

THE SYSTEM AND THE LIFE WORLD

WARREN LEHMAN*

In July of 1986 at Haus Blomendal, a 14th century *schloss* twenty minutes outside Bremen, German and American law professors met to discuss critical legal thought in the two countries. Around the square of tables sat the cadres of the leading progressive legal tradition of each country: the Americans came from the Critical Legal Studies Movement (CLS), which has been attracting unprecedented attention to and within the American legal academy; the Germans were continuers of the Frankfurt School and those engaged with them. It was a meeting of cousins, whose spiritual community came through shared descent from Marx, Weber, and, less well known, the Free Law Movement that developed in Germany the last quarter of the 19th century. Let me start by describing the Free Law Movement.

The Free Law Movement criticized legal formalism just at the time formalism was being encouraged in the massive effort to produce the German Civil Code that came into force January 1, 1900. The view of Rudolph von Jhering, that a judge's decisionmaking should be determined less by a prior rule system than by a consideration of consequences, found favor in America, where it fell upon ground being prepared by Holmes, Grey, and Roscoe Pound. Recognizing in judges a degree of freedom from rule made formalists feel that the law was ungrounded and unpredictable. But looking at consequences seemed to promise an ordinary man's certainty: that the law would be predictable because judges would respond to today's cases as seemed right in today's world.

Americans to whom the sociological jurisprudence of Jhering was persuasive went further, suggesting that the law was not what legislatures said it was, but what judges did. These people came to call themselves Legal Realists. Realists were a powerful force in America, setting the agenda of legal thought for most of this century. The Critical Legal Studies Movement is heir presumptive to American Realism and so to the Free Law Movement that helped to shape it.

In Germany the free law movement was a less vital force. Jhering made little headway there against the nationalist and commercial enthusiasm for codification. Today, however, it might be said that the Free Law Movement is being reimported into Germany in this form of American Realism, because of a growing attention there to the issue that has long engaged American legal thought: the logical indeterminacy of particular decisions.

The American and German participants also were related through Marx, whose general critical posture both groups respected without being either limited or defined by the Marxian text. CLS members distance themselves

* Professor of Law, University of Wisconsin.

from the simple sociological presumption of "vulgar Marxism," particularly the view that the actions of either judge or legislature can be explained as functions of social class. The law too often stands up for the oppressed for so simple an hypothesis to be valid. In Germany, Jurgen Habermas is using a social theory as a framework for a critique of knowledge, an idea he says is implicit in Marxist thought, though not an idea to be gathered from the self-understanding of Marx or Marxism.

Weber is also, for Germans and Americans, both a predecessor and a problem. No one is willing to swallow whole Weber's scary vision of an irreversible movement toward a social life repressively rationalized through law, yet Weber offers especially the Germans the terms in which social history is understood. The Realist claim that indeterminacy is a fact of legal decisionmaking, not simply a liberating ideal, seems to undercut Weber's fear of bureaucracy at the point of application. The practical consequence, however, is that bureaucratic rationality is peculiarly painful because of its humanly unpredictable character. Indeed, its failure to reflect the expectations of the community may be what most makes it oppressive. The consequence in academia, by contrast, is that realism frees sociology from its role of detached, if pained, observation, and makes it available as a tool of reform.

Among the Realists a major faction thought, pursuing Jhering's interests, that social science could replace legal rules as a guide to decisionmaking for the working judge. This direction in realism spawned the Law and Society movement and was responsible for the central place that policy has today in American legal education. The Law and Society movement, however, is generally out of favor with CLS, which subscribes to the realist criticism of formal law but not to the substitution for it of social science, which is viewed as just another privileged theory that threatens to be oppressive.

The German heirs to Marx and Weber, on the other hand, retained an interest in sociology at the general, theoretical level that had engaged their predecessors. The dialectics of social history, not day to day policymaking, engaged the Frankfurt school. Behind the conference title, *German and American Traditions in Sociological Jurisprudence and Critique of Law*, and the invoking of common ancestors, rather different practices and attitudes were hidden.

The differences centered around Duncan Kennedy of Harvard Law School and Jurgen Habermas, this generation's leader of the Frankfurt School. Both Kennedy and Habermas were present, though neither gave a paper. They served, rather, as Ur figures around which the drama of the conference unfolded. Habermas, a solid, self-possessed man, said little in formal session, but such is the respect for him that whatever he said carried an electric charge. A number of speakers were daunted by speaking in his presence on his subjects. Kennedy's impact is more directly related to present performance. He is tall, good-looking, charismatic, and brilliant in extemporaneous analysis. This issue between them was the place of conceptual thought in understanding and action. And despite the conference structure's

corresponding to a different vision (embodied in a proposal to the Volkswagen Foundation, which helped underwrite the conference), this was the real subject matter of the Bremen meeting. It betrayed itself more in style of presentation, however, than in direct discussion.

The majority of the German papers carried forward an argument about the relation of Habermas's two-volume work on communicative action to work of Niklas Luhmann and Gunther Teubner. The American papers were not so consistently exchanges in a single, ongoing conversation. There were papers on the critique of rights theory, on race, on feminism, papers carrying on a beleaguered defense of the vitality of the law and society traditions for CLS, and papers on the Critical Legal Studies movement itself and its place in history. (The conference prospectus suggested that Americans might become more conscious of their debt to the Free Law movement, but the self-examinations of CLS members did not go so far as that.) The unity in the American presence was conveyed by a widely shared antitheoretical stance, of which Duncan Kennedy is the leading proponent and representative.

The German approach was the more comfortable even when the content was abstruse, for the German contributors pursued the kind of rational, public discourse that is still the stock in trade of western intellectual life, even among those prepared to surrender the claim that philosophy is the mirror of nature. Disagreement is expected, but it is assumed that it can be couched in terms consistent with what is held to constitute knowledge, and can be argued about in a manner consistent with how knowledge of that sort can be attained.

The tolerance of the Germans is real. There is a willingness to try to understand other points of view and to absorb them in familiar, rational discourse. That posture, comfortable as it is, is being criticized by increasing numbers, however. Some say that it filters out truths that can be known only to different ways of being or states of consciousness; others say that even in its own conceptual territory, its truth claims are unfounded. If there are truths that slip through the net of conceptualism, or worse, if everything important slips through, the effort of rationality to absorb all views into its own debate has to look misguided. The very real emotional tolerance of enlightened rationality may have, therefore, an unwittingly limited horizon.

Habermas believes that the promise of conceptual thought, which lies in its apparent objectivity, is always threatened by the human interests that undermine that objectivity. (We are always hiding real reasons behind rationalizations.) He hopes to outwit interest by recognizing the pragmatic insight that knowledge itself is constituted out of human interest: science out of an interest in technical control, hermeneutics out of an interest in practical action, and critique out of a desire for autonomy. The critical posture achieves autonomy by its capacity in discourse to winnow out the rationalization of less admirable, less fulfilling, interests. Habermas's theory about theory is, therefore, one that leaves its practice largely intact.

The American cousins in CLS lean toward radical skepticism regarding the claims of conceptual discourse. The observed indeterminacy of applied

law suggests to them a general limitation on the capacity of rules; the problem with rules leads to questioning the utility of all conceptual thought practically applied. Realism's insight regarding doctrinal indeterminacy is radicalized by CLS in depth as well as in breadth. Its members experience the rational, privileged, and fixed as not merely misguided but oppressive. They say law is privileged over politics—said to be higher or better; that is an oppression they would change.

The privileged timelessness of liberal law demands that it be applied in an impersonal, calculative way that denies the propriety of personal confrontation with present moral reality. It is in that usurpation that its oppressiveness inheres. For law's usurpation of the present and personal, Mark Tushnet's paper suggested the substitution of eternal critique. This sounds not unlike Habermas, but the emphasis is changed. Habermas hopes to get somewhere, to fulfill some of philosophy's promise, but for Tushnet it seems all defense. No thought from yesterday will be allowed to so solidify that it can threaten to control today. Law is to be reduced to politics, understood as the quintessentially transitory and personal.

It is in pursuit of this idea that CLS refuses to follow those Legal Realists who thought legal dogmatics could be replaced by sociological truth. Sociology is just another privileged, hence oppressive dogma. A few who identify today with CLS but who had earlier lives in the Law and Society movement would like to see some accommodation between the two, but the momentum of CLS is as anti-social scientific as it is anti-legal doctrine. Like Dostoyevsky's *Underground Man*, CLS members are seeking a form of life that has no conceptual determinants, no rational justifications.

The Americans at Bremen acted out their skepticism by refusing to express their position in conceptual terms. They were more likely to ask in discussion periods about the not infrequent discomforts of a meeting in which one side declined to play by what the other supposed were the rules. Why was there a silence here? or a charge in the air after. . .? The consequence was that the Americans often appeared patronizing, uncooperative, or frivolous.

The choice made by many among the Americans not to discuss in conceptual terms their antitheoretical position was not simple perversity, however. It is not easy to find a posture from which conceptual thought can be challenged successfully. I have had the difficulty brought home to me, for though I am not of CLS I share its reservations about rationality (which is what brought me, though not committed to either side, to participate at Bremen). However, unlike the dominant view in CLS, I am willing to offer a theoretical account of the case against rationalism. We cannot just pretend that philosophy and theory never existed or are meaningless or useless enterprises. There is a human capacity and a Western commitment to engage the mind in categorical thought. To deny that fact is as helpful as the puritanical denial of the reality of sex. The problem, as with sex, is to find a sane perspective. A sane perspective on conceptual thought must confess its incompetence, betrayed by the Realists, to resolve conclusively practical (legal) questions. We need, in a word, a new Kan-

tianism, a theory of theory's limitations, which is what Habermas, too, is working on. But to attempt to fulfill that need is to open oneself to attack from those who see as inconsistent a rational critique of rational thought. Defenders of rationalism find it easy to dismiss speakers who manifest that apparent inconsistency. Refusal to engage has the merit of being both unsettling and, when seriously pursued, resistant to easy dismissal.

Because of the general American self-denial, the epistemological differences were seldom directly discussed. They manifested themselves as a difference in style, however, because they are not only about ways of knowing, but about ways of doing and being. Conceptions of knowing imply postures. Objectivity, for instance, involves the whole of our being. Its emotional tone affects our relation with others as much as or more than the content carried. (It has been pointed out recently that offering apparently objective accounts of affective states—"I love you because you deserve it"—undermines the relation in which they would be felt.)

The conference was like a hall of mirrors in which the epistemological differences manifested themselves in one form after another. After the difference in style, the most obvious reflection was that the theory questions pursued by the Germans within their own moiety spring out of Habermas' concern with the corrupting of ordinary human intercourse (which he calls the life world) by bureaucratic rationality in the service of welfare. The Frankfurt School has called such use of reason "instrumental rationality". The Frankfurt project is to describe as an historical dialectic the ways in which instrumental rationality, at work as and through law, has created such characteristic problems of the modern welfare state as dependency, disorganized family life, and ineffectual bureaucracy. The same dialectic account, in order to avoid Utopianism, should also show a way out of the dilemmas whose creation it explains. Habermas' project is to describe this next step by which the destructive effects of a necessary instrumental reason can be overcome.

Besides avoiding Utopianism, a social theory coming out of the Frankfurt School, with its commitment to Enlightenment, will take the disenchantment of the world as a fact of the world, not of the history of human perception of it. Rational thought will have a place, therefore, (as does law) on both sides of the equation. It is not simply the enemy. The resolution of the problem of a world oppressed by law as medium or system is to be gained through reason and law, in different moments, in service of the ordinary human intercourse of the life world.

The social theory offered by Habermas is founded on Weber's account of bourgeois law as expressing a human tendency toward rationalized, abstract, and totalizing social systems. Law would provide a conceptual framework in which all particular human actions had a place, but, as in the law of contracts, the content of human relations would not be the concern of law. Law, formal and abstracted from moral content, allowed for a release of human potential that had been constrained by the substantive status relations of the medieval world. The empowering effects of bourgeois law have not, however, been cost free. Legal abstraction meant the treatment

of people as things, the commodification, as Marx called it, of human relations. Commodification produced characteristic problems: mere negative rights did not assure either security or influence. (All had an equal right to sleep under bridges.) It seemed possible to resolve the problems caused by the first liberal rationalization by reinserting moral content into law in order to achieve distributive justice. The result was the welfare state.

Reinserting moral content into formal bourgeois law, which in this theory is called "materialization," has its own problems; these are the problems of our time. On the one hand, regulated subsystems manage all too often to evade the regulatory effort of law; on the other, regulation, as insertion of legal rationality into the life world in the hope of correcting the consequences of commodification, changes for the worse the character of day-to-day human existence. The merit of bourgeois law was exactly that formal character that had served as a barrier between the state and the life world, leaving the latter to follow its natural rhythm. There are characteristic dysfunctions caused by inserting systematic rational instrumentalism into day-to-day life. A prototypical example is the corrosive effect of a posture of objectivity on love. To love because, that is instrumentally or for a reason, is not really love. Instrumentalism puts calculation into relations where it is normally absent, and by an emotional Gresham's Law drives out the love, not simply from private relations but from community. It is the force of such rationalism that CLS members experience as oppression, which they seek to avoid by avoiding theory, or by eternal critique.

To account for law appearing on both sides of the historical equation, Habermas says it has two moments or manifestations. In its institutional moment it supports the life world, as in the enforcement of the core of criminal law. In its regulatory moment it is only a medium, like money or power, for the pursuit of ends otherwise defined. As Habermas characterizes it, the problem of the modern world—modernity—is the colonization of the life world by law used as a medium of social manipulation, that is, by law as system.

Alternatives to Habermas' evolutionary theory that use self-defining and self-reproducing biological systems as models are being offered by Nicklas Luhmann and Gunther Teubner, the latter also present at Bremen. Others among the German participants, responding to one objection or another, attempted to rearrange elements from Weber, Habermas, Teubner, and Luhmann. The discussion sounded like that among physicists, all of whom understand in essentially similar terms the problem jointly being worked upon. In a word, for the Germans the workshop was a world of normal science, a working within an accepted intellectual framework, and therefore also a Kantian world: though the problem addressed is seen as protecting the informal, irreducible character of ordinary life, the accepted means for doing so is rational system building. And in that rational system building, rational, abstract law is taken for granted as society's organizing principle.

Indeed, many of the Germans favor a "dematerialization" of the law, that is they favor what can be seen as a retreat from the welfare state and

toward 19th century bourgeois law. Such a proposal is consistent with the notions of Luhmann as well as of Habermas. For Luhmann, law as a closed and self-defining system is in its nature separate from the purposes that the program of materialization aimed to achieve. Luhmann's social theory embodies the claim that institutions have the kind of definite boundaries that by its nature conceptual thought attributes, often wrongly, to the world it is intended to describe. The interest of the Germans in dematerialization looks suspiciously retrogressive to CLS members: they are clearly against the bourgeois formal law to which dematerialization appears a return, yet they are not entirely sure they are opposed to using law to achieve material ends in, say, matters of race and gender.

One reason offered for the favor bourgeois law has found among the Germans was that it would serve as a defense against a recurrence of Naziism. Some thought the spectre of Naziism hung over the conference, others that there was a kind of unspoken agreement to believe that it did. The one paper that discussed Naziism, Hebert Rottenleuthner's, however, effectively discredited the common belief that German judges failed to resist Naziism, showing thereby the futility of presuming that a healthier respect for liberal law could have saved the day.

The antitheoretical posture of the Americans is of a kind that has recurred in history in response to such practically intended theorizing as that in which the Germans engaged. The Germans are saying that it is possible to commit oneself to protecting the life world, to then understand the forces that threaten it, and to conceive and carry out a program to save it. That is what it means to the Germans to have a theory and a politics. Not that the program will be merely technical; enlightenment is the product of communicative action, not of nomological science, Habermas argues, but it is still a self-aware, conceptual going forward. The CLS position, were it expressed as a contrary theory about theory, would say that not only have the Germans no theory that meets the conditions, nomological or enlightened, for what they think a theory should do (which, in the final session some of their number conceded to Kennedy), but that having one is not possible. Duncan Kennedy refuses, however, to claim that no theory is possible. The ground for his refusal I take to be that one could assert such a statement as truth only if theory were possible. That kind of truth would itself be the supposed product of the Enlightenment epistemology.

The trouble with failing to make the larger claim—even if Kennedy is right (and he is) that the assertion cannot be proven by the standards of theory—is that he leaves room for the persistent hope that rationality may after all somewhere find a ground for itself, hope that the feeling a theorist always has of being on the brink of discovery may not after all be delusive. Even if an antitheoretical theory cannot itself be free of rationalist doubt, it can be put as a plausible case, though one whose ultimate appeal is to that other way of knowing, the one enlightenment epistemology denies. As Euclidean geometry is not useless though there be a door from it to a curved universe, it is simply not true that a theory, to be useful or persuasive, need be without escape. An escape-proof cage is the prison enlightenment

epistemology hoped to establish—Weber's iron cage. That it is impossible to achieve does not mean it is useless to build rooms with windows and doors. There is a place for a theory whose claims are reduced, whose pretensions are demolished, and within which, therefore, we can remain free. Indeed, I take this to be very close to Habermas' enterprise.

The CLS critique says not only that the goal of theory with a capital T is impossible, but that the practice of theory with a capital T—theory as the ground and cause of praxis—stands in the way of liberating the life world, is the enemy of transcendence, and is itself the cause of the alienation it is hoped by its means to prevent.

The CLS movement is in that respect heir to Martin Luther, who called reason "the devil's whore." John Calvin similarly resisted what he took to be the scholastic idea that one can save oneself by engaging in good works. Justification by faith is the Protestant critique of what was seen to be the Catholic claim that it was possible to attain salvation by a praxis derived from theory. Luther and Calvin relied in turn upon St. Paul, the fountainhead of this kind of critique in the West. His attack on the legalism he saw among the Jews provided the terms for the Reformation critique. The effort of the conscious self to take over the direction of life is itself a sin—a means the adoption of which makes the end unattainable, a continuing source of infection of the spirit. That is the claim implicit in the style CLS members adopted at Bremen.

And yet, the CLS movement is itself a child of the Enlightenment epistemology it criticizes. CLS takes for granted the disenchantment of the world and is therefore unaware of the religious tradition to which it is a secular heir. I said at Bremen that at least twice in Western history there had been meetings much like this one. The first occurred in Jerusalem before it was clear that Christianity would separate from Judaism, and the second in Germany before the division of Christianity. The acceptance of disenchantment blinds CLS to this heritage and therefore forecloses it access to a history of insight into the posture it has adopted.

In the context of Bremen, the assertion that the German-American split in radical thought has a religious history doubtless seemed doubly absurd. Not only is the bracketing of religious tradition a presumption so fundamental as to be unexamined by either side of this secular, political confrontation, but the suggestion that the meeting was not unprecedented itself called into question presumptions, shared by both sides, that cause the conflict between CLS and the Frankfurt School or militate against the conflict's resolution: those presumptions are that human nature is historical, and history a one way succession of circumstance and states of consciousness. The very terms of the Bremen self-consciousness imply this shared Hegelianism. The issue was seen by the Americans as a conflict of post-modernism (the CLS position) with its predecessor, modernism, represented by what was seen as German theoretical rationality. But if much the same confrontation has occurred before, it may be that there is a persistent structure to the human mind that keeps presenting us with the same psychological and epistemological conundrums. That suggests an essentialism

about human nature firmly resisted in all modern radical thought—perhaps because it is evocative of religion and a world thought safely dead or of a destructive commitment to ontology, or perhaps because an essential human nature threatens to serve (as CLS fears sociology will) as the foundation for yet another oppressive, conceptual theory. At least the latter, however, need not be a problem if the structure of mind is such that it is itself not reducible to the kind of conceptual terms that could be offered to found a new dogmatism, and if, moreover, the mind's working can be corrupted by its taking theory too seriously. Both those things I think are true.

There was one exception to the American strategy of refusing to engage in the discussion that embodied, as they saw it, the problem they were arrayed to fight. Conference papers, mostly distributed in advance, were not presented by their authors, but by another participant, one of opposite nationality. When toward the end of the conference leaders in the American contingent presented the leading papers in German theory, they showed they understood very well indeed the debate within the German family. Though Duncan Kennedy said he felt that in doing so he was selling out, his brilliant presentation of Rudolf Wietholter's paper on legal proceduralism had a powerful effect, making clear that whatever irritating, decentering thing the Americans were about, it seemed to follow an informed understanding of the German theoretical enterprise.

That exception, then, made it clear that the CLS style was not simply a defense against absorption into alienating German theoretical discussion. It was a positive program, a therapy, a decentering of the opposition in the hope of its reconstituting itself an ally. It was a politics, sort of.

It is in a way doubly oxymoronic to speak of political action as conceived by CLS. The Kennedy wing of CLS would reject the claim to theory implicit in the suggestion that they have a conception; and from the German point of view, they are not political (despite their claims), but radically apolitical. While CLS has a characteristic activity, a therapy that it calls a politics, it is almost as apolitical as Lutheranism, which also abandons, as CLS has, either goal or program in the ordinary political sense. People are asked, rather, to deal with what is in front of them. Law professors need not be embarrassed that they devote their energies to the question of the "no-hassle pass" rather than to larger questions, the problems of the proletariat, for instance. The politics of CLS is, then, a localism of theory and practice; it is to "brighten the corner where you are," the theme of an old Protestant hymn. It is not without irony that while German theory is threatened with resolution into neoconservatism, CLS is resolving into secularized fundamentalism. But there it is: despite (or perhaps because of) its brave claim that all is political, CLS is at heart the secular heir of a long religious tradition that would be called by many apolitical. That fact is embarrassing in the world of the radical left, where having a politics is a sign of responsible maturity, so instead CLS will call virtue politics, as politics is virtue.

The elements of the confrontive therapy that CLS substitutes for politics include: a wonderful sensitivity to, and a startling willingness to discuss the emotional level of social intercourse, as when in formal session at Haus

Blomendal, the manifest discomfort of participants was offered as a topic for discussion; a belief that law is to be understood as a history of consciousness, which in practice produces a group psycho-biography reporting the traumas that put CLS at the cutting edge of history; and a persistent, uncommitted seeming irony as a personal style, implicit in the unwillingness to take (hence to offer) any substantive claim at face value.

It is in its militancy toward the world that CLS is differentiated from Lutheranism, and might make a claim at having the posture of a politics, if not the content. CLS is addressed to fixing the world rather than the self. The irony of CLS's strategy is that it manifests perhaps the worst defect to which theory is tempted. Engaging in a therapeutic strategy to fix social arrangements is to use people as means (to use Kantian terminology). It is, therefore, an insidious form of systematic intrusion in the life world (to adopt the terms of German theory). And, in terms of Pauline Christianity, it is another effort to play God, another biting of the apple of the tree of knowledge, whose consequence is our being driven out of Eden (*die Lebenswelt*). It is, therefore, yet another manifestation of original sin, which CLS members in theory properly understand as a commitment to willful theory, but practically are unable to avoid.

I have described CLS as a failure because my attention is on those whom CLS angers and turns away by its therapeutic practice. Kennedy sees the growing number of adherents and accounts it a success. Both judgments are right. CLS has a powerful appeal to the educated and alienated young; it offers them a home and a partial resolution of the conflict of anger and idealism so widespread among them. It is a resolution that allows a genuine sweetness to flower, but it also allows a continuing expression of anger and aggression. Indeed the phenomena are reciprocal. The opportunity to express anger legitimately as a politics of decentering the opposition makes it possible for a sweetness to flourish within the community of CLS, and with respect to anyone recognized individually as a fellow victim of the oppressiveness of system. The trouble is that the aggressive, therapeutic posture toward the outside world alienates and angers with the special intensity that belongs to those hurt for their own good.

By contrast, the genuine intellectual tolerance of the German theorists made them seem less threatening, more consistently attractive. CLS, by carrying its politics into a meeting with kin, seemed aggressive, disrespectful, disconcertingly self-assured, and at the same time narcissistic and trivial. The Germans, in the name of fraternity, generally restrained themselves from expressing openly the irritation that at least some of them manifestly felt. From the German point of view, having done so would seem a triumph of self-restraint. From the American, it would be a self-destructive denial of reality, confession of which might put them on the road to salvation, a road known to be uncomfortable, but the only real road to transformation.

The life world is where we all want to live, a place of daily coming and going, of humane conversation, of the flowering of the self, of living and dying, of the ordinary pains to which our humanity subjects us, and of the great pleasures. The difference between the German and the American

politics is a difference in posture toward this place that we want to be. For the Germans, it is, oddly enough, nearer at hand. That they appear neoconservative reflects their concern with preventing further corruption of something respected about the way things are. Not that the world could not be better, but the most immediate problem seems the threat that things could be worse; threatening forces embodied in the encroaching system must be staved off.

For the Americans, the sought after life world seems much further away. They cannot limn its features, so do not know for sure how to get there; they know only that in stirring things up, confronting their own interiors just as they confront others, it feels as if they are going in the right direction. To the Germans, they appear profligate of the good in what is, but the truth seems to be that they see little or none, certainly not enough that defense could take the central role it has among the Germans. Mark Tushnet in his paper said, "One person to whom the [CLS] critique of rights was described reacted by calling the world that it depicted 'Kafkaesque'. . . . But the point of modernism is that that is just the way things are these days." It is a question of considerable interest why alienation should have progressed further in America than in Europe, but if I read the signs aright it seems to be the fact.

The relative distance from the life world is complemented by a suggestive difference in just where that life world is located. The Americans, by claiming to have a politics and to believe in a distant and desirable life world that they cannot see, appear to have as a goal, just as the Germans do, a changed social reality, a different state of the social world taken as cause of interior experience. They undermine that apparently external concern by their practical Protestantism, their therapeutic politics, and their emphasis on consciousness, all of which give primacy to states of the self. A changed interior experience may cause a different social world, but the head is where the action is.

The possibility of continuing to believe as the Germans do, that the matter in issue concerns establishing access by critical theory to an external world, depends upon their not having been reduced to the desperation of many well-educated middle and upper class Americans. Their very sanity blinds them to the way in which the external life world depends upon, is an expression of, that sense of centeredness that the Americans want to disrupt. It is in the experience of being decentered that the fundamental nature of centeredness is made blindingly obvious.

A mistake for CLS is the apparent belief that an unreflective centeredness, such as allows the Germans to believe in theory, is inevitably a false consciousness. Certainly an unreflective centeredness can blur the boundary between the interior and the exterior world, leading theorists to be confused about whether an evil seen is within or outside. That is a problem that needs to be brought to theory's attention. But centeredness is not necessarily a state of suppressed alienation. It is not in that sense false. There is not necessarily any level at which the Germans feel as bad as their American counterparts seem to. If that is true, CLS therapy will not cure German

theory. Its purchase depends upon a radical alienation of a sort increasingly common in the United States, though by no means universal even here, blessedly.

The complementary trouble with the blindness of theory—which suppresses the part that aesthetic or nonconceptual judgment plays in the apparently rational—is that it leads, perhaps even when interests are taken into account, to the creation of a world in which people take theory more seriously than it can be taken, in which people try seriously to live as if reason had feet of its own to stand upon. When experience demonstrates the shakiness of the claim, disillusioned believers collapse in anger. It is, in a word, the insensitivity of reason to its emotive, its aesthetic, its spiritual ground that raises up reason's enemy. CLS is the product of that which it opposed at Bremen. That dialectic has occurred before, in Jerusalem and Worms, and it will occur again unless it is possible for us in the West to tell a story about ourselves in which our conceptual and aesthetic capacities play a realistic role, a story in which they are neither ignored nor outwitted.

For that reason, we can see that though system and life world are social realities—there really is a system encroaching upon a way of being to which it is alien and subversive—the social reality is a projection of the psychic. In that respect, CLS is right. The life world is within. The system is reason playing God in a world, the unconscious, that it does not really understand. We cannot find a proper place for system in social life without reaching an intrapsychic balance in which reason plays its proper, limited role. The hegemonic disposition of system is the manifestation of the hegemony since the enlightenment of rationalist epistemology. That is the real message of CLS.

This same dichotomy, manifested in the world and in the spirit, showed itself at the conference, therefore, in the opposition of German and American, of system and life world, of theory and practice, of reason and aesthetic judgment. It was also named modern and post-modern, and masculine and feminine.

It is not surprising, on a moment's consideration, that there is such a close identity between CLS and feminism. (There was but one German woman on the program and she disclaimed any connection with the feminist movement.) The conference organizers had distributed the American women through a couple of panels, but that was rearranged on the spot so that all were on the same panel. Asked, by a member of CLS practicing its therapy, why that was done and why those women had not joined the discussion in any of the other panels, Lucinda Finley of Yale Law School answered, apparently for the group, that she found oppressive the kind of conversation carried on in the other panels. She was pursuing the theme of her paper, that the idea of formal equality worked against the interests of women because real differences could lead, within that rhetoric, to the disadvantageous treatment of women on the issue of maternity leave. Women are oppressed by maleness as the standard against which equality is measured. They are likewise oppressed, even at a radical conference, by the expectation that they should participate in a kind of discourse that they do not want

to be part of. She felt made to feel guilty, she said, that she had a greater interest in particularity and practicality than in abstract theory. The women's papers were the papers on concrete problems, racial discrimination in America and South Africa, as well as the maternity leave question. Non-participation, then, was not a negative matter, but a positive rejection of masculine theoretical discourse.

It is hard after that to drive completely from mind the thought that there may be after all a genetic division of labor that loosely follows gender lines regarding *disposition* to abstract thought. That is also a plausible reading of Carol Gilligan's *In Another Voice*. The problem is what valence such a difference might be given. Finley said she was willing to be different if she could be respected. I feel relatively safe in suggesting this interpretation because I see the general problem of (masculine) moral and political action being the denial of the dominant role affect, particularity, and intuition play in all human life. Even if there is a difference, men are more like women than most of us want to admit. Kant and Kohlberg oppress men and women alike by their commitment to generalization. That oppression may be all the more intense for women if it is true that they live closer to the heart of being. And that oppression is the same as the colonization of the life world by the system. The feminist/CLS insight needs to be made a part of a theory that by its inclusion would have to be reduced and humanized. But that work requires that CLS surrender its resolutely antithetical bias. The masculine tendency to theory will not, I think, be eliminated by therapy, but rather must be responded to in its own terms by an account of the divided self, whose reason represses not only his bad inclinations but his good, and of the therefore limited but useful place theory has in our lives.

To have such a theory about theory and its limitations we must begin by recognizing, as CLS implicitly does, that the problem everyone is concerned with is in our heads before it is in society. That implies that there is a way to be mentally well, therefore, that there is a nature that defines such matters. Even in CLS many will say, however, that what appears to be human nature is an artifact of culture, a changing historical phenomenon, and that therefore the social questions are prior. Surely our humanity can be realized only in society. We are like those birds that cannot learn their own song unless they hear it from others. Yet there is a species song to be learned; we cannot learn one that is not ours. There is another species of birds for which a number of possibilities exist, of which each bird will eventually choose one. Our nature shares that characteristic, too. It is discovered by each of us in society, and it admits of a range of possibilities—better understood as potentialities to be allowed to flower rather than as limits against which reason ought not bang its head. There is, therefore, no reason to believe that cultural and historical diversity undermine the plausibility of a natural form that is not raised to the level of ontological absolute.

What is important to understand, I believe, is that human nature is a force, even if it is not susceptible to conceptual reduction. It is, we might

say, the flow that we are advised to go with, the current of life, which T.S. Eliot compared to a river that runs in us, keeping its seasons and its rages, forgotten and unhonored by worshippers of the machine. (*Four Quartets: The Dry Salvages*). The colonization of the life world by the system is one of the rages of that unpropitiated, broad, brown god—a manifestation of our own nature, not simply an external force with a separate dynamic that is somehow taking over an otherwise stable and sound system. The two kinds of efforts to resolve the problem, the American and the German, are in the nature of bridge building—efforts by engineering to deal with and against the flow, because they deny the possibility that the river can take care of itself, knows the way to the sea, becomes violent only against bridges and dikes designed by misguided people seeking control.

Both suppose that there is something external to be overcome, or to be understood, or confronted, some enemy that must be defeated. But they are wrong. The Porkypine character in the *Pogo* comic strip was right many years ago when he said: “We have met the enemy and he is us.” There is no outside, no place for the leverage of reason or politics, therapy or theory. All is within. The river is all, both our inside and our outside, and to escape the bond of theory is to learn to trust the river.

WASHINGTON AND LEE LAW REVIEW

Volume 46

Spring 1989

Number 2

Editor in Chief

J. PATRICK DARBY

Senior Articles Editor

RONALD S. RANGE

Managing Editor

WADE MATTHEW FRICKE

Research Editor

KEVIN JAMES HENDERSON

Articles Editors

MARY HOGE ACKERLY

THERESA A. CALDARONE

MELISSA J. HALSTEAD-WHITE

JAMES D. HIGGASON, JR.

KATHRYN D. KIRMAYER

EDWARD S. MADARA, III

DAVID A. MCKAY

CHARLES S. MURRAY, JR.

ROBERT W. PONTZ

JILL SUZANNE TALBOT

ANNE R. YUENGERT

Staff Writers

ROGER ALSUP

R. MICHAEL CLICK

MICHAEL PAUL A. COHEN

KEITH PAUL DUET

F. RUSSELL DUPUY, III

SCOT A. DUVAL

WILLIAM E. FRAZIER

ROBERT K. GINTHER

JOHN STONE GOLWEN

DAVID L. GOODE

KAREN E. HAVENS

TIMOTHY A. HODGE, JR.

J. GARRETT HORSLEY

KATHLEEN S. MCLEROY

KRISTEN KEY MEAD

DIANE U. MONTGOMERY

BETH A. NIGHTINGALE

KYMBERLY K. OLTROGGE

J. STEVEN PATTERSON

THOMAS W. SMITH, III

JOEL A. WAITE

Faculty Advisor

SAMUEL W. CALHOUN

Staff Assistant

KAREN B. FREDENBURG

DEANS AND FACULTY—SCHOOL OF LAW

JOHN D. WILSON, B.A., M.A., Ph.D., *President of the University*
RANDALL P. BEZANSON, B.S./B.A., J.D., *Dean and Professor of Law*
WILFRED J. RITZ, A.B., LL.B., LL.M., S.J.D., *Professor Emeritus*
ROY L. STEINHEIMER, JR., A.B., J.D., *Robert E.R. Huntley Professor of Law, Emeritus*
EDWARD O. HENNEMAN, B.A., J.D., *Associate Dean and Associate Professor of Law*
MEREDITH SUSAN PALMER, A.B., J.D., *Assistant Dean*
DENIS J. BRION, B.S., J.D., *Professor of Law*
ROGER D. GROOT, B.A., J.D., *Professor of Law*
MARK H. GRUNEWALD, B.A., J.D., *Professor of Law*
FREDERIC LEE KIRGIS, JR., B.A., J.D., *Professor of Law*
LEWIS HENRY LARUE, A.B., LL.B., *Professor of Law*
ANDREW W. MCTHENIA, JR., A.B., M.A., LL.B., *Professor of Law*
JAMES M. PHEMISTER, B.S., J.D., *Professor of Law*
J. TIMOTHY PHILLIPS, B.S., J.D., LL.M., *Professor of Law*
DOUG RENDLEMAN, B.A., M.A., J.D., LL.M., *Robert E.R. Huntley Professor of Law and Director of Frances Lewis Law Center*
JOSEPH E. ULRICH, A.B., LL.B., *Professor of Law*
SAMUEL W. CALHOUN, B.A., J.D., *Associate Professor of Law*
WILLIAM S. GEIMER, B.S., J.D., *Associate Professor of Law*
STEVEN H. HOBBS, B.A., J.D., *Associate Professor of Law*
BRIAN C. MURCHISON, B.A., J.D., *Associate Professor of Law*
SARAH K. WIANT, B.A., M.L.S., J.D., *Law Librarian and Associate Professor of Law*
GWEN T. HANDELMAN, B.A., J.D., *Assistant Professor of Law*
LYMAN PAUL QUENTIN JOHNSON, B.A., J.D., *Assistant Professor of Law*
ANN MACLEAN MASSIE, B.A., M.A., J.D., *Assistant Professor of Law*
JUDITH A. MCMORROW, B.A./B.S., J.D., *Assistant Professor of Law*
DAVID K. MILLON, B.A., M.A., Ph.D. J.D., *Assistant Professor of Law*
JOAN M. SHAUGHNESSY, B.A., J.D., *Assistant Professor of Law*
GREGORY HOWARD STANTON, B.A., M.A., M.T.S., J.D., Ph.D., *Assistant Professor of Law*
THOMAS W. MAPP, B.A., J.D., *Visiting Professor of Law*
EVELYN L. WILSON, A.B., M.S., J.D., *Visiting Assistant Professor of Law*
RUDOLPH BUMGARDNER, III, A.B., LL.B., *Adjunct Professor of Law*
MALCOLM G. CRAWFORD, B.A., LL.B., *Supervisor, Western State Hospital Legal Assistance Program*
LAWRENCE H. HOOVER, JR., B.A., J.D., *Adjunct Professor of Law*
J. STEPHEN LAWRENCE, JR., A.B., J.D., *Adjunct Professor of Law*
MARY ZANOLLI NATKIN, B.A., J.D., *Supervisor, Legal Writing Program*
WILLIAM W. SWEENEY, A.B., LL.B., *Adjunct Professor of Law*
PAUL R. THOMSON, JR., B.A., J.D., *Adjunct Professor of Law*
EDWARD L. WEILBACHER, B.G.S., J.D., *Supervisor, Lexington Legal Aid Program*
LYN F. WHEELER, B.A., M.B.A., D.B.A., *Adjunct Professor of Law*
ROBERT C. WOOD, III, B.A., LL.B., *Adjunct Professor of Law*
HENRY L. WOODARD, A.B., LL.B., *Adjunct Professor of Law*
WARREN LEHMAN, A.B., J.D., *Frances Lewis Scholar in Residence*