about the order or rule of law might begin to worry at an account of law that has hardly any practical content. Am I equal to the task of treating the legal order as an 'imagining'? Must I now become the sort of person who can take an unscripted 'madness' as the necessary reference for what I'd mistakenly taken to be law's authority? Do I now have to face up to a lifetime of denial? Of course it's worrying. Even as we lift weightlessly above the mundane legal circus on the rising tide of 'that [madness] which is repressed as something other than law', we'd surely want to ask: are we now inside a circle of another sort?[1]

There's some relief – and some light on the 'law and madness' manoeuvre – in Ian Hunter's seminar program essay. It's where Ian describes a phenomenologist's capacity to treat identity as arising only 'from the manner in which a fixated consciousness disavows and represses its "other"'. A person with this capacity, I imagine, could empty any conventional identity – not least that of the legal subject – of its positive weight, open themselves up to the 'flux of becoming', and achieve a 'higher and more fluid kind of self'. A feature of our time – in the 'moment of

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[1] Later in *Law's Madness*, Drucilla Cornell (2003: 151) adopts a more muted register, arguing that 'the establishment of right can never be fully rationalised'.

theory' – is that these things have been being said by critical legal thinkers. So, I speculate: to what extent has the transcendental phenomenological template served as an active resource for critical legal thought?

It's as if the Humanities academy has made a donation of 'theory' – whether as moral aid or intellectual seed – to the field now identified as 'critical legal studies'. On the one hand, this could be a victory over bonehead black-lettered lawyer-empiricists for the sort of jurist who has made the break into a 'higher and more fluid kind of self'. On the other hand, if your case is going to be decided by someone committed to 'the mutual permeability of law and madness', again there may be cause for worry. At issue: what is an appropriate formation for the jurist, as distinct from the priest or the philosopher? An ancient question, but one that invites a contemporary answer.

Perhaps it's fortunate that the power of a donation depends on a recipient's willingness to receive. The offer might be one you can refuse. For a recent American instance, there's Richard Posner (2000: 195) snappily answering the leading question: 'what has literary theory to offer law' with a single word: 'Nothing'. This is pretty clear, but a bit abrupt towards a theory that legal scholars outside Posner's own sectarian 'law and economics' school take quite seriously.[2] No doubt a 'law and madness' school – were there to be such an entity – would receive a similarly abrupt dismissal. In fact, not every critical legal scholar has hung their sign on a literary

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[2] I'm referring to the textually-oriented 'law and literature' movement. With a certain virtuosity – and sometimes but not always with humour – the adherents of 'law and economics' seek to align the juridical order with market theory.

notion of 'madness' or 'delirium'. The 'moment of theory' has also brought substantively weighty issues – moral and political – into the ambit of legal studies. Austin Sarat's (2001) own work on legal, infra-legal and extra-legal dimensions of America's use of the death penalty is a case in point.

Not that a Posner's display of utter indifference to literary theory's donation to law has slowed the theory production line in the Humanities academy, at least judging by the state of affairs in Blackwell's bookshop at Oxford where we began. At the entrance to the 'literature' section – 'literature' is on a higher floor than law – the reader confronts a display of three current textbooks for students: *Beginning Theory*, *How to Do Theory*, and *After Theory*.[3] Taken together, these titles would seem to touch just about all the bases. Or is this a last hurrah, a final fling by the liberal arts academy pitching for continued allegiance from students for whom 'theory' has appeared as just another (but more baffling) part of the curriculum, and in institutions that have now seriously prioritised the vocational turn in higher education? Indeed, academic publishers are anxious as to what might come next, should it be the case that the market for undergraduate textbook guides to theory is closing.

Part 2. Theory in law: donations and receptions

Historically speaking, the legal field has always been the place of extra-legal donations … and, in some cases, of receptions. This immixture makes for a history of interweaving paths. Something of how things now stand is glimpsed by scanning the

[3] See, respectively, Barry (2005), Iser (2006) and Eagleton (2003).

content list of a recent textbook of jurisprudence, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005).

Part I of the *Guide* presents British students with six 'contending schools of thought' as paradigm cases of theory in today's legal science: natural law theory, legal positivism, American legal realism, economic rationality in the analysis of legal rules and institutions, critical legal theory, and feminist legal theory. It's a perfectly conventional listing, not least in its omission of separate categories for left-legal theory or race theory (these can be placed within the critical legal theory section), or for religion (which could be treated under natural law theory in its neo-Thomist and post-Protestant modes). Feminist legal theory, though, gains a podium place, alongside the 'economic rationality' category of Posner's zone. Exclusions and inclusions aside, this listing suggests something of the current range of intellectual exchanges and interactions between legal and extra-legal fields of knowledge. Within this range, the 'moment of theory' will be most directly identified with 'critical legal theory', that is, with the Critical Legal Studies movement.[4]

Subsequent sections of the *Guide* address the different domains of law and certain 'perennial topics'. Curiously – is it an indication of the *Guide*'s common-law context of circulation? – two 'continental perspectives' are isolated off to one side of the mainstream (in Part IV). But the final word is given to a philosopher of law, Joseph Raz, who addresses the question: 'Can there be a theory of law?' Where Posner was briskly negative in his assessment of literary theory's contribution to law, Raz (2005: 324) offers a positive answer to his question, albeit in the properly deft

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[4] On critical legal studies, see Part 3, below.

manner of the analytic philosopher: Yes, there can be a theory of law, 'but in a narrow sense' … perhaps to avoid appearing too imperial. Doubtless there's a certain prudence in the editors' placing Raz's contribution last. If his answer had been 'No', it would not have made the most persuasive opening for the *Guide*.

Given the historical differences between national legal systems, the philosopher's postulating a universalist theory of law might well flatter jurists' dreams of their law as an autonomous art or science, abstracted from the empirical religious, political and cultural circumstances. For pragmatists this style of higher-order vision must seem all too abstract. Yet, it also suggests why – given the history of donations and receptions – we're better off if we avoid imposing on our discussion of the critical jurist in 'the moment of theory' a grid that sets theory against law, or law against theory.

The historical record discourages any such dualist picture. In the European 'romano-canonist' tradition and institutions, we've had the convergence of Roman law and Christian doctrine, a synthesis not an antithesis of law and theory. This unprecedented medieval ensemble of legal administration and theological foundation constitutes – in the view of Pierre Legendre – an essential cornerstone of modern Western civil order.[5]

To be sure, in the English territory – especially with the Henrician break from Rome – common-law propagandists such as Christopher St German, Edward Coke and Matthew Hale rejected interference from whatever 'higher right' the civilian and

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[5] Legendre (1999) refers variously to the 'ensemble romano-canonique' (136), the 'montage romano-canonique' (163) and the 'combinatoire romano-canonique' (245).

canon lawyers might claim to convey to England. So, it's not entirely mythical, the common-law habit of mind and the insular allure of a pragmatic legal tradition that has believed itself immune – and averse – to theoretically oriented 'continental perspectives'. In the mid-1600s, Matthew Hale can thus depict canon law as having lacked binding force in English territory 'till received and by usage incorporated into the laws and customs of the kingdom' (Hale 1976: 143). The figure of 'reception' and 'incorporation' here serves to quash any persisting canon-law endorsement of the Papal claim to a superior jurisdiction. In suspecting the encroachment of ecclesiastical powers through the 'reverence and respect which the Christian religion got in the hearts of men', Hale articulates a parallel suspicion of claims to exercise a higher-order authority:

> [W]hile in truth the civil right, *viz*. custom and admission, gave [priests] their power as a civil thing, lest it should be subject to the same power in its dissolution or diminution, they subrogated and interwove into men's minds a pretence and opinion of a higher right, which did not only propagate the admission of their power, but did also fasten and establish it with the concurrence of a double principle, *viz*. the true and real civil right and admission, and the pretended and imposed divine authority. (Hale 1976: 146)

These clerics might claim to observe the 'higher right', but – politically speaking – their 'last devotion was not to the king but the pope'.

The common law's aversion to theory was a no less useful figure for its critics too. Already in the sixteenth century Latinist jurists – the learned doctors of the civil law taught at the universities in Cambridge and Oxford – excoriated the narrow-mindedness, technical obscurantism and grubby commercialism of the common

lawyers in the London Inns of Court. With his 1588 *The lawiers logike, exemplifying the precepts of logike by the practise of the common lawe*, the Ramist Abraham Fraunce joins other civilian critics to berate the commercialism and the casuistical fixation of the 'grand little mootmen, who cast case upon case, as carters do billets, and for every collateral trifle, run over all the six hundred and thirty titles of Brooke's abridgment' (Fraunce 1969: 89-90).

While this style of polemic came at them from the contemplative romano-canonist quarter, a second frontal assault on the common lawyers came from a sharper and perhaps more dangerous quarter: Hobbesian statism, grounded theoretically in political science. If, for Hobbes, the common lawyers posed a threat to civil order in the secular sovereign state, this was not by virtue of some transcendental fiction fomented by university metaphysicians. The threat to political sovereignty – and therefore to peace – was posed by the common lawyers' conduct as a recalcitrant, unincorporated feudal estate. In this capacity, the lawyers joined with the clergy as a 'confederacy of deceivers', a private estate within the civil state. 'The private priests of [legal] reason must be checked as the private priests of revelation needed to be checked' (Cropsey 1971: 26). A modern commentator thus glosses Hobbes's parallel between the English clergy and the common lawyers as 'two great classes of indoctrinators', the former having worked on people's 'opinion of things beyond reason' to persuade them that death was preferable to damnation, the latter – the lawyers – having worked on 'life and property'. The metaphysicians housed in the universities were, of course, another category of 'indoctrinators'.

The particular religious, political and legal history of the English state made its contribution to an enduring disposition towards theory among the country's common lawyers and their commentators, then and now. Versions of the polemic thus continue, attacking or defending the common-law disposition. In *Legal Theory and Legal History*, Brian Simpson (1987: 274) distinguishes two options that have been adopted for dealing with 'the disorderly and unmethodical appearance of the common law system'. The first option was to take a 'practical approach to the disorderly condition of the law, to tidy it up, to systematise it'. Importantly, 'no particular theoretical view of the nature of the common law was involved'. The second option meant working at an altogether higher level: 'An alternative and essentially theoretical approach was to maintain that the law was already systematic, however improbable this claim might appear to the uninitiated' (Simpson 1987: 282).

In domains of law ranging from English constitutional thought to American adjudication practice, a virtue has been made of this speculatively-challenged legal disposition. A similarly prudential advocacy of avoidance of absolute principle sustains both Michael Foley's (1989) defence of the early Stuart constitution for 'keeping fundamental questions of political authority in a state of irresolution' and Cass Sunstein's (1996) defence of 'incompletely theorised agreements' in those areas of modern adjudication where divergent fundamental principles and values clash intractably. Foley (1989: 10) identifies a seventeenth-century English 'social acquiescence in the incompleteness of a constitution, a common reluctance to press the logic of argumentation on political authority to conclusive positions', the purpose of this acquiescence being to allow the 'maintenance of government'. For his part, Sunstein cautions against demanding final certainty in circumstances where value-conflict renders any 'fully theorised' agreement impossible. As for Foley's early

modern England so for Sunstein's contemporary America, the point is that fundamental differences are suspended, rather than settled. In this way, 'constitutional practice could cater for ostensibly unmanageable positions' (Foley 1989: 23), thereby averting civil conflict, at least for a time. In fact it was 'the threat of innovative clarity that posed the greatest danger' (Foley 1989: 34).

Could this be read as a warning against theoretical clarification – a dream of achieving final consensus and absolute certainty – in circumstances of value-pluralism? Is there perhaps a lesson here for those who lament the common law's evasion of more theoretical issues? In some political contexts, it may be better to let the sleeping giants – or sleeping dogs – of theory lie. But such quietism was no panacea for the intellectual malaise arising in some parts of some American, English and Australian law schools at the 'moment of theory'. Given common-law pragmatism's conservative embrace of the *status quo*, how could one teach law in a truly serious manner in a setting peopled by guileless, 'theory-free' believers in the virtues of the law?[6] The question was acute for those legal scholars aware of the contemporary humanities 'theory boom', who now began to fashion modes of 'critical legal studies'. By 2005, this latest wave of legal criticism finds itself canonised in *The Blackwell Guide*, one among today's other 'contending schools of thought'. Successful entrism … or epitaph??

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[6] Major inquiries were undertaken in respect of legal education reform. See the 1983 *Law and Learning/ le droit et le savoir* (the *Arthurs Report*) in Canada, and the 1987 *Pearce Report* in Australia, both of which were concerned with broadening the scope, contents and skills of legal education and research.

Part 3. Critical legal studies

From Cicero on, legal criticism has a long history. Within that history, 'critical legal studies' (CLS) constitutes a recent episode that turned on law's theoretical re-engagement. Already by the mid-1980s, guides for the perplexed were being published to explain the new phenomenon on the law block.[7]

In its own 'official' history, CLS memorialises a place and moment of foundation: the University of Wisconsin-Madison conference of 1977, Here emerged the American Critical Legal Conference, a gathering point for left-lawyers and anti-establishment but legally-minded radicals in the United States. It inspired the parallel British Critical Legal Conference. The impact of these foundations flowed through to Australia, in particular to the Macquarie University Law School. Names of founding 'fathers' now risk verging on legend, at least within critical circles: Roberto Unger and Duncan Kennedy among the Americans; Costas Douzinas and Peter Goodrich among the British.

Though sharing a generational background in social activisms – civil rights advocacy, Vietnam protest, leftist critique – these scholars pursued an important diversity of projects. But an indication of their general aims is well captured by the manifesto of British Critical Legal Conference:

> The central focus of the critical legal approach is to explore the manner in which legal doctrine, legal education and the practices of legal institutions work to buttress and support a pervasive system of

[7] See, for instance, Kelman (1987).

> oppressive non-egalitarian relations. Critical theory works to develop radical alternatives, and to explore and debate the role of law in the creation of social, economic and political relations that will advance human emancipation.

We can note the dual emphasis: on critique of existing law and legal education, and on 'creation' of new socio-legal relations, including curricula.

Duncan Kennedy, a professor in the Harvard Law School, has embraced both these tendencies, from his 1983 *Legal Education as Training for Hierarchy: A Polemic Against the System* to his 1997 *A Critique of Adjudication; Fin de Siècle*. The former work unmasks the contradiction between standard justifications of existing legal education in terms of fundamental principles or doctrines and what is really going on behind the scenes in today's American law school: the implanting of a disposition amenable to sustaining the hierarchy of the legal profession and, by extension, the political system that the profession supinely services. It also proposes – with rhetorical cheek and an irresistible smile that did not adorn many theoretical interventions by Marxist legal scholars – alternative procedures that would institute student selection by lottery, provide salary equality for all staff, basement janitor or law professor, and so on.

By 1997 and *A Critique of Adjudication*, Kennedy is looking backwards, referring to the book as 'a critical legal studies manifesto after the fact'. He now says he's 'trying to make sure those ideas don't just disappear even though the movement is pretty much dead in the water at the moment'.[8] The sense of an episode closing is

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[8] Duncan Kennedy, cited in *Harvard Law Bulletin*, Fall 1996: 24.

not hidden. At this threshold, more generally, much critical momentum has passed from the first-wave CLS left-lawyer materialists and sociologists of law.[9] A second-wave of legal critics emerged, including scholars focussed on gender-based and race-based matters of identity and status, drawing on feminist theory and critical race theory.[10] Concerns of and with minorities displaced concerns of and with the working class.

Though distinct, these currents of legal critique share at least two common features. First, they indicate that CLS was never going to be one more attempt to provide law and legal reason with a formal analytic foundation. That was a task undertaken by others – typically legal philosophers in various normative traditions or schools of thought – vocationally devoted to a view of law as rational, just or good, whatever the historical circumstances. Their company includes the afore-mentioned Joseph Raz, John Rawls, John Finnis and Ronald Dworkin. From a CLS viewpoint, normative legal philosophy is part of the problem: it furnishes theological, moral or

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[9] The left-legal and *marxisant* commencements have sustained substantial work in legal sociology and socio-legal research. This work ranges from empirical-statistical investigations to emancipatory visions of new social relations or other dreams and transformations. Moves to study 'law in context' can display both tendencies. Foundational names include Ric Abel (on the American scene) and Alan Hunt (on the British).

[10] On law and feminist theory, see Richardson and Sandland (2000). On critical race theory, see Crenshaw (1995).

rationalist justification for a legal system that – for CLS advocates – is an instrument of oppression by or exclusion from the present social hierarchy.

Second, CLS threatens positive legal knowledge by problematising the conditions of that knowledge. Conventional knowledge of law - the common law in particular – and the legal education on which it rests are deemed deficient because pre-theoretical and thus unable to grasp its own emergence through exclusions of the other ... or simply because it lacked a higher-order dimension. At least in some zones of the academy, this proved a powerful and even frightening move. A Finnis or a Rawls, a Hart or a Dworkin are impressive presences in seminars debating the ideal nature or universal ground of law, but they are scarcely frightening. To the contrary, they promise the comfort of foundations, be these theological, philosophical or moral. By contrast, CLS theorising of law created anxiety and fear, in part by denying law any such comfort.

To be sure, in 2005 a memorious effort is required to recover the extraordinary state of mind at 'the height of the critical legal studies (cls) "Red scare" of the mid-1980s', as Michael Fischl (2003: 475) now puts it. Imagine that: the critical thinkers about to take over the law school! Get real, we'd now say. And yet, in Australia too, a certain 'crisis through critique' in the law school was played out at Macquarie, in the public media as well as through the usual academic channels of academic dispute.

Yet, for there to be such impact, theory-fear had to draw on some existing intellectual momentum. In the United States, momentum came in spades from the 'legal realists' of the 1930s and 1940s. Not that the American realists – Jerome Frank, Felix Cohen and Karl Llewellyn are major names – elevated theory about law into monster shape; to the contrary, theirs was an iconoclastic demolition of pretensions to ground law in anything like a unified higher-order norm or an objective legal science.

As the antidote to such dreams, the realists propelled their readers towards a reckoning with grim reality – the reality of American law just the way it was – by satirising the other-worldly purity of legal theorists.

Where better to observe dismantling of such 'transcendental nonsense' than in Felix Cohen's (1935: 809) image of juristic heaven, a place 'reserved for the theoreticians of the law', as revealed in dream to 'a great German jurist': von Jhering? Here at last 'one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life'. At last, the 'most beautiful of legal problems' could be solved:

> Here one found a dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts into 999,999 equal parts. (Cohen 1935: 809)

Access to jurists' heaven had one condition: you had to drink a draught of Lethe-water to erase the memory of the world. Yet, as Cohen writes, 'for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget'. For the purist jurist, attaining oblivion is no problem. Nevertheless, 'Von Jhering's dream has been retold, in recent years, in the chapels of sociological, functional, institutional, scientific, experimental, realistic, and neo-realistic jurisprudence' (809).

This warning against getting a legal high on 'pure ether' might not be fair, but – in keeping with the realist tradition – it is funny. Fun and intellectual energy together puncture previously reliable abstractions – formal rules and doctrine, norms

and legal reason, absolute principles of right. Jurists might well cite these pure legal forms. For the realists, though, such jurists were walkers on air, conjurors of magic words, delusional believers in a legal metaphysics.[11] No wonder the English positivist philosopher of law, Herbert Hart (1977: 969), expressed deep anxiety at what for him was the grim 'nightmare' of American legal realist 'nihilism'. Such anxiety contributed to the 'fear of theory' that critical legal studies locally and momentarily inspired in the later decades of last century.

At least three camps of critical legal scholars have emerged in those years. First, some embraced the realists' commitment to exposing the hidden social workings of the law. Sometimes this has been refreshed with a new lexicon in which law's 'occlusions' – the power relations that law conceals and the alternatives that it suppresses – are brought to face the light of day. Talk of 'the occluded' is cousin to talk of 'the repressed'. For a second camp, then, but with a psychoanalytic colouring, the aim became the critical recovery of law's 'unconscious'.[12] A third camp has addressedlaw's 'exclusions': those subjects excluded from legal recognition in terms of their own professed sexual, racial and – more rarely - religious identities.

Interest in 'occlusions' and 'exclusions' could be fuelled by talk of hidden or excluded meanings. Literary theory and cultural studies had donated the 'textualist turn' as exercise apparatus for critical jurists who wanted to disrupt standard legal

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[11] See Frank (1973: 62-79). In the Scandinavian school of legal realism, see Olivecrona (1939: 99-103, 112-22) on legal concepts as vehicles for imaginary entities.

[12] See Goodrich (1995). Among the realists, see Jerome Frank (1930).

hermeneutics.[13] The gymnastic point was to practise unblocking block judicial interpretations that foreclosed with violence – necessarily, given the social finality of legal judgments in secularised liberal states – on the 999,999 meanings that a text could theoretically generate.[14] Sometimes inspired by Derrida on *différance* or deferral, the critical performance called for a reader capable of opening themselves up to the 'radical indeterminacy of meaning', as it was put. This meant delaying arrival at a final meaning, this delay itself being metaphorised as a disruptive bodily transgression of limits arbitrarily imposed upon an illimitable creativity. In this setting, literary interpretation challenged juridical truth. Two hermeneutics clashed, the one as practised in the law schools and the nation's courts, the other as drilled in literary seminars. Each hermeneutic sustains a specialised literate persona. The one could treat legal texts in self-confirming legal terms. The other could treat legal texts – judgements, reports and statutes – as literature, a performance in which commitment to the ostensible legal sense of things is suspended.

Critical jurists turned textualists deployed 'radical indeterminacy' to a second end: to argue the contingent nature of existing legal institutions and their practices. In a volume advertising itself as the 'first work of contemporary jurisprudence systematically to apply critical philosophy to the common law', founders of the British Critical Legal Conference make the 'contingency of law' central to uncovering the 'political and cultural significance' of the 'substantive institutions of law'. In this

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[13] On 'law and literature', see Weisberg (???), Binder and Weisberg (2000), and the journal *Law and Literature*.

[14] On the violence of the law, see Cover (1993).

manifesto, Douzinas, Goodrich and Hachamovitch (1994) announce 'the breakdown of traditional conceptions of legal reason' when confronted by 'conceptions of the contingency of law and the plurality of legal experience'. Their moves look like the classic moves of the phenomenologist. First, a congealed mentality is imputed to the common lawyers with their fixed belief in a formal and objective reason. Second, the critical jurists confront this reified legality with law's 'contingency', such that '[t]he demise of the various sciences of law and their accompanying substrate of systemic concepts throws legal theory back into the life-world' (Douzinas *et al*. 1994: 1). Finally – as in a triptych of the soul's passage to salvation – redeemed by this long-delayed opening to the 'life-world', the once dead law is resurrected into a higher-order but as yet 'strange-sounding' moral value:

> To respond to the legality of the contingent is to formulate an account of the amorphous, incidental, fluid and indefinable realms of justice and judgement, carriage and miscarriage, politic and ethic of common law. This project is predicated upon a theoretical and political radicalism that returns to the specific histories and disciplines of common law and interrogates them in the strange-sounding name of justice. (Douzinas *et al*. 2003: 1-2)

It could be a textbook illustration of the phenomenological template for fashioning a critical jurist..

The topic is law's closure, but these critical jurists have a rare capacity: to discern open future within present closure. 'The history of a closure is always dual and duplicitous: our language, institutional practice and scholarship inevitably belong to the tradition while at the same time seeking its decomposition' (Douzinas *et al*. 1994: 13). They ask 'whether any residue of transcendence and alterity remains or

whether all society has become immanent to the operations of a totalitarian discourse that allows nothing to escape' (Douzinas *et al*. 1994: 23). But the doubt is momentary and moral faith returns: '[c]aught between the call to justice and a lack of any determinate criteria for ethical action, critical legal studies is left with responsibility – indeed, one might say it is left with the responsibility for responsibility' (Douzinas *et al*. 1994: 22). Note the moves: from radical indeterminacy to contingency of law to moral discourse. This is comforting, even religious.

Across the Atlantic, the critique of law has been less comforting, perhaps due to a resilient realist disposition. To end on CLS, I'll say something on the group of scholars in the law school at the University of Colorado at Boulder: Pierre Schlag, Paul Campos and Stephen D. Smith. Individually or together – as in their tri-authored 1996 volume, *Against the Law* – Schlag, Campos and Smith have left as little as possible standing by way of unitary norms, moral or rational, that might furnish a higher-order justification for the actualities of American law. For Schlag in particular, the target is the massive overload of normative abstraction that orthodox academic legal scholars endlessly project on to the law. Schlag's shorthand for this obsessive operation is 'Langdellianism'.[15] This massive yet laborious overloading is no less comic than any other non-incremental repetition. The tracts continue to be written, as if capable of normatively guiding the judiciary. But – if Schlag is right – legislators, judges and the profession remain utterly indifferent to the scholars' unusable theoretic

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[15] As Dean of the Harvard Law School in the late-nineteenth century, Langdell pursued the academic project of an axiological science of law. Such a project was assisted by the rise of the federal jurisdiction, independent of the territorially bound localism of state laws.

industry. Do these guys never learn? Schlag thus remains the classic realist. His aim: to immunise students of law against the blinding lure of higher-order principle.

It's worth staying with Schlag some paragraphs more, to grasp his *modus operandi*.[16] The relentless academic rationalisers of legal judgments into higher-order norms might be enchanters … but they are themselves enchanted by the ethereal allures of a legal metaphysics and the high-sighted intellectual persona that legal reason promises. This is the message of Schlag's (1998) *The Enchantment of Reason*.[17] Here are the opening lines:

> When one is enchanted by reason, it does not feel like enchantment at all. Instead, it feels quite reasonable. Suppose you were in thrall to the enchantment of reason, how would you know? … You would be trying to reason your way through everything. If you were subject to such an enchantment of reason, how could you tell? (Schlag 1998: 1)

Having extricated law from enchantment by reason, a realist conclusion is reached: Reason is unstable. Law is not benign. This is not a great combination. When reason runs out, but continues to rule, we get precisely what we see all around

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[16] See the symposium on Schlag's works, published in the *University of Miami Law Review* 57 (2003), under the title 'The epidemiology of critique'. Also Goodrich, on 'Pierre the anomalist'.

[17] Duncan Kennedy (2003: 513) memorably characterises *The Enchantment of Reason* as 'a book that so vigorously refuses not just political correctness but all concession to our desire that enlightenment should be politically edifying'.

us – the excessive construction of a pervasively shallow form of life. (Schlag 1998: 145)

So, what does Schlag do next? Well, he just sort of stops, plays an amused gaze around the current legal landscape, and says no more. Not a very 'whiggish' thing to do, you'll agree … but then, are we any more convinced than him of law's ineluctable advance to the promised land of reason, or for that matter, of humanity's progress – with or without salvation – to cultural completion?[18]

In critical legal studies Schlag-style, we see a persona unwaveringly on target against the 'obsession with normative questions ("What should the law be?") [that] undermines our capacity to comprehend the law that already is and our decidedly humble (if not entirely innocent) role in its operation' (Schlag 2003: 478-9). This is one who would resist entrapment in any form of legal metaphysics in order to face the grim reality: the American legal system as it 'already is' is bad and beyond the pale of rationalist idealisation. Yet, bad though it is, the law itself is not the principal target. The attack is directed primarily at an intellectual 'obsession', the 'messianic normativity' of the doctrinal tradition (Schlag 165).[19]

We've reached Schlag's threshold. Beyond the threshold lie the various othernesses, the territories of de-repressionists, anti-exclusionists and other CLS voices that Schlag (1996: 10) might well include among the 'perfectionist

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[18] For instance, in the Habermassian style.

[19] In this respect, Schlag's persona is not that of the exemplary 'anti-lawyer' whose critique of law (and state) can be represented as 'religion by other means'. See Saunders (1997).

jurisprudences' insofar as they preach a future 'redemption' for law. This is not his pitch:

> As I see it, part of being an intellectual is having your own projects, your own intellectual agenda, your own sense of what to do – as opposed to simply following the default institutional paths laid out for you. Renouncing those default institutional paths, of course, is no easy matter. (Schlag 2003: 1030)

The challenge is to proffer no normative program whatsoever for a motley American law that is 'an admixture of thinking habits, jargons, ideals, anxieties, and canonical materials … reproduced with sufficient regularity … to produce the appearance of an intellectual discipline' (Schlag 1990: 12).

So, how might we read Schlag's eschewing of theoretical normativity? Is it a 'post-Husserlian' disposition – in Ian Hunter's terms – that comes with a liberal arts' donation of transcendental phenomenology to legal scholarship? If so, the critical jurist would make a two-step move. The first would be to suspend commitment to the established orders of legal thought. The second would be to be open to the transgressive – or transcendental – phenomenon, a gesture that might allow you to 'merge with being beyond structure':

> In seeking to go beyond Kantian metaphysics, Husserl posits a special kind of experience. This is one in which the object self-manifests, somehow displaying its transcendent conditions of intelligibility immediately, as an experience, hence revealing itself in the formalised 'Kantian' field of knowledge as a disturbing foreign body. This breakthrough-object or 'noema' offers the prospect of a fundamental opening to being as something 'other', thus also the prospect of

> overcoming ossified identity and the chance of 'becoming in the flux of life. (Hunter 2005: 6)

No one could doubt that Schlag is at the threshold where the realist jurist vows abstention from the formalised structures and ossified 'object-forms' – 'rules, doctrines, principles, precedents, methods, models, theories and so on' (Schlag 1996: 136) – of what normative legal thinkers count as the law. It's where he breaks with 'this desire for bondage to a higher law', in other words the law as inculcated in 'the legal theory workshop' (Schlag 1996: 116, 5).

But what of the Husserlian beyond? Schlag's realist reticence can only disappoint phenomenologists:

> Some legal thinkers are rendered quite anxious in the present moment. 'What comes next?' they want to know. 'What will be next?' they wonder. 'What admirable vision of law will next capture the legal imagination?' Maybe nothing. Maybe what comes next is that we stop treating 'law' as something to celebrate, expand, and worship. (Schlag 1996: 166)

No doubt this leaves the beyond perfectly open and unscripted. It's even Epicurean: if we can't know the gods, we therefore shouldn't fight one another over higher-order truths. It's also quite Weber-like in its realism: facing the facts, as Weber wrote, is the only ethical question. Yet, 'maybe nothing' scarcely constitutes access to some to 'breakthrough-object or "noema"'' that Ian diagnoses as the culmination of the phenomenological exercise of mind. Conversely, those other camps in CLS – the de-repressive and the anti-exclusionist – are voluble on accessing the other of the law, be it the civilian or learned law tradition that the common law has repressed or the

identities of subjects – African-American or Latino – whose disruptive narratives of personal experience American law has excluded from recognition.

Still, few American or British anti-lawyers match Schlag's tough reluctance to commit to yet another 'perfectionist jurisprudence'. The American might warn against the 'transcendental nonsense' of making law seem good, let alone magically 'the best it can be'.[20] He closes the door on such normative inflations and moral idealisations. He issues memorable warnings against what's happening when liberal institutions are idealised as realisations of fundamental principle or when liberal legality is inflated to the status of a higher law. And he shares his colleague Paul Campos's incredulity at the currency of the belief that ever more law will solve ever more social and personal problems, an invasive 'hypertrophic' juridiifying of American life that Campos (1998) terms 'jurismania'.[21]

Yet, isn't there a yawning gap in all this? Schlag displays no interest whatsoever in the historical liberal state and its prudential civil norms, for instance an adherence to religious neutrality sustained – however imperfectly – by lawyerly practices and administrative routines. When Schlag (1996: 5) describes the law as that

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[20] The phrase is Ronald Dworkin's (1984: 173). The magicians are the moral philosophers. It falls to them to work out 'the purer form of law within and beyond the law we have' (Dworkin 1986: 407). Undaunted, Schlag suggests that the philosopher Dworkin, despite authoring *Law's Empire*, could never get even a walk-on part in the down and dirty world of *L.A. Law*.

[21] Clearly, this is a different take on 'law and madness' from that in Sarat et al. (2003), cited at the outset of this paper.

'ugly bureaucratic noise that grinds daily in the nation's courts, legislatures, and agencies', he's throwing in his lot with the majority of critical jurists – the anti-statist anti-lawyers. Here he does nothing to legitimate a political regime or a juridical order that do without a foundation in moral truth, and do not enforce a particular religious creed or impose an exclusive moral code on everyone.

The donation of theory – perhaps together with its bespoke persona, the transcendental phenomenologist – has been described in one direction only: from the liberal arts to the legal academy. Once implanted in those institutional settings where critical legal studies gained a toehold, was the phenomenological template put to use, drawing boundaries between standard legal thought or legal education and, on the other side of the line, the theoretically-informed alternatives? Has the same template – with its powerful dichotomies of closed and open, hierarchy and freedom, the old and the new – operated inside the field of critical legal studies too? Did the initial concerns of the left-legal critics – mode of production, class analysis, base and superstructure – become CLS's own internal ossuary, zones of closure to be opened up in their turn by emergent concerns with fluid embodiments and marginal subjectivities, gender and race identities, transgressions and various alterities? If so, the question remains, how could such a donation have happened? Or would it be better to rephrase the question: how could such a donation not have happened?

Part 4. A legal institution and a social theorist

One answer might be gleaned from Bruno Latour's (2002) ethnography of a legal institution at work, a study based on two six-month periods spent observing the French Conseil d'Etat. As a theoretical and methodological intervention, Latour's work is not without surprise.[22] Early in the piece, among the lawyers of the Conseil he admits to encountering a 'subtlety without need of foundations – even doctrinal – entirely typical of law yet capable of constantly surprising the philosophically-minded ethnographer' (Latour 2002: 26).[23] This signals the point of the experiment. The intricate diversity of elements constituting the Conseil's regime – the multiple sections and offices (rapporteur, réviseur, commissaire du gouvernement, président),

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[22] Latour's (2004) essay on theory and critique is cited in Ian Hunter's program notes for this seminar. With the talk of critique's loss of 'steam', Latour's call for 'a bit of soul-searching' (227), and his claim that social scientists' explanations of our own 'favourite objects' are 'so horrific' (240), the essay promises to offer an 'autocritique'. This appearance is borne out by Latour's sharp dissection of critique as a winning rhetorical strategy: having shown the 'naïve believers' that what they take to be objects are just 'their own projection', the critic can 'humiliate them again, this time by showing that, whatever they think, their behaviour is entirely determined by the action of powerful causalities coming from an objective reality they don't see, but that you, yes you, the never sleeping critic, alone can see' (Latour 2004: 239). But are we deceived too? When Latour writes: 'Although I wish to keep the paper short …' before continuing on, we should be warned. Another word and it's too late: 'The solution lies, it seems to me, in this promising word 'gathering' that Heidegger had introduced to account for the "thingness of the thing."'.

[23] All quotations from Latour's study are in my translation.

the mix of technical procedures and legal arguments, the citation of texts and precedents, the writing of opinions and judgements, the court's institutional proprieties, all the while working 'dans l'urgence' (58) – suggests that 'the work of the law' will not prove susceptible to explanation in philosophical or social-theoretical terms. These are public official at work within the massive framework of a state, yet these French lawyers are not Max Weber's 'automatons of the [civil-law] paragraph'.[24]

Already by one-third distance, the 'philosophically-minded' observer of French administrative law in operation begins to display symptoms of unease. It's as if something is eluding his gaze:

> How is it possible? Is there really nothing higher than these infinitesimal discussions on words and texts in this so-called 'supreme' court?', the ethnographer asks himself … 'Is there really nothing higher than the laws?' (Latour 2002: 79)

It seems not. 'Beyond this rather derisory institution, [there's] nothing that is better, quicker, more effective, more economic – in particular, nothing that is more just' (80). Further observation of the Conseil's management of legal dossiers brings the ethnographer to the mid-point of his research. He's now growing suspicious of two

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[24] 'We have seen how, in the space of a few minutes, reasoning can pass through political considerations, economic interests, open admissions of prejudice, preoccupations with the opportunity, with justice, with good administration, the whole of this serving to inflect, disturb, suspend the elaboration of law. And yet, each time, the presence of all these elements is of itself insufficient: with one word, the signal is given that now, it's necessary to "begin to do some law"' (Latour 2002: 280).

standard social-theoretic perspectives on law and lawyers (Latour 2002: 152-4). The first perspective – associated with Pierre Bourdieu – sees law as an armature of the power relations in society. In this light, the lawyers of the Conseil would represent an 'elaborate camouflage for relations of power that we must learn to overturn'.[25] The second perspective would reduce the work of law to the application of a rule in a purely formal apparatus.

To embrace these two perspectives – sociologism and formalism – would entail 'abandoning the sinuous pathways of [juridical] practice to follow a different reality, invisible to the eyes of the [legal] actors yet offering the explanation of their conduct: that of society and its violences; that of the rule and its own logic' (Latour 2002: 153).[26] The question arises: are these allegedly relational conditions of law's possibility – social dissimulation and epistemological formalism – 'any more real than the law they're claiming to explain'? An answer in the negative begins to form:

> Far from following the sociologists' and epistemologists' contradictory advice to recover the deep reality of law, we're choosing to *remain on the surface*, doggedly following the uncertain trail of the judgements in the course of which judges openly admit their prejudices while affirming that these don't furnish the solution, or attach themselves

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[25] Latour (2002: 152) dismisses Bourdieu's concept of an 'autonomous juridical field' as a ploy whereby the sociologist can deflect the charge of a reductive 'sociologism'.

[26] For savage criticism of the damage done by 'le sociologisme' to French legal education since the 1960s, see Legendre (1999: 168-9, 188).

> passionately to the forms while constantly guarding against a fall into what they call 'juridism' or formalism'. (Latour 2002: 154)

Only now, with this resolution to 'remain on the surface', can the ethnographer describe the work of the Conseil positively, that is, in its own terms as a *mise en droit*. The challenge is clear: 'to make description of the law compatible with the practice of the judges' (204). Various discoveries are made on the legal surface, including the officers' trained 'attitude of indifference' (222, 250) and their reluctance to accord their conclusions 'the grandiose air of the Undiscussable' (253).

So, what has the once 'philosophically-minded' observer of these things derived from his time with the Conseil? First, that explanations of the work of law by a 'sociology of the social' fail:

> [H]ow can law be explained by the influence of the social context, when law itself establishes an original form for the contextual relationships of persons, actions and texts, such that it is difficult to define the very notion of social context without having recourse to the legal apparatus. (Latour 2002: 278)

In short, the reported explanation – 'society' – is weaker than the law it would explain.[27]

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[27] Alan Watson (1988: 20) presents a historically grounded version of the hypothesis that, from the juridical point of view, nothing necessarily follows from the mere fact of social change:

> The proposition is that in any country, approaches to lawmaking (whether by legislators, judges or jurists), the applicability of law to social institutions, the structure of the legal system, the formulation and

A second lesson returns us to the issue of law and (deep) theory. 'There is no point', Latour writes, 'in being profound in studying the law' (284). To illustrate this, he refers to two cases resolved by the Conseil, on prescription of the 'morning-after' pill and on film censorship. In this work of the law, he finds 'nothing strong, nothing true, nothing sensational, nothing sentimental, nothing – in fact – just: instead, [there is] recall of a basic principle of non-contradiction, delicate and loose, always liable to review and reinterpretation, that avoids – "in the present state of the texts" – leaving too much incoherence in the scattered actions of humans. Nothing but surface …' (286).

At this juncture, 'the ethnographer despairs: will he ever be *superficial enough* to grasp the force of the law?' (Latour 2002: 286).[28] Yet, this parable of the despairing

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> scope of legal rules are all in very large measure the result of past history and overwhelmingly the result of past legal history, and that the input of other even contemporary societal forces is correspondingly slight.

Societal forces change, but for the most part law 'remains, not because of any particular message, but simply because it is there' (55). This points to a sense of contingency not explored by Douzinas *et al.* (1994).

[28] Compare Schlag (1998: 144): 'Shallowness is particularly troublesome for those intellectuals whose ambition is to perfect thinking'. But, as we've noted, for Schlag the problem of 'a pervasively shallow form of (American) life' is only too real. Thus, '[w]ith the shallowness problem, most of that which might be interesting to think or rewarding to live remains beyond reach'.

ethnographer recognises a crucial dimension of the rule of law in liberal constitutional states: legal relations 'hold and protect us – on condition that they remain on the surface, that they do not engage deeply, and that we too remain on the surface, not too deeply engaged, in order to follow and interpret them'. In jettisoning deep philosophical or moral justifications for the work of law, perhaps we'd come closer to an insight into the limited scope of action imposed on law in liberal regimes by their religious and political histories. In our academic setting, however, what chance of defending law's superficiality? As Pierre Schlag (1998: 44) says: 'shallowness is particularly troublesome for those intellectuals whose ambition is to perfect thinking'. In this regard at least, the donation of theory was more likely than not.

Part 5. The jurist antinomian

There's a second and quite different answer to our question. Here it's not law's superficiality that's at issue, but the figure and culture of the anti-lawyer … as a religious phenomenon. Listen to Anton Schutz:

> Today, a vast array of campaigns, with no apparent relation to the Christian project, such as, for example, the Critical Legal Studies Movement, side with protochristian anti-legalism. (Schutz 2005: 81).

Schutz has something big in view: a cultural genealogy of legal critique whose dynamic is the relation of law and Christian anti-law or gospel antinomianism.

If Schutz is right, anti-legalism has been the main game for two millennia, since Paul's inauguration of the Christian campaign for love, freedom and faith and

against power, repression and whatever the law that administers worldly life.[29] Seen in this light, the 'foundational antinomianism of the Christian gospel' gains extraordinary credits, including the Critical Legal Studies Movement:

> Without the Pauline 'un-coupling from law' no Western Science, no Enlightenment anti-institutionalism, no socialist revolution, no post-modern human rights philosophy, can as much as be conceived, no social-peace-pampering Western-type 'civil society' as much as be dreamt of. (Schutz 2005: 85, n. 19)

The argument requires that we treat these diverse historical artefacts as effects of the one impulsion: the 'antinomian trend animating Western cultural evolution' (73). Generality aside, there's a specific provocation here for critical jurists. Anti-legal movements are to be seen as so many 'applications of the Christian effort of uncoupling-from-law' (73). To be sure, many of today's 'law-critical communities-in-campaign have since long ago disposed of any reference to their Christian or Pauline archetype'. Yet, though they deny it, '[i]n reality, of course, they are the living hallmarks of Christianity's unique historical success' (73). Critical legal studies, seen in this optic, would be one among other 'spirituality-based alternatives to the injunctions of law' (80).

There is, however, one historical alternative to these higher-order law-denying postures. Rather curiously, Schutz leaves mention of it to the very end of his essay:

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[29] Schutz (2005: 87) acknowledges Pierre Legendre's account of 'christian-postchristian anti-legalism as the protagonist of Western culture'.

> In establishing and maintaining an institutional order predicated on law, not predicated on the absolutist claims by means of which the Christian and post-Christian West systematically exposes itself to the adventure of 'uncoupling from law', the Middle Ages endow Western Christianity with an internal alternative. (Schutz 2005: 93)

But it remains unclear to what extent this medieval 'moment of theory' is viewed positively, given that here 'the claim of a repressive and enclosing Christianity is, for once, not obviously erroneous'.[30] Perhaps the view is positive, though, to judge from Schutz's earlier footnote reference to Pierre Legendre's treatment of this same alternative to Christian anti-legalism: the twelfth-century convergence of Roman law and Christian doctrine that brought legal organisation and theological foundation together in a manner that – exceptionally – embraced law without denying law.[31] he romano-canonist convergence was an 'unrepenting exercise of law not subject to the usual foundational denial'.

Speculative history in this style easily has us looking beyond the issues of critical legal studies and the formation of the jurist in our own 'moment of theory' in

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[30] At the outset of his essay, Schutz (2005: 72) cites Foucault's 'repressive hypothesis', along with Enlightenment thought on religion, as examples of the notion that Christianity's historical role has been to suppress 'values and habits essential to human flourishing'. And he comments: 'What is so striking about these notions is their desperate inability to capture with even the slightest degree of ethnographic justice what Christianity is about'.

[31] See Schutz (2005: 87).

order to wonder at 'the exorbitant presence of Christian anti-institutionalism in the Western past and its necessary formative effects on the present' (Schutz 2005: 84). Yet – kept within bounds – it can return us to the question of phenomenology and law. As a 'subjective uncoupling from institutionalised bonds' (73), does Pauline antinomianism point towards the phenomenological exercise?[32] Could critical legal theory and the phenomenological exercise be dual relays for Pauline-Christianity. Is their common aim to recapture the law from a religiously indifferent state for a higher cause, if not for religion directly, then for morality?

The founding members of the British Critical Legal Conference defined themselves as 'heretics' who reject the 'church' of common law doctrine that 'has increasingly assumed rather than proved or practised the relation of God, justice or truth to legal acts' (Douzinas *et al*. 1994: 7). If our 'moment of theory' belongs to the history of a millennial antinomianism, how could the recent donation of anti-legal theory – as normative elevation or as critical debunking of positive law and institutions – not have been made?

6. A persona: the critical jurist

The 'moment of theory' has posed the classic question once again: how do you want the persona of the jurist to be formed, shallow or deep? The offices of positive law define the persona they require in terms of legal-technical attributes. In the Conseil d'Etat, '[t]he judge is not without conscience, but he puts his scruples elsewhere'

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[32] Schutz (2005: 73, n. 2) cites Marcel Gauchet's neat aphorism on Christianity as 'the religion of the way out of religion'.

(Latour 2002: 224). Yet, the attributes that define the persona of the critical legal theorist – the anti-lawyer – are at once legal and anti-legal. This persona is a hybrid creation. On the one side, it rests on a brute, positive legal education that evades theoretical issues but instils a technical capacity to work within the instituted legal-administrative order; on the other side, it might rest on mastering the phenomenological exercise of spirit … and this demands an 'uncoupling from law'. At once juristic in court but anti-juristic in classroom or church, can this extraordinary *persona duplex* exist otherwise than as an admirable – but ultimately futile – dialectical performance?

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