Articles

Legal Disintegration and a Theory of the State

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This paper describes a topology of legal thought and the social conditions (the larger social construction of reality) of which that topology, that thought, is a component. Part I is a description of the structure of legal thought; Part II of the social conditions (a theory of the state, or political economy). The Conclusion considers the place of traditional legal practice on a new landscape.

I experience legal thought, roughly speaking, as a progression from the first year of law school, with its emphasis on common law and legal method, through the second and third year courses on statutory law and regulation of the economy, to later experiences of sociology of law, policy analysis, and critical thought. Consequently, in its entirety, legal thought could be represented by the curriculum and scholarship of any large, sophisticated modern law school, like my own. But legal thought is both larger than the academy (drawing on countless authoritative legal acts: cases, statutes, debates, etc.) and different than legal practice (whose relationship to legal thought is unclear).[1]

In general, I propose that legal thought is composed of a core and periphery and that the whole structure roughly corresponds to the dichotomous and fragmented political economy of the modern democratic welfare state. Thus, the movement of this paper is from legal phenomenology (the experience of legal thought) to a corresponding kind of cultural organization, called political economy.[2]

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[1] Although lawyers can do their pragmatic jobs with little formal ideology, throughout the paper I take the position that, consciously or not, types of practice can be identified with characteristic projects of legal thought. See also the Conclusion.

[2] Although political economy deals with material things, I consider it to be essentially cultural, an aspect of consciousness, because it is fundamentally a stable set of self reproducing mutual expectations about material things. Political economy seems more distant and objective (and certainly, in some sense, beyond the periphery of legal thought); but we are part of the political economy as well and hence can experience it phenomenologically. See *infra*, note 19 and accompanying text.

The problem that I am trying to confront is a sense of both disintegration and integration (or progressive movement) in the law. After an initial period of infatuation with its conceptual power and elegance, the observer of legal thought begins to see fragmentation, an assortment of epistemologies, social philosophies, and policy instruments, full of conflicts, sloppy patchwork, and disorienting gaps or discontinuities. At the same time, there seems to be both a structure to the disorder (though fragmented, the law is not a chaotic pile of rubble) and a progressive movement toward broader and more efficient social problem solving. In this paper, I would like to illuminate this sense of orderly disorder and progress flawed every step of the way by conflicts and confusion. By looking first inside legal thought, then outside to its broader cultural context, I hope to avoid arid idealism or conceptualism and achieve a kind of energy and depth of explanation not otherwise possible. (I also am implicitly rejecting an interpretation of legal thought as exclusively an ideological product of the legal academy.[3] I regard legal thought as at least partly a product of a larger, indeed society-wide, construction of reality).

A. A Basic Model of Legal Thought: Core, Periphery, Transition, and Beyond

The basic schema of legal thought presented in Part I is this: Legal thought has a core of "old fashioned law", consisting of a model of courts, litigation and cases; a private law model of social order; ethical justification; interpretive reasoning; and a hegemonic view of legal influence. The periphery of legal thought is composed of the opposites of the elements of the core: legislation and statutes; a public law model of social order; policy analysis as justification; positivist legal interpretation; and a marginalist view of legal influence.[4]

Since the elements of core and periphery are constructed as opposites, the conceptual space between them is empty, or discontinuous; and the legal thinker feels pulled in opposite directions, alternating between the two without an adequate transition. Movement from core to periphery is influenced by powerful opposing forces, like centripetal and centrifugal forces. In the core, law feels natural, secure (unchallenged), unadulterated by incompatible paradigms or rationalities. The core is also a space with an

[3] John H. Schlegel, *American Legal Theory and American Legal Education: A Snake Swallowing its Tail?, in* CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 49-84 (C. Joerges & D. Trubek eds., 1989) – and reprinted in this issue. I agree with Schlegel that legal thought helps legal academics distinguish themselves from both legal practice and academic departments, but I also see connections with larger patterns of social thought.

[4] The idea of core and periphery obviously owes a good bit to Duncan Kennedy: Duncan Kennedy, *The Political Significance of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737, 1765 (1976). This article differs from Kennedy's conception in several respects, for example, by incorporating policy analysis (and the rematerialization thesis generally); by seeing a progressive movement from core to periphery; and by seeing capitalism as implicated in the construction of both core and periphery, and the contradictions between and within them.

attractive blend of moral reasoning and social philosophy. At the periphery, everything is opposite: law feels awkward, bureaucratic and challenged both by other forms of thought and other kinds of experts. In this sense, there is a powerful centripetal force driving legal thought inward toward its core institutions. But there is also a powerful force running in the opposite direction. At the core, the law feels abstract, socially inconsequential, obsolescent; while the periphery seems modern, relevant, substantive, powerful.

Core and periphery would be complicated enough, but there is something else. Let me call it "transition" and "reintegration": an effort to project values of the core onto the periphery, breaking down the discontinuous space between them; and, in the process, extending the scope of legal thought to something which seems "beyond law".[5] Positive attributes of the core, like moral reasoning and social philosophy, are being combined with positive elements of the periphery, like sophisticated social problem solving. Transition consists of simple hybrids of core and periphery (which might be pictured as located in the otherwise discontinuous space between the two). Reintegration occurs when the structure of core and periphery breaks down and something is created beyond law. Incompatibilities between core, periphery, transition, and reintegration lend a sense of contradiction and confusion to the whole structure or topology of legal thought.

I. The Five Dimensions of Legal Thought

Core, periphery, transition and reintegration can be portrayed along five dimensions, as follows. (Subsequent sections will describe the dimensions in more detail).[6]

Dimension: decision making agency, process & type of decision
- *Core*: courts, litigation, case
- *Periphery*: legislatures, legislation, statute
- *Transition*: public law litigation, statutory rights of action
- *Reintegration*: social problem legislation, constitutional welfare rights

Dimension: substance of decision
- *Core*: private law
- *Periphery*: public law
- *Transition*: judicial regulation, common law as economically rational
- *Reintegration*: reflexive law (intermediate policy organizations)

[5] See section B.II.2, *infra*.

[6] The dimensions correspond somewhat to what Europeans in the Weberian tradition call the "rematerialization" of law. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law,* 17 LAW & SOCIETY REV. 239, 240 (1983).

Dimension: type of justification or rationalization
Core: legal analysis
Periphery: policy analysis
Transition: law and economics
Reintegration: moral considerations in welfare policy, policy analysis as participation and empowerment

Dimension: type of interpretation
Core: moral reasoning
Periphery: positive reasoning
Transition: statutory intent
Reintegration: situational interpretation of statutes, etc.

Dimension: role of law
Core: hegemonic
Periphery: marginal
Transition: implementation
Reintegration: institutional choice

II. Descriptions of Each Dimension, Transitional and Reintegrative Forms

This section of the paper offers a description of each dimension of legal thought, elaborating on the schematic presentation of the previous section.

Courts, litigation, case/Legislatures, legislation, statute. In the core legal action occurs in cases, through courts and litigation. Law is the resolution of disputes; change is anecdotal. In the periphery, legislatures make social legislation encompassing social problem areas, rather than discrete situations. Transitional forms include public law litigation (where the remedy breaks with the underlying dispute and addresses a social problem area) and private rights of action under statutes (where the statute is imagined to create a zone of protection for individuals). I can't think of any truly reintegrative form. It would be like bringing a lawsuit to solve a social problem. Social reform litigation comes close, as does the Michelman idea of constitutionally required welfare benefits.[7]

Private law/Public law. In the core, law takes the form of legal relations between individuals, that is, in general, the form of rights (property, torts, criminal law). In the periphery, law takes the form of social planning, or engineering, focussing on

[7] Frank Michelman, *On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969); Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

consequences for and behaviors of organizations, groups, sectors, societies. Transitional forms include the proliferation of public law considerations in private law making (for example, public interest invading the supposedly absolute right of property, judicial regulation of contracts).[8] Another transitional institution is the suggestion of law and economics that private law automatically serves public purposes by adjusting for market imperfections. A reintegration is the contemporary idea of using intermediate organizations as the vehicles for social policy (for example, HMO's, schools, publicly minded corporations, and reconstituted nursing homes). This "reflexive law" attempts to combine social engineering with a sense of voluntarism and individual rights.[9]

Legal analysis/Policy analysis. Legal reasoning is conceptual, ethical, analogic; and rests (somewhat paradoxically) on an ethical world view, a picture of a just and orderly society. Policy analysis is consequentialist (resting on predictions about social behavior, including everything from social deviance to balanced budgets). Policy analysis is substantively specific, requiring expert knowledge about the behaviors of specific social systems, such as education, banking, the police. Therefore, in the periphery, legal analysis is hotly contested by substantive expertise, both general (economics, policy analysis) and special (e.g., technical knowledge about pollution). Policy analysis also tends to be substantively fragmented and ad hoc, a series of solutions to specific social problems. Law and economics is a classic transitional form, attempting to invest legal reasoning with consequentialist potency. A powerful reintegrative form is just emerging: the idea of the welfare state as embodying a series of moral judgments about society.[10] Another reintegration is a new form of policy analysis where the emphasis is on participation and empowerment rather than top-down, command-control implementation.[11]

Legal Reasoning/Positivist Reasoning. Here we switch from reasoning about formation of law (justification for making law) to interpretation of the law (the meaning of law already made). Legal reasoning in the core (the common law) combines justification and interpretation in a single act. Legal reasoning at the periphery is positivist, treating decisions as already made (for example, in the specific provisions of statutes) and

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[8] Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

[9] Teubner, *supra*, note 6.

[10] MICHAEL PIORE & CHARLES SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY (1984); William H. Simon, *Rights and Redistribution in the Welfare System,* 38 STAN. L. REV. 1431 (1986).

[11] JOEL HANDLER, THE CONDITIONS OF DISCRETION (1986); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982); SERGE TAYLOR, MAKING BUREAUCRACIES THINK, THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (1984). The purest application of the approach is in business management: TOM PETERS & ROBERT WATERMAN, IN SEARCH OF EXCELLENCE, LESSONS FROM AMERICA'S BEST RUN COMPANIES (1982); ROSABETH MOSS KANTER, THE CHANGE MASTERS, INNOVATION AND ENTREPRENEURSHIP IN THE AMERICAN CORPORATION (1984).

standardizing huge numbers of decisions in bureaucratic routines (for example, the standard operating procedures of the social security administration). Statutory intent is something of a transitional form (for example, statutory interpretation based upon policy purposes). Reintegration is rampant, including pure interpretation as a canon of statutory interpretation,[12] situational interpretation of law in light of local application,[13] and CLS universal interpretivism (applied to cases, statutes, and policy analysis).[14]

Hegemonic law/Societally marginal Law. At the core, there is no distinction made between law and compliance (rules are discussed as if people will comply with them). Thanks mainly to the sociology of law, peripheral legal thought now accepts the idea of the marginality of law in society. Legal commands are recognized as mediated by private fields of incentives and values, with various outcomes (little or no effect, reduced effect, unintended effects, etc.). Indeterminacy of effect created problems for legal analysis and, because of the frequent disjuncture between moral goals and behavioral outcomes, forced legal analysis in the direction of consequentialist policy analysis. Transitional forms include implementation analysis, which attempts to specify the precise impact of legal programs.[15] But implementation, like the core of hegemonic law, retains a state-centered view of society. Reintegration includes theories of institutional choice, like transaction cost economics.[16] (Choices for regulating transactions include markets, hierarchies, trust, and, in certain specialized situations, courts). By a breathtaking reconceptualization, legal purpose is defined as choosing among institutions, legal and nonlegal, thereby annexing previously nonlegal territory, and relegating the previously legal territory to marginal status (e.g., disputes in court over idiosyncratic capital between strangers or those terminating a relationship).

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[12] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Richard Posner, *Statutory Interpretation -- In the Classroom and in the Courtroom*, 50 U CHI. L. REV. 800 (1983); Jerry L. Mashaw, "Positive Theory and Public Law" (Rosenthal Lecture delivered at the Northwestern University Law School, February, 1986), on file with author.

[13] BARDACH & KAGAN, *supra*, note 11.

[14] James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought,* 133 U. PA. L. REV. 685 (1985); Gary Peller, *The Politics of Reconstruction*, 98 HARV. L. REV. 863 (1985).

[15] In a sense, my own work on implementation has been concerned with synthesizing findings from the sociology of law about private social fields with findings from implementation about local variability of impact. I have integrated the two perspectives in a framework of political action, reaction, and social construction at all stages of the implementation process: William H. Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47 (1983); William Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 LAW & CONTEMP. PROBS. 7 (1985).

[16] Thomas M. Palay, *Comparative Institutional Economics: The Governance of Rail Freight Contracting*, 13 J. LEGAL STUD. 265 (1984); Neil Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis,* 51 U. CHI. L. REV. 366 (1984); William H. Clune, *Institutional Choice as a Theoretical Framework for Research on Educational Policy*, 9 EDUCATIONAL EVALUATION AND POLICY ANALYSIS AND ADMINISTRATION 117 (1987).

III. A Summary: The Dynamics of Core and Periphery

The cumulative effect of all of these dimensions is an energetic dynamism between the core and periphery of legal thought. One effect is introspection and a provincial mentality, as legal professionals cling anxiously to the core symbols and activities of their specialty, legal interpretation and litigation, even at the cost of gradual obsolescence. (The rearguard action of trial lawyers defending the crumbling tort system is an example, along with the somewhat shocking indifference of legal professionals to thinking about compensation systems in a more systematic way. See next section).

But exactly the opposite trend occurs at the same time, a torrent of novel perspectives, activities and institutions, to the point that the discourse of a privileged, progressive law school faculty can become extremely heterogeneous, a sort of United Nations of intellectual territory. Legal professionals know lots about very different kinds of institutions – police departments, business corporations, families, schools, agriculture, women, nuclear energy production, apportionment of scarce water, international tax treaties, law in socialist societies, health care delivery systems, entertainment and sports contracts, consumer buying habits, T.V. advertising for children, labor unions, income maintenance for the poor, mental health care for homeless schizophrenics, and the asylum needs of Salvadoran refugees (without even touching the diverse theoretical, disciplinary, and ethnographic ways of experiencing these phenomena).

Law is a small fortress which offers a restricted and artificial perspective on the outside world through its narrow portholes of legal method and legal procedure; but the doors to the fortress are wide open; and the fort is filled with different strangers every day. The dichotomization of law is thus a dynamic phenomenon consisting of inward pressure on the uniquely legal viewpoint and outward pressure from the intrusion of foreign perspectives. The total sensation is both energetic and uncomfortable.

IV. A Small Case Study: Tort Law in Transition

At this point, a concrete example of the above trends probably would be helpful. The example of tort law in transition reflects many of the trends and also provides an introduction to some of Part B.[17] The transition is both topological (moving from different locations on an existing map of legal thought) and, I think, historical (at least in the broad outlines).

[17] The story I am telling here is essentially an abbreviated version of Stephen Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985), and conclusions reached from my own teaching of the classic no fault materials in Insurance Law. See also HENRY STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS (1987).

Tort law is portrayed, both in scholarship and cases, as involving at least three rationales or purposes: an adjustment of moral responsibility, compensation of victims, and deterrence (accident prevention). Legal methodology reasons about these purposes on a case by case basis and tries to achieve an appropriate selection or balance. But the program of realizing all three purposes simultaneously is becoming increasingly difficult because of changes in the social environment and the periphery of law. As a result, tort law itself is under attack and is thought by some authorities unlikely to survive another century of development.

From the inside of tort law, the problem is experienced as threefold: conflicts between the purposes, inefficiency in achieving the purposes, and a need for coordination with other social and legal institutions (and none of these problems can be solved within the constraints of existing core legal methodology). Compensation and deterrence compete with each other. Compensatory efficiency is achieved by broadening coverage, deterrence by narrowing it. Strict liability broadens compensation but interferes with deterrence by (at least ostensibly) eliminating the criterion of fault.

Furthermore, even if compensation and deterrence could be uncoupled, in tort law there are strict constraints on realizing either of these purposes. Compensation is limited by the requirement of causation (attribution of responsibility to identifiable defendants) and the corresponding impossibility of social insurance (spreading the cost in a fiscally rational manner to a broad base of taxpayers). Deterrence is limited by the clumsiness of money judgments as a method of social control of accidents. Viewed from either perspective (compensation or deterrence), litigation appears to be a preposterous administrative mechanism. And tort law finds it increasingly awkward to either recognize or ignore related social and legal institutions which are designed to achieve the policy purposes in a more efficient manner (especially private insurance, both first party and liability, and social insurance, like workers' compensation). The collateral source rule, for example, looks like socially wasteful double compensation; but its opposite (reducing tort judgments by the amount of alternative compensation) casts doubt on the need for tort law in the first place. No fault plans begin to replace tort in a variety of areas (automobile, nuclear accidents, etc.); and authorities repeatedly call for the replacement of tort law with a more comprehensive plan for compensation and deterrence.

How shall we explain this pattern of tort law in transition? From the inside, the fateful step appears to be the recognition of consequentialist social policy purposes (compensation and deterrence). Once tort law left its undisputed high ground of the adjustment of moral responsibility, a fundamental critique on grounds of policy inefficiency became all but inevitable. From the outside, perhaps explaining the adoption of consequentialist goals, the story looks to be one of increasing social complexity and demands for improved performance. In an industrial society, tort law found itself required to process millions of transactions, in a setting with gigantic requirements of compensation, and sensitive issue of under- and over- deterrence (consider swine flu as an example of overdeterrence based

on the inability of the tort system to tax the beneficiaries of vaccination; the problem of attributing causation; and, possibly, socially unrealistic damages).

Meanwhile, that same social complexity provoked an array of more adequate social policy instruments, including social and private insurance. The venerable institution of tort law found itself surrounded by a range of broader, more efficient, more thoroughly planned and rationalized policy instruments directed at the same set of problems. A respectable argument can be made for the continuing vitality of a better defined tort law in this modern environment.[18] But the main reason for its survival seems to be a professionally oriented (and not particularly adaptive) defense of the status quo.

Anticipating Part B, and following the pressures of social complexity further in the direction of legal reintegration, we can see that the patchwork of social policies gradually replacing the tort system is itself becoming obsolete. Gaps, overlaps and inequities of compensation are the inevitable result of statutory and private systems with limited coverage; and the resulting social and economic waste seems less affordable. Prevention of accidents requires more sensitive adjustments, some involving the active participation and cooperation of potential wrongdoers (e.g., enterprise liability). Self interested, special interest politics is a serious obstacle to necessary legislation on both fronts (e.g., privileged positions in comfortable compensation schemes, immunity from costly accident prevention).

B. Disintegration in Legal Thought and the Theory of the State

In this part of the paper, I want to tell the same story as Part A – core, periphery, reintegration – from outside the confines of legal thought in the realm of social thought called political economy. Legal thought and political economy seem not just similar but tightly related parts of the same construction, one embedded in the other. Similarity of structures is not the only reason for believing that the two areas of thought are related. There are also multiple points of substantive convergence, where the two areas of thought seem to be saying the same thing for the same reason. As shown below, legal thought deals almost exclusively with economic relationships and uses the same ideological constructs to interpret and shape them (libertarianism, market failure, etc.).

Notwithstanding this convergence, I do not always tell the story in a way that permits point by point logical correspondence. For example, I do not show how each specific kind of reintegration in legal thought corresponds to a specific point on the map of political economy. Instead I try to establish a parallel set of structures, discontinuities and ideological movements. Though not strictly literal, I believe that the comparison

[18] See *infra*, note 33.

illuminates, enriches and quickens our understanding of legal thought. Lifeless areas of legal thought become lively and meaningful when placed in the context of political economy.

The bipolar structure in political economy which corresponds to the core and periphery of legal thought is a core of economic liberty and a periphery of social complexity which I maintain is intrinsic to a capitalistic organization of the economy.[19] The next section of the paper (B.I) describes that approach to, or theory of, political economy, thereby laying the foundation for subsequent sections on the structure of law. Section B.II describes the corresponding bipolar structure of law, including tendencies toward reintegration in the peripheral aspects of political economy emphasizing social cooperation. Section B.III discusses contradictions (tensions) between core and periphery which further explain the sense of discontinuity in law and the difficulty of realizing the project of social cooperation and legal reintegration.

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[19] My theoretical stance in this paper is an unusual blend of several different traditions. With marxists, I see fundamental contradictions in capitalism; but, with CLS, no materialism, determinism, class warfare or instrumental theory of the state; and, like mainstream critics of capitalism, I see strong liberating trends in both major projects of capitalism (as described in Part B). Strongly influenced by the sociology of law, I reject that school's disembodied policy-instrumentalism. I also put sociology of law inside legal thought, rather than outside, where it perceives itself. I follow the neo-Weberians in the ideas of rematerialization and social complexity, but I reject the evolutionist theme in favor of fragmentation and contradiction. Finally, this paper is strongly influenced by the theory of autopoiesis, a theory of self-organizing living systems, including communication. Autopoiesis becomes the vehicle for bridging the gap between thought and action. However, unlike proponents of strictly closed autopoietic systems, I see mixed and fragmented systems with protected cores, open peripheries, and lots of internal contradictions capable of deconstruction. An illustrative set of references corresponding to the above influences is: JAMES O'CONNOR, THE FISCAL CRISIS OF THE STATE (1983); CLAUS OFFE, DISORGANIZED CAPITALISM (1985); CLAUS OFFE, CONTRADICTIONS IN THE WELFARE STATE (1985); Robert W. Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57 (1984); G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SOUTHWESTERN L.J. 819 (1986); MICHAEL PIORE & CHARLES SABEL, THE SECOND INDUSTRIAL DIVIDE, POSSIBILITIES FOR PROSPERITY (1984); NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY (1982); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law,* 17 LAW & SOCIETY REV. 239 (1983); Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 19 LAW & SOCIETY REV. 291 (1984). In narrative form, my approach goes something like this. Start with the proposition that social structure, all social structure, is meaning -- routinized perception and systems of symbolic interaction. Systems are somewhat autonomous, possessing their own logic and cultural codes which resist exogenous discourse. Systems in this sense include families, organizations, institutions, the economy (a system of symbolic codes based on price), fashion, law. But systems also are linked and connected, sharing certain common social constructs. It is a fact that people can stand both inside and outside systems -- feel the esthetics of fashion as well as analyze it; reason legally as well as deconstruct that reasoning. And perhaps the capacity to stand inside and outside systems, a system of decoding systems, is itself a product of social complexity, arising naturally from the encounter with multiple systems of meaning. See Thomas C. Heller, Structuralism and Critique, 36 STAN. L. REV. 127, 147-51, 163-72, 187-97 (1984). This does not mean that law is "the instrument" of capitalism. Law is a part of capitalism; and capitalism is constituted by law as much as its other constitutive systems. There is no pure, denatured capitalism orchestrating the cultural systems from some hidden central location. And, though our culture may be preoccupied with material things, there is no material causation (everything is symbolic, even symbols about things).

I. The Two Projects of Capitalism: Economic Liberty and Social Interdependence

Capitalism may be thought of as involving two grand projects, both intrinsic to its existence as form of social organization: economic liberty and social interdependence. Economic liberty is extremely familiar because it corresponds to the theory of classical liberalism and is the primary feature of contemporary political ideology about capitalism. For the legally trained, economic liberty corresponds to the market facilitating structure of the first year curriculum, based, as it is, in models of classical liberalism (property, tort, contract, in their unadulterated form, criminal law as a protection of property; constitutional law as a mushy exception). Economic liberty is intrinsic to capitalism because capitalism involves delegation of authority to property owners who are entitled to make decisions about economic and social policy and retain profits.

But capitalism also involves an intrinsic project of social interdependence and complexity emerging from the cooperative by- products of market transactions and concerted collective political activity. Markets produce networks of production, consumption, trade and interlocking innovations. Collective political activity produces complex organizations of production and marketing as well as economic and social planning, both legal and non-legal. (Think of the design of the mass production economy, involving a characteristic organization of the workplace, a model of management-labor relations, complex controls over mass markets, design of welfare programs to maintain demand.[20] On a global scale, think of the International Monetary Fund, its clients, constituents, and machinations.)
In a general sense, the project of complexity and interdependence seems to involve two mutually reinforcing tendencies: (1) The increased density of social life (the end of empty spaces and the increasing development of human and natural resources). To make society more productive, capitalism has relentlessly built innumerable avenues of coordination and communication. (2) Sophisticated information about interdependencies. The same technology which is needed to create more production also demonstrates the

[20] See HUGH HECLO, MODERN SOCIAL POLITICS IN BRITAIN AND SWEDEN 1-2 (1974): Perhaps the most fundamental change that is taken for granted is the growth of modern social policy. Occurring within the span of three or four human generations, it entails a transformation that writers of the 1930's and '40's were accustomed to call "a new phase in man's history". Almost the only time our great grandfather came in direct contact with the state was when he posted a letter or encountered a policeman ... Today, in most industrialized nations, the citizen finds much of what he earns disposed of by the state. A great deal of this money goes to provide for his future before any question arises of his personal inability to help himself. If he is ill or becomes injured, if he grows old or is unable to find a job, if his mate bears children or dies, if he seeks housing or education, some explicit or implicit involvement with a state social policy is almost unavoidable ... While the rate of total government spending in industrialized nations has grown perhaps 80 to 90 times in real terms during this period, the rate of spending on social policy has probably mushroomed by 5000 to 6000 times ... When such changes in social provision by government are identified, they have usually acquired the collective label welfare state ... In this study, I prefer to use the term social policy to designate state interventions designed to affect the free play of market forces in the interests of citizens` welfare. (Emphasis in original). See also MICHAEL PIORE & CHARLES SABEL, THE SECOND INDUSTRIAL DIVIDE, POSSIBILITIES FOR PROSPERITY (1984); JANE JACOBS, CITIES AND THE WEALTH OF NATIONS, PRINCIPLES OF ECONOMIC LIFE (1984); ALFRED D. CHANDLER JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

interdependencies in ways that are more difficult to obscure politically. Think of the role of information in debates about acid rain, nuclear war and tests, and tobacco smoking. While these examples all come from knowledge produced by physical sciences, models of interdependence also have great influence in the social sciences. Consider economic forecasts, estimating the social costs of childhood neglect, family therapy, and the emphasis of feminism on social networks and support.

Because of increased social complexity and interdependence, actions in one sphere of activity seem to produce almost immediate, observable effects in several other areas. Manufacturing creates acid rain which harms the tourist trade in other parts of the state, other states, or other countries. The economic welfare of third world countries affects the economic welfare of the advanced economies. War exercises in El Salvador produce Spanish speaking refugees in Texas. Rent controls affect housing supply. Technology develops and is disseminated quickly.

II. Impact of the Two Projects on Law: Separate Effects

Here, I want to discuss the separate impacts on law of the two projects of capitalism on law (the basic structure of core and periphery). The effect of contradictions will be considered in the next section.

1. The Core of Economic Liberty

The impact of economic liberty on law is economic dynamism and hegemony. Because the law has delegated so much power to economic actors, the law also must cope with the consequences, which are profound, widespread, rapid, and constantly changing.

The first consequence of economic dynamism and hegemony (dominance in social life) is simply the substance or content of law. Most of our law is political economy, a vast network of provisions for facilitating market transactions, settling disputes, and preventing harmful consequences. Legal humanists, like myself, eventually experience a revelation about the dominance of business and economics in the law. Practically the entire law school curriculum is wrapped up in the production and distribution of wealth. Family law becomes preoccupied with property rights. Criminal law has much to do with poverty and property (e.g., drugs). Childcare and its associated injuries, which become the mental health problems of tomorrow, come to focus on the problem of meeting the dependency needs of children in a world of two earner and single parent families (and in a world of commodified self-preoccupation). The law of politics becomes largely a question of what controls to place on the power of wealth in the electoral process. So deep is this connection between business and law, so ingrained in our consciousness, that it is hard to imagine any other way. Business is the giant in the neighborhood.

The second consequence is the speed and diversity of the changes produced by uncontrolled economic decisions. Products liability, immigration law, environmental protection, regulation of banks, employment security, tax – all of these areas of law, and many others, reflect continuous adjustments to constant changes brought about by economic actors and the resulting political demands for compensation.

2. The Periphery of Social Interdependence

The connection between social complexity and legal thought is multifaceted. One effect is a greatly expanded range of application of law. Increasing numbers of disputes require some form of at least temporarily binding and stable adjustment – hence, a tendency toward widespread legalization. The economic liberty aspect of law is a non-intrusive system of facilitation for laissez-faire capitalism, plus a tightly packaged system of rules for resolving disputes in courts. It is tight, elegant; and it doesn't do much. Because of interdependence, law is involved in so many things that it is reasonable to speak about the legalization of society (and of its subsidiary institutions – the legalization of education, business, etc.). Law apparently is trying to serve as the so-called steering mechanism for resolving some of the multiple interdependencies of modern society, in such areas as environmental protection, macro-economic fine tuning, provision of human services, consumer protection, and so on. No one who thought all of law was described in *Blackstone's Commentaries* would comprehend modernistic creations like Simpson-Mazzoli, Gramm-Rudman, or the Education for All Handicapped Children Act.

But the expansion of law is not simply a matter of a proliferation of technical statutes. Along with the growing range of social problems and issues, has been a parallel growth of broad norms of justice, like equal protection, due process and administrative fairness. This is not to say that norms of justice transform whole areas of social life. The norms are marginal and contested every step of the way. But they cannot be dismissed as insignificant either. On the judicial side, think of developments like exceptions to the contract at will, a type of judicially engrafted job security; or due process rights in the immigration process and schools; or judicial regulation of insurance contracts; and each of these has obvious legislative and administrative counterparts: pension regulation, disciplinary codes, social insurance.

A second effect of interdependency on legal thought is a new performance requirement – the legal solutions must work, and that has two other effects. Most important, law cannot afford to remain ideologically ignorant of its effects. Policy orientation, including sociological jurisprudence, comes to replace moralistic thinking. Moreover, in order to serve as part of a flexible, problem solving process, law must acquire a high degree of both positivism and politicization. Positivity means that law can be designed and redesigned to meet changing circumstances with new adjustments. Politics also helps law be more

responsive, because the pressure for dispute resolution is felt first and quickly in the political sphere.

Projected even further, the trend toward social complexity moves away from positivism and toward social and legal reintegration (including a new form of law). Democratic social organization and politics can be seen as a necessary facilitator of social interdependence. Business and other kinds of organizations learn that the old bureaucratic and hierarchical forms of authority are inefficient and must be replaced with a new principle of organization: staff participation and empowerment.[21] The trend also can be seen in policy analysis. Moving beyond command-control, top-down policy, and even the more sophisticated forms of unidirectional implementation analysis, government policy must discover means of enlisting the cooperation of regulated organizations. Meanwhile, a world wide educated middle class with expectations of security, participation, dignity, and quality of life may be the engine of increasing political democracy. Global economic organization may foreshadow social cooperation on a planetary scale.

Alas, to those who fail to see evidence of a final victory of these beneficial trends, it must be admitted that the political reality at any given moment also consists of some groups trying to create zones of security and welfare at the cost of others; and that some legalization flows from endless series of property rights designed to create protected borders. That part of the story is picked up in the next section, on political- economic contradictions.

III. Impact of Contradictions on Law

The two projects of capitalism are both mutually reinforcing and contradictory. Markets require and produce social cooperation, but liberty undermines it. Interdependence is increasingly a condition of capitalism, but reduces the hegemony of property owners. Within itself, interdependence has contradictory effects: an accelerated process of dumping problems on others (or, in economics language, externalizing them), but also resistance to being dumped on and correspondingly sophisticated social controls. Dumping usually creates lots of complaints from people and organizations with some influence over the dumper – hence a different kind of connection between capitalism, democracy, and the liberated middle class. The rest of this section discusses aspects of these contradictions in more detail. B.III.1 examines problems of access to the complex, fragmented legal structures produced by social contradictions. B.III.2 extends the analysis of access and membership to the design of the welfare state. The final subsection, B.III.3, is an

[21] PETERS & WATERMAN, *supra*, note 11; ROSABETH MOSS KANTER, THE CHANGE MASTERS, INNOVATION AND ENTREPRENEURSHIP IN THE AMERICAN CORPORATION (1984).

examination of the problems created by contradictions in the political system per se (which I call "liberal democracy").

1. Issues of Access to Collective Benefits

The first reflection of social contradictions on law is the problem of access to collective benefits. Law responds to increasing complexity by developing more sophisticated techniques of social planning, often culminating in the creation of administrative structures designed to deal with a category of social problem on behalf of a class of people. Examples include income maintenance, social insurance, safety regulation, economic planning, and membership in organizations whose members are protected by various legal rights. The positive aspect of these programs is that they protect large numbers of people in a reasonably efficient way that allows coordination with other social programs (compare the efficiency of Social Security, for example, with either private insurance or, especially, tort law, Milton Friedman to the contrary notwithstanding).

The access problem comes from the issue of membership. Almost every social program raises issues of membership (in/out) and internal stratification. Membership issues usually are obvious, beginning with the immigration issues which determines membership in wealthy countries, right down to employment in stable organizations, coverage by social insurance, and protection by safety laws. Internal stratification of protection is more subtle but also gets a good bit of attention, for example, the fate of the elderly under cost cuts to health insurance, or the practical coverage for poor people under administered health care insurance, like Health Maintenance Organizations.

2. Design of the Welfare State

On the largest scale, issues of planning and access, inclusion and exclusion, can be seen in the design of the welfare state. From recent research, it appears that market/welfare economies are held together by some kind of broad, incrementally discovered design, like the mass production economy described by Piore and Sabel.[22] And it is reasonable to believe that present design is in crisis. The partnership of mass production and Keynesian welfare economics is foundering on excess capacity, unproductive international competition, the collapse of the labor movement and a popular but degenerate ideology of liberalism. The current wave of conservative philosophy seems to represent a repression of the collective side of capitalism, a loss of memory about capital's constructive role and self interest in the welfare state. For the moment, the program of economic liberty has become unhinged from its collective counterpart. Conservatives (like David Stockman) now

[22] PIORE & SABEL, *supra*, note 10.

actually argue that practically all government spending represents a subsidy for the unproductive sector of society, eliminating in a single dogmatic stroke insights of public finance about externalities and of Keynesian economics about the interest of capitalism in maintaining demand among idle and underpaid workers and consumers.

This moment in history opens the opportunity for creating, inventing, forging new social and economic patterns, an enterprise in which scholarship plays a part. Following suggestions in all sorts of research – institutional economics, organizational theory, feminism – we can assume that the new plan must achieve a higher degree of participation and membership than the old one. Greater productivity will require greater cooperation (local ownership and understanding, superior incentives, etc.). Yet the battlefield is rife with conflict and strewn with obstacles. The new information technology, for example, may be another effort by capital to increase productivity by isolating workers and creating unidirectional (hierarchical) social cooperation.[23]

3. Liberal Democracy

Contradictions between the two projects of capitalism also are reflected in the political order developed in the West to cope with economic dominance – liberal democratic politics and welfare state capitalism.[24] Social interdependence puts pressure on law to be more sophisticated, functional, adaptable, and socially responsive. Law adjusts by decreased formalism, increased openness to competing symbolic orders, improved techniques of deconstruction, new regulatory institutions (bargaining, new policy instruments, etc.).

But the principle of liberalism contradicts and undermines the basis for a broader, more coherent, stable, and cooperative response to economic dominance. This erosion occurs in four, connected ways. First, libertarianism is preoccupied with the protection of economic liberty to the exclusion of more cooperative and sophisticated collective policy. Almost any amount of waste and clumsiness can be justified for the sake of preserving the underlying political power relations. Second, liberals in the welfare state find themselves sponsoring enormous amounts of government intervention without any philosophical justification or coherent political theory. The state becomes nothing more than the accumulation of ad hoc responses to economic and political crises. Third, a vast gulf opens between the

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[23] Fernando Rojas, *Is Information Technology A Capitalist Tool for Further Subordinating Workers*?, Working Paper 1-6, Institute for Legal Studies, University of Wisconsin-Madison Law School, March, 1986.

[24] In summarizing, I rely on the work of Claus Offe, *supra*, note 19; and I refer to my own paper, presented in draft at the first American/German conference on reflexive law. See William H. Clune, *Unreasonableness and Alienation in the Continuing Relationships of Welfare State Bureaucracy: From Regulatory Complexity to Economic Democracy*, 707 WIS. L. REV. (1985).

prevailing political philosophy of anachronistic laissez- faire individualism and the overwhelming evidence of massive governmental interventions. Government becomes a series of decisions without memories. Fourth, liberalism protects economic liberty and resolves the paradox of unexplained governmental action through a symbolic degradation of politics. Politics becomes the dangerous, imperialistic enemy of a productive private sector, captive of acquisitive collectives called "special interest groups".[25]

But social interdependence also undermines liberalism. Liberalism organizes politics in terms of property and rights. Social relationships are pictured as consisting of zones of individual autonomy (property) protected by powerful legal remedies (rights). Anything not protected or which interferes with property can be appropriated or destroyed, hence the search for ways of externalizing costs, locating new frontiers, and dumping problems on someone else. Increasing interdependence and social complexity makes liberalism hopelessly simplistic and internally contradictory. Protection through autonomy, immunity and social isolation becomes impossible. Protection must be achieved instead through social cooperation and functional problem solving. The model of rights begins to look like a ludicrous method of social planning, pitting members of the collective against each other in a haphazard series of disorganized, egotistical contests which disrupt social bonds and overextend the total amount of collective resources.[26] Liberally facilitated market transactions help build social complexity, interdependence and cooperation; but libertarianism prevents the collectivity from making desirable adjustments for resulting externalities and insecurities, or achieving positive cooperation unavailable through markets. And clearly, these two countertendencies of social interdependence are at war with each other. Diminishing formalism and increasing institutional flexibility seem anomalous, threatening and contradictory to the world of property and rights. ("Flexible, you say. Doesn't sound like property to me").[27]

And so, it does look like old fashioned liberalism as a comprehensive model for social order is in a true state of crisis (not stress – crisis). The impact of the fragmentizing influences described in this section can be seen in the behavior of right wing radical populist groups presently gaining strength in the United States.[28] Each group, bewildered by the unexplained actions of government and obsessed with economic liberty, has its own

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[25] See Clune, *id*.

[26] Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TX. L. REV. (TEX. L. REV.) 387 (1984); White, *supra*, note 19; Edward V. Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

[27] See John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1 U. of Ill. L. Rev. 41 (1986).

[28] For additional insights on the perceived conflict between liberty and authority in American culture, see Stewart Macaulay, "Images of Law in Everyday Life: The Lessons of School, Entertainment and Spectator Sports, Institute for Legal Studies", University of Wisconsin-Madison Law School, Working Paper 2:3 (1986).

eccentric, or bizarre, theory of absolute personal autonomy and its own kind of populist paranoia about who is responsible for loss of autonomy. Absolutist demands for autonomy are paradoxically coupled with punitive programs against enemy groups. People threaten violence against government officials for being asked to pay taxes and wear seat belts, then turn around and demand that government brand people with Aids and execute drug addicts. These extreme splits between personal and collective actions are the populist extensions of the contradictions between individualism and altruism recognized by Kennedy in the law of tort and contract.[29]

C. Conclusion: Traditional Law in a New Key, Old Paths on a New Landscape

The theme of legal disintegration is partly a manifestation of anxiety; and conferences and papers on legal disintegration are partly eschatological events about the end of the legal world. As a law school person, I would be remiss if I did not include at least a short section answering an obvious question emerging from all these supposed trends away from the traditional core – is traditional law dead? I would say that traditional legal analysis is quite vital, but its role has changed and become more eclectic. Only by seeing traditional law on the changing landscape can its selected positive roles be appreciated. (At times, I tend to use "positive" in a self consciously, left-oriented fashion which can easily be converted to the reader's own political positions).

In one sense, most of the action has moved elsewhere. Policy analysis has replaced moral reasoning as the dominant rhetoric of policy formation. Legal finality divorced from policy analysis tends to be somewhat empty. Legal institutions like courts and litigation are at best only one of a range of possible policy instruments and, at worst, an irritating anachronism. The common law of market facilitation is not at the leading edge of social development. In many settings, lawyers seem like they don't know anything useful and specialize in obstructionism defended by quaint legalisms ("the negligent should pay").

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[29] See Kennedy, *supra*, note 4; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979). Common people seem to be in a good bit of pain, distress and confusion as they cling to the idea of property as a source of protection and social connection. Blue collar, "conservative Democrats" of my acquaintance in Chicago identify government intrusion on their small possessions as socialism, thereby isolating themselves from cooperative social planning, yet find these same possessions constantly at risk from market transactions and the inevitable, haphazard crisis management of the welfare state. Ethnic bonds which provided models of genuine community are dissolved in the new patterns of rational bureaucracy, commodity consciousness, and social class. Meanwhile the national government elected on their anxieties pursues a dangerous strategy of minimalism, preserving the maximum amount of economic liberty by staying as close as possible to the border of social catastrophe. Playing this kind of social chicken takes a good deal of agility and nerve, personality characteristics with which our entrepreneurial ruling class comes well equipped. But the corresponding social experience is stressful and frightening. In many ways, the modern social consciousness is a bizarre combination of complacent materialism (emphasizing the digestive values of consumption) and nauseating risk (emerging from lack of social cooperation and repressed below the placid surface of everyday consumerist life).

But this picture is only valid as a gross generalization. A closer look reveals all sorts of projects going on, some traditional, some modern. A very small inventory of such projects to give a flavor of the idea is as follows: In the traditional category, property transactions and ordinary disputes over property are impossible to eliminate in a complex economy, and some of the disputes will continue to place a demand on civil litigation (and its substitutes). The core of legal method also cannot be eradicated. In spite of the trend toward prospective, consequentialist reasoning, there is an equally strong trend toward legal finality. A complex social and economic situation actually increases the demand for stabilization of norms at the same time that it demands increased flexibility. Some matters must be considered "as if" they are already decided. In light of the need for flexibility, and the ubiquity of consequentialist reasoning, reification in law (the "itness" associated with finality) often seems artificial; but it is not "nonsense".[30] As pointed out earlier, the prevalence of complex statutory schemes with bureaucratically administered norms represents an increased degree of finality (or legal positivism) compared with the open-textured common law.

In the intermediate category, law has a strong role to play in membership (or access) disputes spawned by complex social welfare programs and economic planning. The simplest kind of dispute consists of identifying second class treatment and complaining about it. A more subtle project is recognizing structured obstacles to access, such as the fragmentation of the labor movement through a policy of exceptionalism.[31] And sometimes the cause of access may justify support for some otherwise antiquated legal institutions. One of the problems with modern social welfare planning is the subversion of individual and minority interests in the collective compromises necessary to produce a final program. For example, Health Maintenance Organizations (HMOs) may involve an element of consumer deception in the advertising of benefits which are, in fact, difficult to obtain. In shifting from a system based on consumer demand to a system based on expert decisions, but also requiring fierce competition for customers, there is a temptation to promise a lot and save money later. At some point, such behavior may cross the line and become something that we would be willing to call consumer fraud. At that point, the old fashioned fraud rights and remedies may prove quite useful. Clear remedies are especially useful in a complex bureaucratic system where no one will take responsibility for consequences. Collectivism diminishes the scope of individualism but increases its importance.[32]

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[30] See White, *supra*, note 19.

[31] Joel Rogers, *Divide and Conquer: The Legal Foundations of Postwar U.S. Labor Policy*, *in* CRITICAL LEGAL THOUGHT: AN AMERICAN GERMAN DEBATE 213-235 (Christian Joerges and David M. Trubek, eds.); Katherine Van Wezel Stone, *Re-Envisioning Labor Law: A Response to Professor Finkin*, 45 MD. L. REV. 978 (1986).

[32] Also consider traditional tort law. Tort law is generally a grotesquely inefficient and unfair method of compensating people for the cost of accidents and a perfect example of how legal thinking becomes replaced with policy analysis. But the tort remedy has one characteristic which may justify preserving the system in modified form. Administered compensation schemes have the problem of overcentralization both in the

In the avant-garde category are new methods of legal interpretation. Here one thinks of the reinstatement of moral reasoning in statutory interpretation and policy analysis, statutory interpretation based upon the realities of implementation, and the increased range of legal interpretation made available by critical methodologies.

Also in the avant-garde category is social welfare planning through institutional choice. One way to reduce the complexity of social planning, and the conflict between liberty and cooperation, is by delegation rather than detailed prescription. Instead of regulation, social policy consists of matching institutions with policy objectives, empowering organizations to take on new functions, and the like. For example, the key issue in social policy with regard to seriously ill newborns can be thought of as the locus of decision making (doctors and families, hospital boards, courts, prosecutors, etc.).[33] Of course, the process of institutional choice in a situation like this cannot be solved by legal method. Everything depends on the substance of the area (e.g., medical decisions), the nature of the institutions (e.g., biases of medical professionals), the constraints of the field situation (how decisions arise), and a sense of ethics. Yet, even if legal training did not involve an element of pragmatic ethics,[34] legal expertise in the narrow sense is still important. There is a unique legal role in helping formulate the boundaries of the institutional choice (e.g., who is "seriously ill"), establishing appropriate procedures, and designing the interface with the rest of the legal system (e.g., courts). For lawyers to understand such issues, they must become immersed in the technical and institutional subject matter. Such hybrid practice is a far cry from a lawsuit to replevy a horse; but it is still law.

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legislative politics which creates the compensation scheme (its rules of eligibility and damages, for example) and the bureaucratic politics through which the scheme is administered. Just finding out what rules apply, or who is responsible for something, may be impossible in byzantine public bureaucracies. One good thing about traditional tort law is its ability to cut through bureaucratic resistance by a lawsuit, backed with powerful discovery rights, emerging, as it were, from the blue. The heroes of the asbestos litigation were trial lawyers because they alone had the incentives and clout to break the conspiracy of insiders. We should, therefore, proceed very cautiously with surrendering all protections to complex, public bureaucracies and keep in mind the desirability of litigation remedies (if not the traditional private tort suit, for example, then perhaps some kind of public intervenor action). In general, the "unpredictable" quality of legal remedies which makes them such poor devices for planning and programming also makes them good candidates for a type of democratization.

[33] See Symposium, *Baby Doe: Problems and Legislative Proposals – Legislative Workshop*, 1984 ARIZ. ST. L.J. 601-92 (1984).

[34] Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 (1984).