

# Essay

## Michael Reisman's Jurisprudence of Suspicion

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### I. INTRODUCTION

In *Freud and Philosophy*, Paul Ricoeur presents Karl Marx, Friedrich Nietzsche, and Sigmund Freud as the “three masters of suspicion.”<sup>1</sup> What was common to all three, writes Ricoeur, was their assumption that consciousness was primarily “‘false’ consciousness,”<sup>2</sup> the domain of “illusions and lies.”<sup>3</sup> The common problematic therefore that occupied all three was that of the relation between the “hidden” and the “shown,” the “simulated” and the “manifested.”<sup>4</sup> Their effort of “demystification”<sup>5</sup> not only established a new relation between “the patent and the latent,”<sup>6</sup> writes Ricoeur; they also extended the boundaries of consciousness and “clear[ed] the horizon . . . for a new reign of Truth.”<sup>7</sup>

Michael Reisman's jurisprudence is “a jurisprudence of suspicion.” It is a jurisprudence aimed at demystifying our commonplace understanding of the phenomenon of legality and making it more truthful.

Reisman defines law as a combination of power and authority, but he sees power as lying at the root of authority, and authority as both concealing and legitimating power. Reisman's jurisprudence is aimed at exposing the many layers of legality that exist underneath the “official,” formal layer of state law. Not only does a discrepancy exist between what the law says and the law's actual implementation, but deviations from what the law says may constitute a normative system, Reisman maintains, so that the same conduct would be governed by two normative systems—the official law and the law that is actually applied. This last normative system would usually work, according to Reisman, for the benefit of elites that are involved in certain illicit conduct while at the same time invest efforts in maintaining the official normative system (for all the rest). Reisman writes about *lex imperfecta* and *lex simulata*: laws that are not meant to affect conduct, but rather to reaffirm beliefs in the vigor of an official layer of legality. Finally, Reisman exposes the existence of legality, i.e., a combination of power and authority, in our mundane, daily social interactions.

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1. PAUL RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* 33 (Denis Savage trans., 1970).

2. *Id.*

3. *Id.* at 32.

4. *See id.* at 33-34.

5. *Id.* at 34.

6. *Id.* at 33.

7. *Id.*

One particular context to which Reisman's demystifying endeavor applies is that of the gap existing between the high ideals of the law and our culture in general, on the one hand, and the extent to which these ideals are actually realized in our social life, on the other. The claim that we are living amidst a severe crisis of normativity is a unifying thread that runs throughout Reisman's jurisprudence. The claim comes across with particular vigor in *Spiritual Exercise*, a novel published by Reisman under the pseudonym Deborah Shai, to which I shall later return.<sup>8</sup>

One context in which no normativity crisis exists, however, is Reisman's own life. On the contrary, if a gap does exist in Reisman's life it is that between his low-keyed verbal pronouncements as to how a person ought to lead his or her life and the unmatched high standards of conduct he has continuously demonstrated throughout his life in his relations with his students and colleagues. In *Spiritual Exercise* the protagonist undergoes conversion to Catholicism under the instruction of a Benedictine priest to whom the protagonist later on refers as "my father."<sup>9</sup> Many of Reisman's students underwent jurisprudential conversion under his instruction and they refer to him as "their father," extending the term beyond the purely intellectual context.

## II. LAW

### A. *Defining Law*

The key to Reisman's jurisprudential writings is his departure point, namely his definition of law.

Law for Reisman is a process of decision that is both authoritative, i.e., conforms to the expectations of rightness held by members of the relevant group, and controlling, i.e., enjoys effectiveness over members of the group.<sup>10</sup> The major function of law for Reisman is to determine the way resources, both material and symbolic, are distributed among members of a group, as well as to determine the procedures for the making of further decisions of that kind.<sup>11</sup>

There is no one fixed formula as to the balance that needs to exist between authority and effectiveness for a legal norm to exist, maintains Reisman; the particular mix between the two may vary widely.<sup>12</sup> No law is ever wholly effective, however.<sup>13</sup>

8. DEBORAH SHAI, *SPIRITUAL EXERCISE* (2005).

9. *Id.* at 14.

10. See W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORM* 17 (1979) [hereinafter REISMAN, *FOLDED LIES*]; Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, in *INTERNATIONAL LAW ESSAYS* 191, 192 (Myres S. McDougal & W. Michael Reisman eds., 1981); Michael Reisman, 1995 Seibenthaler Lecture, *A Jurisprudence from the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605, 616 (1996) [hereinafter Reisman, *Political Superior*]; W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118, 121 (1992) [hereinafter Reisman, *New Haven School*].

11. Reisman, *Political Superior*, *supra* note 10, at 616-17.

12. Reisman, *New Haven School*, *supra* note 10, at 121; Reisman, *Political Superior*, *supra* note 10, at 616; see also McDougal et al., *supra* note 10, at 192.

13. McDougal et al., *supra* note 10, at 191-92.

Reisman's holding that law is an arena for the determination of the distribution of material and symbolic resources is heir to the normative claim of realism.<sup>14</sup> As Reisman puts it, those who apply the law need "to consider every statement presented as 'law' in terms of its policy consequences."<sup>15</sup> This approach makes law a humanistic enterprise through and through.

The realist claim that law should be evaluated in terms of its effects on the lives of those subject to it led to a complete reshuffling of law school curricula in the course of the twentieth century; to the emergence of the various "law and . . ." movements, first in American law and later on in the laws of other countries; and to the current perception of the law school, in the United States and in other countries as well, as "a mini university."<sup>16</sup> It is in line with these processes that Reisman expects lawyers to be people versed in wide-ranging knowledge borrowed from all the disciplines of the social sciences and the humanities so that they will be able to assess the implications of potential decisions in which they are involved.<sup>17</sup>

### B. *Law: Between the Professional and the Political*

The perception of law as a process in which the distribution of resources is determined invites two contradictory approaches as to the nature of law-making processes.

The first approach, identified with legal realism, sees law as a *professional arena*:<sup>18</sup> lawyers are professional experts located in policymaking teams and working together with other professionals for the advancement of the well-being of their societies.

A second approach as to the nature of law-making processes, identified with Marxist tradition, sees law as a *political arena* in which various social

14. Legal formalism is premised on two major tenets. First, legal norms need to be organized in a system so as to turn legal decisionmaking processes into a procedure. (The outcome of a procedure is embedded in it so that the personality, character, life experience, etc., of the decisionmaker are eliminated from the process.) Second, the system of legal norms needs to be operated autonomously, i.e., in disregard of the effects of legal decisions on the lives of those subject to them. Legal realism undermined both tenets. In what may be referred to as the descriptive strand in realism, it has been shown that legal formalism is unable to make good of its promise to eliminate the decisionmaker from legal decisionmaking processes. In what may be referred to as realism's normative strand, it has been claimed that the supreme test for everything legal is its effects on the lives of the human beings subject to it.

15. Reisman, *Political Superior*, *supra* note 10, at 626; *see also* Reisman, *New Haven School*, *supra* note 10, at 121. Reisman presents this vision of law as one that runs counter to the formalist and positivist jurisprudential traditions which see law as an autonomous system of legal contents—mainly rules—found in books and developed by legal experts in accordance with the internal logic of the system and in disregard of law's effects on the lives of those on whom it applies. Reisman, *Political Superior*, *supra* note 10, at 616.

16. *See* George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437 (1983).

17. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, in INTERNATIONAL LAW ESSAYS, *supra* note 10, at 43, 49-50; Reisman, *New Haven School*, *supra* note 10, at 121. This, again, is presented by Reisman as running counter to the formalist and positivist traditions that expect lawyers to confine themselves merely to knowledge of the contents of the law. *Id.*

18. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 65-67 (1984).

and political groups, drawing on varying combinations of resources, struggle over the distribution of resources (both material and symbolic).

Where is Reisman's jurisprudence located between these two approaches? At first sight the answer seems to be straightforward: Reisman's jurisprudence focuses on the professional, rather than the political, aspects of law. But upon further reflection things prove to be more complex than that.

Reisman's jurisprudence is located at the level of the practicing lawyer who is expected to take part in decisionmaking processes. On the other hand, however, every word in Reisman's writings imparts the thrust of a conflictual approach that sees decisionmaking arenas as sites of struggle between competing social and political groups drawing on varying, unequally distributed resources. These processes usually end up in the triumph of what Reisman refers to as "the elite"—a group that routinely succeeds in promoting both its interests and its worldview.<sup>19</sup> Thus what we have in Reisman's jurisprudence is a combination of an interest in nonpolitical decisionmaking arenas and processes—where, for Reisman, lawyers typically operate—together with an understanding that these arenas and processes are always sites of conflict, struggle, and competition.

Since Marx's *The German Ideology*,<sup>20</sup> we are aware that control over essential civil society and state institutions leads to control over culture, so that a social group that enjoys such control manages to widely—never completely—propagate cultural dispositions that promote its interests and worldview.<sup>21</sup> This Marxist analysis of the relation between power and culture (which, of course, is part of what makes Ricoeur view Marx as advancing a "hermeneutics of suspicion")<sup>22</sup> bears on the relation between power and authority in the law: if law is always a combination of authority and power, then power is primary and authority is secondary and derivative. Yet much in Reisman's writing, particularly his recurrent emphasis of the crucial importance of power in decisionmaking processes, resonates with this Marxist insight as to the inter-relationship between power and culture. Moreover, for Reisman the relation between power and authority is circular, so that it is not only that power establishes authority, but that authority further feeds power. Citing Harold Lasswell's Weberian statement that "'possession of authority is itself effective power,'" Reisman adds: "[t]o refer to the 'power' of elites without explicit recognition of the role that authority plays in creating power and making it effective, is to ignore an important component of effective decision."<sup>23</sup>

19. See REISMAN, FOLDED LIES, *supra* note 10, at 15-36; W. Michael Reisman, *A Theory About Law from the Policy Perspective*, in LAW AND POLICY 79, 84-85 (David N. Weisstub ed., 1976) [hereinafter Reisman, *A Theory About Law*].

20. KARL MARX & FREDERICK ENGELS, THE GERMAN IDEOLOGY (C. J. Arthur ed., Lawrence & Wishart 1970) (1932).

21. Antonio Gramsci developed this theme by filling the Marxist concept of hegemony with new content. See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); see also JEAN COMAROFF & JOHN COMAROFF, OF REVELATION AND REVOLUTION 1 (1991); Chantal Mouffe, *Hegemony and Ideology in Gramsci*, in GRAMSCI AND MARXIST THEORY 168 (Chantal Mouffe ed., 1979).

22. RICOEUR, *supra* note 1, at 32-34.

23. W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 52 (1987).

### C. *The Tasks of Jurisprudence*

If law is supposed to be the process through which decisions are made with the aim of advancing the welfare of human beings, the task of jurisprudence according to Reisman should be to provide lawyers with an understanding of the decisionmaking processes in which they are involved, the social processes in which they are expected to intervene by means of the law, and the various values that it is for the law to make part of the lives of human beings.<sup>24</sup> Put differently, for Reisman, jurisprudence should “seek[] to be as comprehensive as possible regarding the various factors that influence decision.”<sup>25</sup> Also, it should be premised on the understanding that policy decisions are taken in the context of varied institutions beyond the court system, and at times even illicitly.<sup>26</sup> Jurisprudence should therefore see it as its task to provide enlightenment as to the decisionmaking processes that take place in all institutions in which law is made.<sup>27</sup> Also, it should be a jurisprudence that “derives from the natural law tradition,”<sup>28</sup> and that stands in stark contrast to any jurisprudence that “drastically reduce[s] the universe of variables to a text or a few purportedly key social factors.”<sup>29</sup> In particular, jurisprudence should stand in stark contrast to the Austinian positivist tradition, which confines itself to the perspective of the “receiver of commands” who is expected to obey the dictates of the law.<sup>30</sup>

### D. *Gaps, Legal Pluralism and Lies*

Roscoe Pound's 1910 classic *Law in the Books and Law in Action* pointed out that in many instances a discrepancy exists between what the law says and law's actual implementation.<sup>31</sup> Following Pound, voluminous literature, known as “Gap Studies,” grew in the course of the twentieth century, aimed at identifying the many manifestations of, and reasons for, the recurring discrepancy between what the law says and the actual conduct of the world.

Reisman adopts Pound's great insight,<sup>32</sup> but he gives it a new and radical twist: deviations from what the law says (Reisman calls this the “myth

24. Reisman, *New Haven School*, *supra* note 10, at 119, 120; Reisman, *Political Superior*, *supra* note 10, at 618; W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 *YALE L.J.* 935, 936-37 (1999).

25. Reisman, *New Haven School*, *supra* note 10, at 121.

26. REISMAN & SCHREIBER, *supra* note 23, at 3.

27. Reisman, *New Haven School*, *supra* note 10, at 120.

28. *Id.* at 119.

29. *Id.* at 121.

30. *Id.* at 119.

31. Roscoe Pound, *Law in the Books and Law in Action*, 44 *AM. L. REV.* 12 (1910).

32. REISMAN, *FOLDED LIES*, *supra* note 10, at 15-16 (“The picture produced by control institutions does not correspond, point for point, with the actual flow of behavior of those institutions in the performance of their public function: indeed, there may be very great discrepancies between it and the actual way of doing things.”); *see also id.* at 7. Reisman applies the notion of the gap not only to the level of the norms of the law; the gap may apply with regard to the institutions instrumental in determining the contents of the law: it is often the case that a discrepancy exists between “formal legal institutions” and “actually effective institutions.” REISMAN & SCHREIBER, *supra* note 23, at 2. “[I]n many municipalities and organizations, in states and even in national politics, there are both formal institutions and effective ‘machines,’ i.e., informal institutions. The two are not always congruent.” *Id.*

system”) do not amount merely to discrepancies between law and actual conduct. Rather, the deviant conduct itself (Reisman calls this the “operational code”) may amount to a normative system, a “law,” so that “we encounter two ‘relevant’ normative systems: one that is supposed to apply; . . . and one that is actually applied.”<sup>33</sup> Based on his definition of law,<sup>34</sup> Reisman therefore conflates the phenomenon of the gap and that of legal pluralism. The existence of the gap is not merely a matter of deviance; the law in action is “law” as well that operates beneath state law and in competition with it.

Thus, for Reisman the same activity may be governed by two competing normative systems. Some people would abide by the official state system. Others, however, the “connoisseurs,” usually those belonging to the elite, would not only act according to the deviant normative system that would tell them “when, by whom, and how certain ‘wrong’ things may be done;”<sup>35</sup> they would usually also conceal their illicit activities, suppress all knowledge of their operational code while at the same time invest efforts in “maintain[ing] the integrity of the myth system.”<sup>36</sup> Also, the same person may at times act in accordance with the norms of one system and at other times in accordance with the norms of the other. Moreover, it might be the case that in a certain context, conduct would comply with neither of these two systems—actual behavior may be discrepant from both.<sup>37</sup> As a result of this complexity, “determining the ‘law’ or the socially proper behavior in a particular setting necessitates a much wider social inquiry than the simple consultation of the formal law.”<sup>38</sup>

Roger Cotterrell recently suggested that it is important to keep separate discussion of the phenomenon of the gap and discussion of legal pluralism.<sup>39</sup> Ordinarily, this suggestion would make sense. But the radical move taken by Reisman shows that at times the divergent conduct may amount to a legality of its own, so that what we would otherwise regard as a gap would in fact amount to one more manifestation of legal pluralism. In doing that, Reisman not only demystifies the role played by state law in our lives; he also exposes the great complexity of the phenomenon of legality and further extends our understanding of it.

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at 2-3. For example, formal documents may say that a City Council makes decisions. The fact of the matter, however, may be that “fundamental policy is actually made in a series of informal meetings taking place in country clubs, business lunches, periodic meetings of merchant associations and so on. The City Council, you may discover, really does no more than validate or promulgate decisions and policies clarified elsewhere.” *Id.* at 3; *see also* Reisman, *A Theory About Law*, *supra* note 19, at 79.

33. REISMAN, *FOLDED LIES*, *supra* note 10, at 16.

34. *See supra* text accompanying notes 10-17.

35. REISMAN, *FOLDED LIES*, *supra* note 10, at 1.

36. *Id.* at 23-24, 28.

37. *Id.* at 16.

38. *Id.* at 35; *see also* W. Michael Reisman, Book Review and Notes, 76 *AM. J. INT’L L.* 868 (1982) (reviewing ORAN R. YOUNG, *COMPLIANCE AND PUBLIC AUTHORITY* (1979)).

39. Roger Cotterrell, *Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies*, in *LIVING LAW: RECONSIDERING EUGEN EHRLICH* 75 (Marc Hertogh ed., 2009).

### E. *Lies: Lex Imperfecta and Lex Simulata*

Reisman's complex understanding of the phenomenon of legality, and his efforts at exposing the means employed by elites for concealing this complexity, are also manifest in his discussion of two types of laws, in addition to the distinction he makes between mythic and operational legality: *lex imperfecta* and *lex simulata*.

The concept of *lex imperfecta* is well known. It refers to "laws without teeth," namely laws that are devised in such a way that no remedy or sanction would be invoked following violation of a legal norm. Reisman writes that *lex imperfecta* is often "a conscious operator or elite design for dealing with aggravated myth system and operational code discrepancies."<sup>40</sup>

The concept of *lex simulata*, which to the best of my knowledge is Reisman's creation (and note that Paul Ricoeur presents the problem of "simulated" reality as the one lying at the basis of the writings of the three "masters of suspicion," Marx, Nietzsche, and Freud),<sup>41</sup> is a highly interesting one. *Lex simulata* is meant to perform a function similar to that of *lex imperfecta*. It is "a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied."<sup>42</sup> *Lex simulata* is not meant therefore to affect conduct. Rather, its function is "to reaffirm on the ideological level that component of the myth, to reassure peripheral constituent groups of the continuing vigor of the myth, and perhaps even to prohibit them from similar practices."<sup>43</sup> In the case of *lex simulata*, as in the case of any other legislation, writes Reisman, "the mere act of legislation functions as catharsis and assures the rank and file that the government is doing what it should, namely, making laws. Legislation here becomes a vehicle for sustaining or reinforcing basic civic tenets, but not for influencing pertinent behavior."<sup>44</sup>

When one adds the concepts of *lex imperfecta* and *lex simulata* to Reisman's distinction between the "myth system" and the "operational code," small wonder that one reaches with Reisman the conclusion that "in law things are not always what they seem."<sup>45</sup>

### F. *Microlegal Systems*

Reisman's jurisprudence is comprehensive not only in that it is premised on the assumption that law is being made in varied arenas and through varied processes. The anti-positivist traits in Reisman's jurisprudence, together with his definition of law as premised on a combination of authority and power, enable him to see law as being made and invoked in such varied contexts as the all-encompassing world arena, on the one hand, and micro social interactions, on the other. Also, Reisman, who writes about lawyers as expert

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40. REISMAN, FOLDED LIES, *supra* note 10, at 29.

41. RICOEUR, *supra* note 1, at 33-34.

42. REISMAN, FOLDED LIES, *supra* note 10, at 31.

43. *Id.* at 31-32.

44. *Id.* at 32.

45. *Id.* at 7.

professionals operating in elite decisionmaking institutions, finds law also in the mundane, daily settings in which ordinary people live their lives. This last point needs further elaboration.

"The law of the state may be important," writes Reisman, "but law, *real* law, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction. Law is a property of interaction. Real law is generated, reinforced, changed, and terminated continually in the course of almost all of human activity."<sup>46</sup> Thus, as "social relationships cannot operate without law,"<sup>47</sup> "[t]here are microlegal systems about looking at people, touching them accidentally, standing in line, laughing in public, talking, and so on."<sup>48</sup>

Indeed, if for law to exist there should be a combination of authority and power, it is possible to see why there is law in micro social interactions. First, as to authority, parties to such interactions share expectations that under the circumstances there is a right way of acting. Law does not require "expressly articulated codes," writes Reisman.<sup>49</sup> Moreover, norms that govern social interactions may not only be uncodified; it is often the case that they operate below the level of overt consciousness, so that "the actors whose behavior is being influenced by those norms are unaware of knowing, acting on, and reacting to them."<sup>50</sup> An additional set of expectations that exists in micro social interactions is that defections from the right way of acting "will lead to a common response among members of the microsituation that the defection was 'wrong.'"<sup>51</sup> This, in turn, "authorizes the injured party to respond in a way (otherwise impermissible) that may hurt or sanction the offending actor."<sup>52</sup>

As to the requirement of power, Reisman maintains that enforcement mechanisms that subject norm violators to sanctions are at work in micro social interactions. "Enforcement . . . does not require formal control by an authority," writes Reisman. "[S]anctions may be embedded in the situation and may be no more than symbolic approval or disapproval of something substantial, like money or time."<sup>53</sup>

Reisman's conceptualization of the legality of micro social interactions is part of a growing interest in the role of law in the everyday experiences of ordinary people. This interest is manifest in the rise of the constitutive approach to law<sup>54</sup> and the legal consciousness approach,<sup>55</sup> as well as in a

46. W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 2 (1999); *see also id.* at 8-10.

47. *Id.* at 16.

48. *Id.* at 40.

49. *Id.* at 54.

50. *Id.* at 10.

51. *Id.* at 54.

52. *Id.*; *see also id.* at 13, 39.

53. *Id.* at 54; *see also id.* at 12, 39-40.

54. *See, e.g.,* *LAW IN THE DOMAINS OF CULTURE* (Austin Sarat & Thomas R. Kearns eds., 1998); *JUSTICE AND POWER IN SOCIOLEGAL STUDIES* (Bryant G. Garth & Austin Sarat eds., 1998); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 242-68 (1987); Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 *YALE J.L. & HUMAN.* 95 (2001); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805 (1987); Roger Cotterrell, *Law as Constitutive*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES* 8497, 8497-500 (N.J. Smelser & P.B. Baltes eds., 2001); Gordon, *supra* note 18; Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 *LAW &*

growing literature on the role of law in everyday life.<sup>56</sup> (From a larger perspective, the interest in the everyday may be seen as part of a growing interest in the topic in recent decades in many disciplines, such as anthropology, sociology and history. This interest is manifest also, among many others, in the writings of the Cultural Studies Movement,<sup>57</sup> in Erving Goffman's pioneering *The Presentation of Self in Everyday Life*,<sup>58</sup> in Pierre Bourdieu's sociology of practice,<sup>59</sup> in Ann Swidler's understanding of culture as "tool kit,"<sup>60</sup> and in the writings of Michel Foucault.<sup>61</sup>) However, it is noteworthy that the constitutive approach, the legal consciousness approach, and studies of law in the context of everyday life are interested mainly in the role that *state law* plays in the everyday social interactions of people, i.e., in the way state law participates in shaping the way ordinary people perceive their social situations and their conduct in them. Reisman's micro jurisprudence is premised on a radically different move: he claims that legality per se is inseparably part of the social, so that it is impossible to properly understand the nature of everyday, mundane social interactions without accounting for the element of legality that is inherently embedded in them (even prior to deciphering the effects of state law on the structure of such interactions). In that, Reisman not only provides us with a fresh understanding of the nature of everyday social interactions; he also expands our understanding of the phenomenon of legality and of the reach of legal pluralism.

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SOC'Y. REV. 1231 (1994); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001); Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 LAW & SOC. INQUIRY 145 (2001); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001); Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129 (2000); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

55. See, e.g., ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* (2006); PATRICIA EWICK & SUSAN S. SILBIEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998); LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 1-24 (1975); LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* (1990); Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13 (David Nelken ed., 1997); Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117 (1994); Lawrence M. Friedman, *Legal Culture and Social Development*, in LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND BEHAVIORAL SCIENCES* 1000 (1969); S.S. Silbey, *Legal Culture and Legal Consciousness*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES*, *supra* note 54, at 8623.

56. See, e.g., *LAW IN EVERYDAY LIFE* (Austin Sarat & Thomas R. Kearns eds., 1993); P. Ewick, *Law and Everyday Life*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES*, *supra* note 54, at 8457.

57. See, e.g., TONY BENNETT, *CULTURE: A REFORMER'S SCIENCE* (1998); *THE CULTURAL STUDIES READER* (Simon During ed., 2d ed. 1999); FRED INGLIS, *CULTURAL STUDIES* (1993); JEFF LEWIS, *CULTURAL STUDIES* (2002); GRAEME TURNER, *BRITISH CULTURAL STUDIES* (1990); N.K. Denzin, *Cultural Studies: Cultural Concerns*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES*, *supra* note 54, at 3121; Richard Johnson, *What Is Cultural Studies Anyway?*, 16 SOC. TEXT 38 (1986); Toby Miller, *What It Is and What It Isn't: Cultural Studies Meets Graduate-Student Labor*, 13 YALE J.L. & HUMAN. 69 (2001).

58. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

59. See, e.g., PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., 1977).

60. ANN SWIDLER, *TALK OF LOVE: HOW CULTURE MATTERS* 6 (2001).

61. See ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994); Alan Hunt, *Foucault's Expulsion of Law: Toward a Retrieval*, 17 LAW & SOC. INQUIRY 1 (1992).

## III. SPIRITUAL EXERCISE

As mentioned earlier, in 2005 Reisman published a novel, *Spiritual Exercise*, under the pseudonym Deborah Shai. If Reisman's jurisprudence is "a jurisprudence of suspicion" aimed at exposing the many layers of legality and normativity that exist underneath the "official" normative layer of state law, the novel is an attempt to unfold the dynamic between the high ideals to which we vow allegiance in our culture and in our law and the actual normative situation that exists around us. Reisman portrays a bleak picture of the wide discrepancy that exists between declared ideals and their realization. The novel provides Reisman with the opportunity to emphasize and expand on some of the themes he has dealt with as a scholar, as well as to say some things he has not formerly said.

The book, for the most part, is an account composed by Stefan Fomes of his two years as a fellow at the Parker Gallery—a small private museum outside Philadelphia that also serves as an art research institute. Fomes, who was in his late twenties, comes across as a heartless, vicious, highly ambitious, highly opportunistic, and highly manipulative young man who will not abstain from anything for self-promotion and to destroy those he perceives as his rivals. At one time, Fomes's conduct amounts to nothing short of rape. Additionally, he makes a fellow at the Parker Gallery lose his job and get deported from the country. And if that is not enough, Fomes's ruthlessness causes a young woman to take her own life. But above and beyond anything else, the number one trait that defines Fomes's character is his sinister mendacity. Lying and pretense are his way of being in the world; they define his existential condition. Fomes's entire existence is premised on ceaseless lying and pretense.

Also, repeating a well-known Freudian theme, *Spiritual Exercise* presents the relation between sexual drives and culture as one in which a thin layer of culture works at suppressing, controlling, and channeling underlying turbulent sexual drives. Additionally, playing on a famous Marxist theme first set out in *The German Ideology*,<sup>62</sup> *Spiritual Exercise* portrays a stratified class society in which the rich manage to determine central contents of culture so as to legitimate their control over society, promote their interests, and preserve and propagate their worldview. Reisman spells out therefore in unequivocal terms a point left somewhat ambiguous in his scholarship: true, law is always a combination of authority and power, but power is primary and authority is determined by it. Those who have power at their disposal enjoy the benefit of being able to constitute a culture that cloaks their power with authority. The dialectic of the patent and the latent that is so fundamental to Reisman's jurisprudence of suspicion is extended to an analysis of society and culture.

But there is an interesting and thought-provoking twist in the story of Stefan Fomes. After Fomes's death, some thirty years after the writing of *Spiritual Exercise*, the manuscript is discovered by Fomes's literary executor. At the time of his death, Fomes is one of the most influential people in the American art world. More interestingly, and surprisingly enough, for many

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62. MARX & ENGELS, *supra* note 20.

years before his death, Fomes had been known as a considerate, generous, and scrupulously honest human being. How did this transformation happen? Fomes's literary executor finds out that *Spiritual Exercise* had been written in Venice, some time after Fomes's term at the Parker Gallery ended, when he received instruction and became a Catholic. Thus, *Spiritual Exercise* was prepared for the Benedictine priest who accompanied and instructed Fomes in the process of his conversion, the person to whom Fomes later on referred as "his father."

What does this transformation mean?

The claim that secularization left modern persons without a coherent framework of meaning, a "broader vision," as Charles Taylor puts it,<sup>63</sup> is a recurring theme in the discourse of modernity, much like the claim that modernity's neglect of substantive rationality contracted the world of modern persons to the realm of instrumental rationality (clearing the way for modernity's great atrocities).<sup>64</sup> Is Reisman a thinker who interprets modernity in such a way? Additionally, for many years now there has been an ongoing discussion of the means for ensuring moral conduct of persons. Aside from varied means such as moral education that have been discussed in this context, it has been suggested that religion may have the effect of inhibiting deviant behavior.<sup>65</sup> Is *Spiritual Exercise* to be read as Reisman's suggestion that religion may serve as effective means for avoiding the moral deterioration of persons and for rehabilitating the moral character of corrupt persons? If the responses to these questions are in the affirmative, Michael Reisman is not only a thinker suspicious of the patent manifestations of law and legality—he is also a thinker suspicious of modernity.

#### IV. CONCLUSION

Reisman's scholarship exposes an explosion of normativity—the existence of normative systems in the broad gamut that lies between the all-encompassing world arena and micro social situations, as well as in cases where gaps exist between what the law says and the actual conduct of legal subjects. However, Reisman also portrays a world in which the powerful manage to have the upper hand and to cloak their privilege with authority, as well as a world in which a troubling gap exists between declared ideals and their actual implementation in the lives of human beings.

Reisman's jurisprudence is therefore a reminder that the mere fact of the existence of a normative system does not imply anything about the normative value of that normativity. Rather, any normativity needs to be constantly reviewed and evaluated according to criteria borrowed from some body of high ideals, such as the doctrine of natural law and the doctrine of human

63. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 4 (1991); see also CHARLES TAYLOR: *A SECULAR AGE* (2007).

64. See, e.g., ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989).

65. For a review of the literature, see Colin J. Baier & Bradley R. E. Wright, "If You Love Me, Keep My Commandments": *A Meta-Analysis of the Effect of Religion on Crime*, 38 J. RES. CRIME & DELINQUENCY 3 (2001). See also Jeffery T. Ulmer, Christopher Bader & Martha Gault, *Do Moral Communities Play a Role in Criminal Sentencing? Evidence from Pennsylvania*, 49 SOC. Q. 737, 738 (2008) (sources cited).

rights. Indeed, Reisman often argues in his scholarship that these doctrines should set ideals to be met, as well as to be invoked as criteria for evaluating extant systems of normativity.

All of this makes Reisman's jurisprudence even more ambitious and demanding. It is not only the case that lawyers need to attain extensive knowledge on the decisionmaking processes in which they are involved and on the societies their interventions are supposed to affect. According to Reisman, lawyers should also constantly look up to high human ideals, even if it is too often the case that these ideals fail to attain the place they deserve in our lives.