

Articles

Modernism, Polarity, and the Rule of Law

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The rule of law is in peril. Some say it is imperiled by reactionary politics. Some say it is imperiled by radical theory. Some say that these two dimensions are complicit: by working so avidly to undermine the integrity of texts and institutions, key movements in contemporary legal theory and philosophy are often said to weaken the bulwark of the rule of law just when it is most needed. The question for this Article is the following: is this true, and if it is, what can we do about it? Powerful critiques of “rules,” language, objectivity and meaning in law have been accumulating for a long time now and cannot just be wished away, regardless of our political preferences. The challenge is to address more seriously what this means for the rule of law. But it is a challenge confronted. Those interested in the rule of law tend to trivialize the critique; those interested in the critique tend to ignore the rule of law. In this Article, I attempt to get past this willful blindness and engage the issue. The critique of positivism does indeed have serious implications for

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the rule of law. But by paying attention to the historical moment when these two traditions most dramatically collided, there is much we can learn. Not only does the historical context sharpen and intensify the issues at stake, but it also reveals a third alternative that ignores *neither* the critique of positivism nor the rule of law. In this Article, I will call this alternative “polarity,” and I want to show where and why it arises from the historical context of modernism and what implications it might have for a post-positivist rule of law. History therefore teaches us not only why the problems with the rule of law have been so long-lasting, but what we might do about it. Perhaps, after all, the peril to the rule of law might be averted not by ignoring the critique of positivism but by embracing it.

In Part I, I show how the basic assumptions of positivism parallel those of the rule of law such that the intellectual critique leveled at the former causes acute problems for the latter. Yet, those who have attempted to engage with the critique from the point of view of the rule of law have merely avoided the issue. I illustrate that avoidance by looking at recent work by Brian Tamanaha in particular.

In Part II, I show that missed opportunities and circular debates around this critical issue go back many years. It is only by going back to the historical and interdisciplinary origins of the conflict between the rule of law and legal critique that we can see it properly and respond to it adequately. History, I will argue, affords us insight, perspective, and new opportunities. The challenge to the rule of law crystallized and was indeed at its most intense at the height of the movement of modernism in the fraught years following World War I. Right across Europe and in America, the “crisis of modernity” unleashed by that cataclysm profoundly undermined the faith of the West in its systems, mechanisms, structures, and institutions. That led in many quarters to a reactionary romanticism, a kind of anti-positivism of which, in relation to law and politics, Carl Schmitt is emblematic. The force of Schmitt’s argument against the very possibility of rule-constrained decisionmaking has not diminished. Powerful traces of transcendentalism or romanticism, which would throw out the baby of the rule of law with the bathwater of positivism, can still be found across many aspects of contemporary legal theory.

Returning to the roots of the problem sharpens what is at stake in this debate and demonstrates how closely the legal and political issue is tied to a literary, aesthetic, philosophical and cultural context—modernism. In Part III, I argue that while post-war modernism dramatizes the standoff between positivism and romanticism, it also contains the resources to move beyond it—resources which, like modernism itself, legal theory keeps forgetting. The language and ideas of “polarity” articulated by D.H. Lawrence in the early 1920s is one such resource. Polarity expresses

Lawrence's insight that contradiction and opposition, such as those between rules and applications, general norms and particular persons, law and justice even, should neither be *separated* as the positivists would have it, nor *harmonized* as the romantics would have it. On the contrary, for Lawrence the tensions and oppositions in our life must be maintained and preserved. This insight came precisely out of his experience of literature and his intense engagement with the political currents of the time. Neither was he alone in making this move and thereby fully embracing the contingency and uncertainty of the twentieth-century. Time and again the great modernists of the 1920s, including Walter Benjamin, moved in the same direction.

In Part IV, I briefly show polarity's continuing relevance to contemporary legal theory as a way of embracing the very uncertainties and contradictions which both positivism and romanticism wish to overcome. In particular, the idea of polarity clarifies the contribution of deconstruction to these debates. Deconstruction continues to be misread and misunderstood. Polarity allows us to more clearly see that it is not only an anti-positivist theory of law, but equally, and, despite many assertions to the contrary, an anti-transcendental one.

In Part V, I apply what we have learned from our excavation of modernism. The question I began with was whether the critique of positivism must doom the rule of law. My answer is no. Polarity and modernism suggest a way past this false dichotomy—a way of understanding the rule of law while *at the same time* embracing contingency, uncertainty, and contradiction. Polarity allows us to see the rule of law as a site for oscillation rather than determination, as a place for unending public discourse rather than decision, and therefore as the occasion for the widening and deepening of our social involvement in law and justice rather than its settlement. Modernism thus offers something specific and necessary to our understanding of justice. It imagines the court and the law as the forum for an ongoing process of learning built on principles of dialogue, conflict, and imperfection, rather than the site of a didactic set of outcomes. The rule of law, under the polarized light of modernism, does not exist to maximize certainty but rather to manage uncertainty. For the positivists and the romantics amongst us this is a tragic conclusion. But for the modernists in our midst, it is an affirmation of the human condition.

I. POSITIVISM AND ITS DISCONTENTS

A. Orthodoxy

The rule of law seems to depend upon positivist assumptions about the

certain and objective application of legal rules, while the critique of positivism, both historically and now, has focused precisely on undermining those same assumptions. The rule of law relies on the very ideas that the critique insists are untenable. Positivism claims that objective meaning can be derived from established legal rules such that judges and other interpreters are able to apply them in a predictable and pre-determined fashion—not all the time, of course, but enough of the time to be treated as paradigmatic. In the “normal case,” argues H.L.A. Hart, the meaning of the rules is neutral, given, and inflexible:

[T]he hard core of settled meaning is law in some centrally important sense and that even if there are borderlines, there must first be lines. If this were not so the notion of rules controlling courts' decisions would be senseless as some of the “Realists”—in their most extreme moods—and I think on bad grounds—claimed.¹

Hart embodies both a theory of interpretative method and legitimacy; he seeks to explain what judges “do” and why they should do it. The great Australian judge Sir Owen Dixon unites these features:

It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism. . . . The authority of the courts of law administering justice according to law is a product of British tradition and it is for us to maintain it. There is I believe a general respect for the Queen's courts of justice which administrate justice according to law, and I believe that there is a trust in them. But it is because they administer justice according to law.²

In this conception of the rule of law, justice plays a purely “administrative” role. A judge who was tempted for whatever reason to dispense justice but not *administer* it “according to law” would be undermining the general respect given it.

Admittedly, the rule of law is a broad and nebulous concept. Ronald Dworkin, for example, has been particularly critical of writers who distinguish between the rule of law and “substantive” rights.³ Yet broad and substantive visions of the rule of law (most notoriously the Declaration of Delhi) are by and large suppletive.⁴ They reflect an

1. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614-15 (1958).

2. Owen Dixon, Address upon Taking the Oath of Office (Apr. 21, 1952) (transcript available in 85 CLR xiv-xv) (Austl.).

3. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

4. The *Declaration of Delhi* provided an expansive statement of the rule of law which went well beyond merely formal or procedural guarantees. It treated the rule of law as “a dynamic concept . . . which should be employed not only to safeguard and advance the civil and political rights of the

expanding circle of expectations implicit in the rule of law,” but these add to, rather than subtract from, its central features, most notably a commitment to protecting values of predictability and certainty in the law. This much was evident as far back as Aristotle, who famously distinguished rule by “the best men” from rule by “the best laws.”⁵ As the rule of law took its modern shape it came to express other concerns too: the tripartite division of powers, habeas corpus, and law’s equal application to all persons.⁶ But it never lost its principal commitment to a theory of interpretation and certainty. As Friedrich Hayek put it in his conservative manifesto, *The Road to Serfdom*, the rule of law does not ensure justice. Rather, it ensures certainty and clarity in the application of government power, which for Hayek is itself a moral principle: “[G]overnment in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”⁷ Thus, positivist theories of interpretation seem to form the necessary condition of what it means to do justice “according to law.”

B. Critique

Yet critiques of this claim for a rational, abstract, and certain objectivity have only multiplied with the passing years, from legal realists and Marxists to feminists in the 1970s, race theorists and critical legal studies in the 1980s, and post-structural theorists in the 1990s. Thus, according to Derrida, justice embodies two opposed impulses: equal treatment and singular respect. Justice expresses an aspiration towards “law or right, legitimacy or legality, stabilisable and statutory, calculable, a system of regulated and coded prescriptions”⁸ and at the same time wishes to find a unique and singular response to the particular situation and person before us. Justice is both general and unique; it involves treating everybody the same *and* treating everybody differently.⁹ If we could divorce justice from law, then this would not present a problem. We could apply the law in court and talk about justice over lunch. But this response will not work. The rule of law tells us to follow the rules, but every legal decision

individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.” INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW IN A FREE SOCIETY: A REPORT ON THE INTERNATIONAL CONGRESS OF JURISTS 2* (1959).

5. ARISTOTLE, *POLITICS* ¶ 1286a (Harris Rackham trans., 1932).

6. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 203 (1902).

7. FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 54 (1944).

8. Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 *CARDOZO L. REV.* 919, 959 (1990).

9. *Id.* at 961.

requires us to make a judgment as to the applicability of prior general norms in the inevitably different and singular circumstance before us. We must always decide if this unique case is the same as or different from the past, and this is the very choice that the past *cannot help us with*.

The unavoidable passage of time between the enunciation of a norm and its application, and the unavoidable uniqueness of the present judgment by comparison to any prior instance, inevitably opens up a space for choice.¹⁰ The decision might be obvious. But it cannot be made without a moment of reflection. Once in a while that reflection will cause us to change our mind, to reconfigure our understanding of what the rule in question meant. That reflection cannot be limited in advance to predictable aspects—"hard cases" or "grey areas"—since it is in the nature of time and circumstances to transform easy cases into hard cases unexpectedly. Uncertainty is built right into legal interpretation. The judge *cannot* fall back on the established law to answer this question; it would be circular reasoning to do so. Instead, the judge must have recourse to something beyond the rules, some element of uncertainty which, as we have seen, we had hoped to set aside. Responding to Hart, Fuller too insisted that it is just not possible to apply a rule without being forced to consider its meaning in relation to a greater framework or set of principles that are themselves, by a logic of infinite regression, incapable of reduction to some transparent meaning.¹¹

The standard view, however, remains the one articulated by H.L.A. Hart: "If it were not possible to communicate general standards of conduct which multitudes of individuals could understand, *without further direction*, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist."¹² As Brian Langille observes, if "language is indeterminate, unstable, subject to manipulation and incapable of expressing rules and principles which constrain judges . . . the law is a failure on its own terms and the virtues of the rule of law are impossible to secure."¹³ That's the problem.

C. Response

Many scholars thus reject such critiques of legal interpretation on purely normative grounds, dismissing them just *because* the rule of law

10. RICHARD BEARDSWORTH, *DERRIDA AND THE POLITICAL* 110 (1996) (arguing that the aporia of law is nothing but the aporia of time); *see also id.* at 37, 98-121.

11. *See* Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 661-69 (1958).

12. H.L.A. HART, *THE CONCEPT OF LAW* 121 (1961).

13. Brian Langille, *Revolution Without Foundation: The Grammar of Scepticism and Law*, 33 *MCGILL L.J.* 451, 455 (1988).

could not survive.¹⁴ In *Law as a Means to an End: Threat to the Rule of Law*, Brian Tamanaha argues that “relativism and postmodernism” pose a threat to the rule of law that “cannot be overstated.”¹⁵ He continues:

If judges substantially base their legal decisions . . . upon their personal views, then the rule of law ideal would be a fraud. . . . Furthermore, when the total body of judges is made up of individuals who hold divergent personal views, the formal rule of law in the sense of stability, certainty, predictability, and equality of application, cannot be sustained.¹⁶

Tamanaha identifies the problem, but he does not begin to deal with it. Instead, he neuters the critique by setting up a false dichotomy. On the one hand, “objective” decisionmaking, and on the other, “willful judging,” which “instrumentally manipul[at]es the legal rules to reach a particular end.”¹⁷ For Tamanaha those are the only options:

A legal system requires that judges render decisions according to the applicable rules, not according to their own political views or preferences. . . . There is no doubt that the task of achieving purposes or ends . . . is more complicated, far more uncertain, and far less ascertainable than strictly applying legal rules to an existing situation.¹⁸

So, Tamanaha thinks the integrity of the rule of law can be maintained only if we simply refuse to manipulate or second guess the consequences of applying the rules. The interpretation of rules in order to achieve particular ends is a seduction to which a good judge will “just say no.” But this misses the point. For critics of positivism—whether we are talking about Llewellyn in the 1930s or Fuller in the 1950s or Derrida in the 1990s—the inability of rules to entirely constrain the decision of the judge is not a *choice*. There *is* no hard and fast “rule” that judges either choose or refuse to apply. The problem is how to work out what the law “really means” in a never-before circumstance and at a never-before time. Tamanaha is blind to the real critique, which lies in the necessary limitations of rule-bound reasoning. Ultimately, his essential position appears to be that the critique of positivism *ought* not be allowed because

14. BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006) [hereinafter TAMANAHA, *LAW AS A MEANS TO AN END*]; BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004); see also TREVOR ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001); WILLIAM SCHEUERMAN, CARL SCHMITT: *THE END OF LAW* (1999); John Gardner, *The Legality of the Law*, 17 *RATIO JURIS* 168 (2004); Andrei Marmor, *The Rule of Law and Its Limits*, 23 *LAW & PHIL.* 1 (2004); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Phenomenon?*, 21 *LAW & PHIL.* 137 (2002).

15. TAMANAHA, *LAW AS A MEANS TO AN END*, *supra* note 14, at 236.

16. *Id.*

17. *Id.* at 237-44.

18. *Id.* at 227-29.

that would be the death of the rule of law. But the real question seems to me how to face the critique and not how to ignore it. If law does involve “madness”—an unavoidable “moment of undecidability”¹⁹ in which the judge merely intuits what justice requires—what then? Must we ignore the critique or forget the rule of law?

II. MODERNITY AND ITS DISCONTENTS

A. *The Crisis of Modernity*

Beneath this confusion and this forgetting lies another, greater problem: the confusion and forgetting of history. These disputes about the rule of law are far from new. Similar questions emerged and converged in philosophy, literature, and the humanities at a crossroads in our intellectual and social history, the aftermath of the Great War. The so-called “crisis of modernity” into which Europe was then plunged is not over. It has continuing implications for how we understand the relationship between judgment and the rule of law, on the one hand, and between law and literature, on the other.

As I have recently elaborated,²⁰ the Great War stood as the graveyard of not one but two nineteenth-century ideologies: romantic fantasies of unity and progress and positivist fantasies of logic and system. The Great War had traumatically shown that the problem of the modern world lay in man, not the world, and that a greater knowledge of it, a greater institutional control over it, a greater technological *mastery* over it, was likely to be more terrible than good. The war was an event which entered a world of social and technological arrogance, unmasking its inner contradictions and its hollow rhetoric. George Orwell later described the emerging conflict as between technology and humanity: the problem of social relatedness in an era of scientific progress, of the deadening effect of industry, rationality, and positivism on art, emotion, and community.²¹ Max Weber too was alert to the dangers of the rationalist and specialized tendencies of the West that he had so clearly identified as critical characteristics of the modern world. In his posthumous *Economy and Society*,²² Weber warned of the coming of a “polar night of icy darkness,” which would trap individuals in an “‘iron cage’ of rules.”²³ By 1917 “the

19. Derrida, *supra* note 8.

20. DESMOND MANDERSON, KANGAROO COURTS AND THE RULE OF LAW: THE LEGACY OF MODERNISM (2012).

21. GEORGE ORWELL, THE ROAD TO WIGAN PIER (2007).

22. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922).

23. *Id.* at 241-71.

crisis of modernity” or the “crisis of civilization”²⁴ was already familiar shorthand for this critique of the very idea, which now seemed naïve or fraudulent, that rules, mechanisms, and systems could save us from ourselves.

Romanticism was concomitant with the rise of modernity and to some extent a counterpoint to it. M.H. Abrams defines romanticism as “a metaphysics of integration, of which the key principle is that of the ‘reconciliation’ or synthesis of whatever is divided, opposed, and conflicting.”²⁵ The great romantics like Wordsworth or Coleridge believed that imagination “reveals itself in the balance or reconciliation of opposite or discordant qualities . . . rich in proportion to the variety of parts which it holds in unity.”²⁶ But the war had equally trampled that utopian dream of unity or synthesis. The world seemed defined by its incurable differences: conflicts between peoples, countries, or ideologies, for example, or the conflict between man and nature, art and science, or reason and emotion. In sociology as in poetry, in philosophy as well as literature, the crisis of modernity articulated a widespread loss of conviction in the possibility of ever reaching some promised land of solidarity or harmony or peace. Materialism, technology, bureaucracy, capitalism, and rationalism had undermined the illusory rhetoric of such naïve alternatives but no credible replacements had been found. Max Weber called this phenomenon “the disenchantment of the world.”²⁷ He saw a modern world in which *belief* was no longer possible. The present gave us nothing to believe in, and we could no longer believe in the past. After the war this crisis and this vertigo imbued the question of positivism and its “other” with an even more furious or desperate urgency—in the expressionist art of Otto Dix and the literary modernism of Joyce or Woolf as in Max Weber or R.G. Collingwood.²⁸ In every sphere was felt a disorienting loss of faith in both this world *and* the next, human *and* divine, reason *and* love.

24. See RICHARD MURPHY, COLLINGWOOD AND THE CRISIS OF WESTERN CIVILIZATION: ART, METAPHYSICS AND DIALECTIC 105, 142, 233 (2008).

25. M.H. ABRAMS, NATURAL SUPERNATURALISM 181 (1971).

26. *Id.* at 220-21.

27. Max Weber, Science as Vocation, Speech at Munich University (1918), *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 155 (H.H. Gerth & C. Wright Mills trans. and eds., 1946); *see also* RICHARD SVEDBERG, THE MAX WEBER DICTIONARY: KEY WORDS AND CENTRAL CONCEPTS 63 (2005); MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., Routledge 1992) (1904).

28. *See, e.g.*, OTTO DIX, DER KREIG (1924); JAMES JOYCE, ULYSSES (1922); RICHARD MURPHY, COLLINGWOOD AND THE CRISIS OF WESTERN CIVILIZATION (2008); VIRGINIA WOOLF, TO THE LIGHTHOUSE (1928).

B. The Logic of Reactionary Modernism

Contrary to casual usage, modernism is by no means a synonym for modernity.²⁹ Rather, it encompasses the aesthetic and intellectual trajectory of the late nineteenth and early twentieth century wherein these artists and thinkers were united in their sensitivity to the crisis of modernity and the dilemmas it posed and struggled for a way to meaningfully *respond* to them. But the modernists were not united in the nature of that response. For the “reactionary modernists,” the post-war period marked a turn away from modernity and a return to romanticism.³⁰ Carl Schmitt would certainly fall into that category despite his vehement protestations to the contrary,³¹ as would Pound, Yeats, Auden, the later Eliot, Heidegger, and many others.³² I mean by romanticism the gesture to turn away from the disenchanting human world of modernity and towards a holism based on something above and beyond the mundane world.

In legal and philosophical circles this might be framed in terms of an appeal to an instinctive, responsive, and unbounded justice. Let us take Carl Schmitt as a celebrated example of this romantic turn. Schmitt’s appeal to the power of the sovereign is tied to his rejection of the very possibility of the rule of law. Now, some have argued that his critique is relevant *only* in what he famously termed “the state of exception.” He argues that “the decision that a real exception exists cannot therefore be entirely derived from a norm” but must be the result of a “decision that frees itself from all normative ties and becomes in the true sense absolute.”³³ That clearly leaves no place for the rule of law. But Schmitt is careful to emphasize that the “normal” situation, in which rules and practices function in a predictable way, remains the aim of the legal order. One might conclude from this that the exceptional circumstances that override the rule of law are the rest of the time irrelevant. In that case, the two realms would stand apart; an unbounded freedom in one small part of the legal world would not undermine standard interpretative constraints elsewhere.³⁴

Schmitt went much further, however. In *The Dictator*, he treats the gap

29. See, e.g., PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* (2001).

30. JEFFREY HERF, *REACTIONARY MODERNISM* (1984).

31. CARL SCHMITT, *POLITICAL ROMANTICISM* (Guy Oakes trans., The MIT Press 1986) (1919).

32. CHARLES FERRALL, *MODERNIST WRITING AND REACTIONARY POLITICS* (2004); see also HERF, *supra* note 30.

33. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 6-13 (George Schwab trans., MIT Press 1985) (1922).

34. This was essentially the argument made by Kelsen in his work on sovereignty at the same time as Schmitt. See HANS KELSEN, *DAS PROBLEM DER SOUVERANITÄT UND DIE THEORIE DES VOLKERRECHTS* (IDC 1986) (1920). It was also made by H.L.A. Hart, still more explicitly, in his discussion of the “penumbra” of legal interpretation in his debate with Lon Fuller. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614-15 (1958).

between norm and application as limited and exceptional.³⁵ But in *Political Theology*, written only a year later in 1922, the anomalous moment of dictatorship or free decision goes viral. Since the power of the sovereign is not limited to “he who decides *in* the state of exception” but “he who decides *on* the state of exception,” there exists an ever-present potential for free decision that permeates the legal system.³⁶ In *Political Theology*, Schmitt is explicit about this broader implication. He writes, “All law is ‘situational’ law. The exception reveals most clearly the essence of the legal authority.”³⁷ So the exception is not marginal. On the contrary, it reveals the essence of all law once the facade of liberal legality has been stripped away. By 1922 Schmitt had concluded that the state of emergency, far from being an anomaly capable of being contained within the legal structure, ultimately undermined the whole structure. Indeed, his first work of legal theory, written in 1912, had already foreshadowed this conclusion.³⁸ Coiled within each and every moment of legal judgment or interpretation lay a fundamental indeterminacy constituted by “the concrete exception”³⁹ and incapable of being foreseen or limited by any structure of rules. We can see how closely this argument parallels later critiques of positivism. Schmitt was addressing the *inherent* problem of what he saw as the endemic undecidability of the law, binding all law to the violence of a decision which must in the end be ungovernable, and then legitimating that violence in the singular figure of the sovereign who both belongs to the law and yet rises above it.⁴⁰

In Schmitt’s new legal order, the sovereign emerges as a Christ-like figure, anomic, ecstatic, and charismatic. He does not follow the law; he performs *miracles*.⁴¹ That, accompanied by his romantic hostility to the moral vacuity of positivism, led Schmitt not only to reject the rule of law as illogical but to embrace that rejection. For Schmitt, the *Rechtstaat* or

35. SCHEUERMAN, *supra* note 14, at 585; CARL SCHMITT, *DIE DIKTATUR* 585 (6th ed. 1994) (1921).

36. DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* 42 (1997).

37. SCHMITT, *supra* note 31, at 13.

38. SCHEUERMAN, *supra* note 14; CARL SCHMITT, *GESETZ UND URTEIL. EINE UNTERSUCHUNG ZUM PROBLEM DER RECHTSPRAXIS* [LAW AND JUDGMENT: AN INVESTIGATION INTO THE PROBLEM OF LEGAL PRACTICE] (München Beck 1969) (1912).

39. William Scheuerman, *Legal Indeterminacy and the Origins of Nazi Legal Thought*, 17 *HIST. POL. THOUGHT* 571, 587 (1996).

40. SCHMITT, *supra* note 31, at 54-55; Carl Schmitt, *Der Führer schützt das Recht* [*The Leader Protects the Law*], 39 *DEUTSCHE JURISTEN-ZEITUNG*, 945-50 (1934).

41. The miraculous might be defined as a fact or reality which emerges despite its physical impossibility—that is, “against the law.” The analogy draws our attention to the relationship between Schmitt’s jurisprudence and his arch-conservative Catholicism. The connection is made explicit in SCHMITT, *supra* note 31, and is discussed in GIORGIO AGAMBEN, *STATE OF EXCEPTION* 80-85 (Kevin Attell trans., 2005). See also CARL SCHMITT, *ROMAN CATHOLICISM AND POLITICAL FORM* (G.L. Ulmen trans., 1996) (1923).

positivist rule of law was a “national poison” which refused to face up to the necessity of this higher, finer law.⁴² Liberal legality was a form of lying because it dishonestly denied the ultimate sovereign power of the decision maker. It was also a form of cowardice because it gave up on the power to do justice instead of law.⁴³

C. *A Continuing Romanticism*

Right after World War I, the crisis of modernity raised the stakes and sharpened the distinction between positivism’s fetishization of certainty and romanticism’s appeal to a transcendent justice unassimilable to legal rules. But the romantic turn has not died. It can still be heard in Lon Fuller and Philippe Nonet;⁴⁴ in a revival of interest in Schmitt and Heidegger wherein we find prominently these appeals to the palpable yet ineffable power of this idea of justice;⁴⁵ and in the transcendentalism of some recent scholars of Derrida and law.⁴⁶ Gillian Rose for example, accuses Derrida, Levinas, and their followers of advocating a kind of “messianic justice” which surrenders all reason and knowledge in favor of a “new ethics” with no justification or relation to either.⁴⁷ Meanwhile, as I have argued elsewhere, the belief in the natural, anomic, and healing power of literature still influences a great deal of writing in law and literature.⁴⁸

Neither is that all. An elegiac sense of loss and betrayal colors almost all of the work of critical legal studies (CLS) from the 1980s. Juxtaposed against its general nihilism, the almost routine gestures towards love or politics or community in Peter Gabel or Duncan Kennedy or Mark

42. F.R. Cristi, *Hayek and Schmitt on the Rule of Law*, 17 CANADIAN J. POL. SCI. 521, 529 (1984); see also ELLEN KENNEDY, CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR 24 (2004) (describing Schmitt’s concern that *Rechtsstaat* theory subordinated the substantive content of the state to procedure).

43. Heiner Bielefeldt, *Carl Schmitt’s Critique of Liberalism: Systematic Reconstruction and Counter-criticism*, in LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM 23, 25-27 (David Dyzenhaus ed., 1998) [hereinafter LAW AS POLITICS]; Robert Howse, *From Legitimacy to Dictatorship—And Back Again: Leo Strauss’s Critique of the Anti-Liberalism of Carl Schmitt*, in LAW AS POLITICS, *supra*, at 56, 61-63.

44. Philippe Nonet, *Antigone’s Law*, 2 LAW, CULTURE & HUMAN. 314 (2006); Philippe Nonet, *What is Positive Law?*, 100 YALE L.J. 667 (1990).

45. See, e.g., MARIANNE CONSTABLE, JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW (2007); MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE (1994).

46. See, e.g., MARINOS DIAMANTIDES, LEVINAS, LAW, POLITICS (2007); SUSANNA LINDROOS-HOVINHEIMO, JUSTICE AND THE ETHICS OF LEGAL INTERPRETATION (2012); DESMOND MANDERSON, PROXIMITY, LEVINAS, AND THE SOUL OF LAW (2006); see also GILLIAN ROSE, JUDAISM AND MODERNITY (1993); GILLIAN ROSE, THE BROKEN MIDDLE (1992); Jack Balkin, *Deconstruction’s Legal Career*, 27 CARDOZO L. REV. 719-40 (2005); Jack Balkin, *Transcendental Deconstruction, Transcendental Justice*, 92 MICH. L. REV. 1131 (1994).

47. See ROSE, JUDAISM AND MODERNITY, *supra* note 46, at 6; ROSE, THE BROKEN MIDDLE, *supra* note 46, at 310.

48. Desmond Manderson, *The Irony of Law and Literature*, 35 AUSTL. FEMINIST L.J. 107 (2011).

Tushnet or Arthur Leff show an unerring faith that—not in law but somewhere outside of it—an unlimited and undefined justice could *cure* the limitations of law.⁴⁹ Roberto Unger is paradigmatic, at least in his early work.⁵⁰ The very last words of *Knowledge and Politics* capture precisely the combination of nihilistic despair and need rooted in legal romanticism: “Speak, God.”⁵¹ In fact, although resolutely opposed to CLS, Brian Tamanaha himself appeals to a “non-instrumental” vision of law in which “divine and natural law and . . . the wisdom of custom and tradition were thought to provide correct principles for morality, law, and life”⁵² Somewhat bizarrely, it seems to me, he makes that appeal central to his defense of positivism. From the historical point of view, Tamanaha has it upside down. The development of law’s structural, systemic, and linguistic neutrality—legal positivism—was a *creature* of modernity and a consequence of the steady leeching away of some underlying religious or customary sense of the common good or justice. The whole notion of positivism was built on the claim that we cannot agree on any of these things anymore; it replaced that kind of justification for law with a purely structural or formal justification which was entirely content-free.⁵³ For modern positivists like Joseph Raz,⁵⁴ for example, formalism is the means by which law becomes effective precisely *as an instrument*; it provides the certainty that ensures that the instrument of law is capable of realizing whatever ideals, wise or unwise, moral or immoral, are set for it. Tamanaha is right to see the loss of these ideals as “an enduring, bedeviling legacy of the Enlightenment,”⁵⁵ but it is puzzling that he thinks positivism was designed to protect them rather than to take over from them.

49. See, e.g., Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (discussing community as the salvation of law); Mark Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) (defending nihilism as method); Duncan Kennedy, *Freedom & Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (discussing politics as the salvation of law); Arthur Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (discussing the possibility of God as the salvation of law); Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 100 YALE L.J. 94 (1984) (describing the nihilistic streak of CLS); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (discussing politics as the salvation of law).

50. ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975); ROBERTO UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1986); ROBERTO UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987); see also Drucilla Cornell, *Beyond Tragedy and Complacency*, 81 NW. U. L. REV. 693 (1987); Martin Stone, *The Placement of Politics in Roberto Unger’s Politics*, in *LAW AND THE ORDER OF CULTURE* 78 (Robert Post ed., 1991).

51. Compare UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 50, at 295, with Leff, *supra* note 49, at 1249 (concluding, similarly but ironically, “Sez who? God help us.”).

52. TAMANAHA, *LAW AS A MEANS TO AN END*, *supra* note 14, at 23.

53. HART, *supra* note 12; JOSEPH RAZ, *AUTHORITY OF LAW* (1979); Michael Giudice, *Existence and Justification Conditions of Law*, 16 CANADIAN J.L. & JURISPRUDENCE 23 (2003).

54. Joseph Raz, *The Rule of Law and its Virtue*, 93 L.Q. REV. 195 (1977).

55. TAMANAHA, *LAW AS A MEANS TO AN END*, *supra* note 14, at 23.

In different ways, then, these modes of legal theory all seek some transcendent balm—sometimes literature, sometimes politics, sometimes ethics, sometimes God, sometimes wisdom—capable of overcoming the limitations of legal judgment. Roger Berkowitz is a good example of the new romantics. He argues that “the gift of science” is a poisoned chalice. Indeed, the plea to re-forged the relationship between law and justice runs through *The Gift of Science* from the first sentence: “Justice has fled our world.”⁵⁶ This justice is presented throughout as “transcendent.”⁵⁷ Modern law’s promise of scientific objectivity suppresses precisely “the legal idea of justice . . . in its connection with transcendence . . . the beautiful dream of transcendence.”⁵⁸ Justice as law’s underlying “ethical unity” appears to transcend individual or conflicting interests in favor of the unification of the community. Berkowitz argues:

Active thinking . . . is irreducible to rules or laws. . . . Similarly, justice demands that man think and in thinking transcend the limits of his unique self and enter into an ethical community with others. The dream of justice, in other words, is the dream of transcendence.⁵⁹

Ultimately, “the natural connection with the divine” underpins Berkowitz’s argument. Our “incalculable yet manifest sense of divine and human justice” girds this authority, provides this insight, ordains this inhuman unity, and grants this transcendence.⁶⁰

According to Berkowitz, “the impulse to think deeply and critically about whom we have become need not and should not be confused with the romantic longing for a return to a glorified past.”⁶¹ But this disclaimer is not convincing. Berkowitz is an advocate “striving to rejuvenate an idea of justice.”⁶² Nothing could be clearer, it seems to me, than that the very ideas of insight, nature, and transcendence that mark legal romanticism are the foundation of Berkowitz’s approach. Just as in the influential work of Philippe Nonet, Berkowitz displays “a mourning, or, rather, melancholic longing for a lost utopia, a world without the things the law decides.”⁶³ Judgment becomes a game played with invisible trumps, in which one just leaps over the gap between rules and particulars, between then and now, by reference to some inarticulable thing above and beyond

56. ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION*, at ix (2005).

57. *Id.* at x, xiii, xv, 90, 139.

58. *Id.* at 159-60.

59. *Id.* at x.

60. *Id.* at 159, 24.

61. *Id.* at xiv.

62. *Id.*

63. Andrew Norris, *Heideggerian Law Beyond Law? Technique, Recht, and Physis*, 2 *LAW, CULTURE & HUMAN*. 341, 348 (2006).

the “inevitable totalising horizon” of rules.⁶⁴

There is a sleight of hand here, a crucial amnesia. Berkowitz gives us dichotomies, one side of which he subjects to a very careful historical critique—law, positivism, rules, social policy—while its counterparts—nature, authority, justice, tradition, insight, community—are not interrogated at all. The reason for this partiality is that Berkowitz stops his history in 1900, the very apotheosis of German positivism. His attacks on this tradition reproduce in both tone and argument the *critique* of modernity that dominated the period that followed it, from 1900 to 1930. Berkowitz’s response to the legal and social history of positivism, and his attacks on mechanics, systems, and rules, echo almost word for word the arguments of early twentieth century “New Romanticism.” The language and arguments of this later period lie outside Berkowitz’s book but nevertheless frame and indeed haunt his argument. He relives and repeats this intellectual history, *denuo e de novo*, but without ever allowing us to see its context or its problems.

III. ANOTHER MODERNISM

A. Background and Antecedents

In the years following the Great War, however, the choice did not simply lie between a failed positivism and a failed romanticism. Another possibility, more closely allied to the sensibilities of modernism, lay open. I want now to introduce D.H. Lawrence. He was unquestionably a child of the romantic world. It told in his social, religious, and intellectual upbringing and through the time he spent in Germany before the War. As a romantic and a student of Apocalypse,⁶⁵ Lawrence at times sounds a lot like Schmitt. He too craves a humbling purification—a second flood to cleanse the world. Indeed, the mythical phoenix or firebird was a symbol particularly close to Lawrence’s own heart. He referred to it frequently in his writings, as the name of the journal he edited, and even in bookplates he designed.⁶⁶ The phoenix, burnt to death every five-hundred years and from whose ashes a new bird is then born, symbolized the possibility of a new beginning forged out of the ashes of war—the promise of transcendence. Nonetheless, Lawrence’s most sustained attempt to engage with literary, political, and psychological modernism lies in his misunderstood novel *Kangaroo*, written from far-off Australia in 1922, at

64. JACQUES DERRIDA, *SPECTRES OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING & THE NEW INTERNATIONAL* 28 (Peggy Kamuf trans., 1994).

65. PETER FJÄGESUND, *THE APOCALYPTIC WORLD OF D.H. LAWRENCE* (1991).

66. D.H. LAWRENCE, *PHOENIX: THE POSTHUMOUS PAPERS OF D.H. LAWRENCE* (E.D. McDonald ed., 1936).

the very height of these debates.⁶⁷ That novel, while perfectly comprehending the attractions of a purified and transcendent justice, ultimately responds to the crisis of modernity without reverting to either nineteenth-century positivism or to nineteenth-century transcendentalism or rism.

At the beginning of *Kangaroo*, its main character and the author's alter ego, Richard Lovatt Somers, is a romantic in precisely the legal, jurisprudential, and political ways that I discussed above. He seeks a "new show" to replace the lies and weakness of liberalism and democracy. He seeks leadership and honor and glory. He seeks the *end* of pettifogging rules and pedantic law and the triumph of instincts and of justice, in just the same way as we have seen in Berkowitz. But by the end of the novel, Lawrence repudiates the hysteria into which his post-war melancholia led him (and by no means him alone).⁶⁸ As Lawrence's oeuvre develops, particularly in *Kangaroo*, the central framing principle that emerges is neither the triumph of disenchanted reason, nor the mystical force of a community or instinct. He draws instead on a different tradition going back to Samuel Taylor Coleridge and Friedrich Schelling and before them to Heraclitus: polarity.⁶⁹

Polarity maintains the power of oppositions rather than seeking to eliminate or synthesize them. Now, it is true that this idea was current throughout the romantic period. "Contradiction," wrote Schelling, "is life's mainspring and core If there were only unity, and if everything were at peace, then truly nothing would want to stir."⁷⁰ Coleridge wrote:

[I]f all knowledge has, as it were, two poles, which reciprocally presume and demand each other, then these poles must seek each other Two forces should be conceived which counteract each other by their essential nature; . . . these forces should be assumed to be both alike infinite, both alike indestructible.⁷¹

In the romantic period, this idea of "two poles" was merely the catalyst for an ultimate fusion. Coleridge describes his work as "transcendental philosophy" because he insists that these poles must finally unite in a new entity that perfectly "interpenetrates" and "partakes" of both.⁷² But Lawrence gradually goes beyond this movement of reconciliation. As he

67. D.H. LAWRENCE, *KANGAROO* (Bruce Steele ed., 2002) (1923).

68. This rejection is certainly apparent in *Kangaroo*, although the situation is less clear in his next novel, *THE PLUMED SERPENT* (1926), from which all traces of irony and humor have been surgically removed.

69. ROBERT MONTGOMERY, *THE VISIONARY D.H. LAWRENCE* 36 (2009).

70. ABRAMS, *supra* note 25, at 173.

71. SAMUEL TAYLOR COLERIDGE, *7 BIOGRAPHIA LITERARIA: THE COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE* 255, 299 (J. Engell & W.J. Batc eds., 1983) (1817).

72. *Id.*

writes in *The Crown*, a strange work from 1915, “[T]here is no rest, no cessation from the conflict. For we are two opposites which exist by virtue of our inter-opposition. Remove the opposition and there is collapse.”⁷³ We can see the development of this idea in Lawrence’s books. In *The Rainbow*, published the same year, the character Ursula says, “If the lamb might lie down with the lion, it would be a great honor to the lamb, but the lion’s powerful heart would suffer no diminishing.”⁷⁴ Yet, in *Twilight in Italy*, published only twelve months later, Lawrence writes otherwise: “They are two Infinites, twofold approach to God. And man must know both. But he must never confuse them. They are eternally separate. The lion shall never lie down with the lamb.”⁷⁵ Lawrence begins to sound less like the romantics than like earlier writers whose attention to antinomy and paradox had been articulated in Renaissance theories of *concordia discors*, not to mention Carl Jung’s vision of an eternal struggle between mythic opposites of dark and light. In each case, what we see is a refusal to choose between opposites *or* to attempt to harmonize them. Instead, polarity respects the constitutive and ineradicable fact of their opposition—an unending and productive back-and-forth movement between incommensurable principles.

B. Polarity in Lawrence

Polarity for Lawrence is most emphatically not a reconciliation or a fusion, but an oscillation. Take the magnet as a model. Here we have two opposite poles, positive and negative, but what at first glance appears to be an irreconcilable dualism is in fact the source of its energy. The two opposite poles that wage war within a man or an idea or an institution remain *necessary* to one another. Its forces form the electrical circuit that drives us on. Lawrence wrote, “I know I am compounded of two waves. I am framed in the struggle and embrace of the two opposite waves of darkness and of light.”⁷⁶ Likewise, polarized light does not mix or meld. It has been separated into its distinct component parts. In *Psychoanalysis and the Unconscious*, Lawrence writes of “the polarity of the dynamic consciousness . . . the sharp clash of opposition . . . and no possibility of creative development without this polarity from the beginning of life.”⁷⁷ He even attempts to map these polarities onto the body, the contrast between upper and lower bodies, front and back, man and woman—even

73. D.H. LAWRENCE, *The Crown*, in REFLECTIONS ON THE DEATH OF A PORCUPINE AND OTHER ESSAYS 251-306 (Michael Herbert ed., 1988) (1915).

74. D.H. LAWRENCE, *THE RAINBOW* 317-18 (M. Kinkead-Weckes ed., 1989) (1915).

75. D.H. LAWRENCE, *TWILIGHT IN ITALY AND OTHER ESSAYS* 252 (Paul Eggert ed., 1994) (1916).

76. MONTGOMERY, *supra* note 69, at 15.

77. D.H. LAWRENCE, *PSYCHOANALYSIS AND THE UNCONSCIOUS* 65-66 (1923).

sun and water—becoming corporeal sites of inherent oppositions that ignite “circuits of passion.”⁷⁸

Lawrence’s notion of polarity, like his rejection of unity and coherence, derives from his experience of literature as a genre that does not aim to resolve or overcome tensions but, on the contrary, to draw them out. The introduction to *Studies in Classic American Literature*, published the same year as *Kangaroo*, contains one of the most celebrated passages on literature: “But if it really be a work of art, it must contain the essential criticism of the morality to which it adheres. And hence the antinomy, hence the conflict necessary to every tragic conception.”⁷⁹ In *Kangaroo*, the “laws of polarity” are described as the movement between two flows, one sympathetic and loving, the other mighty and authoritarian. “There is a dual polarity and a dual direction,” he writes. “The whole movement is but a polarized circuit. Insist on one direction overmuch, derange the circuit, and you have a terrible debacle.”⁸⁰ The Whitmanesque theme of “call and answer,” describing both the backwards-and-forwards form and the discursive themes of the novel, becomes Lawrence’s way of articulating how we are *nourished* by contradiction. Lawrence writes:

A man’s soul is a perpetual call and answer. He can never be the call and the answer in one: between the dark God and the incarnate man: between the dark soul of woman, and the opposite dark soul of man: and finally, between the souls of man and man, strangers to one another, but answerers. So it is forever, the eternal weaving of calls and answers, and the fabric of life woven and perishing again.⁸¹

This language captures both the tensions of the novel’s broader structure and the intense internal dialogue and disputation that marks the text. The book embodies an earnest if perverse commitment: *not* to resolve its contradictions and tensions but to see in them its main character’s essential activity. The polarity between opposed forces is further figured as a tension between the substantive and the formal elements of the novel, creating “an unstable locale between the move to multiply and disseminate meanings, and an alternative move to retrieve and reclaim them.”⁸² This love of instability, this internal tension, is what accounts for the book’s indeterminacy and for the perplexity with which critics greeted it. Yet these same elements are what make the book,

78. D.H. LAWRENCE, *FANTASIA OF THE UNCONSCIOUS* 83 (1933).

79. D.H. LAWRENCE, *STUDIES IN CLASSIC AMERICAN LITERATURE* 2 (Ezra Greenspan, Lindeth Vasey & John Worthen eds., 2003) (1923).

80. LAWRENCE, *KANGAROO*, *supra* note 67, at 302-03.

81. *Id.* at 267.

82. Gerald Doherty, *White Mythologies: D.H. Lawrence and the Deconstructive Turn*, 29 *CRITICISM* 477, 477, 493 (1987).

written in 1922, the same year that both T.S. Eliot's *The Waste Land* and James Joyce's *Ulysses* were published, one of the most characteristic if unsung works of modernism.

In *Kangaroo*, the abiding metaphor for polarity is the Australian surf:

Then, when [the waves] fell, the fore-flush in a great soft swing with incredible speed up the shore, on the darkness soft-lighted with moon, like a rush of white serpents, then slipping back with a hiss that fell into silence for a second, leaving the sand of granulated silver A huge but a cold passion swinging back and forth. Great waves of radium swooping with a down-curve and rushing up the shore. Then calling themselves back again, retreating to the mass. Then rushing with venomous radium-burning speed into the body of the land. Then recoiling with a low swish, leaving the flushed sand naked.⁸³

The oscillation of the waves evokes Somers's own polarity, towards and away from the romance of ecstatic belonging, and presents it not as a conflict or a problem, but as part of him. Although they "seem to sunder life into an irreconcilable dualism [they] are in fact polar opposites We can distinguish them but we cannot divide them."⁸⁴

Polarity is thus not synthesis, not balance, not transcendence, and categorically not harmony—it is opposition. Polarity describes forces that cannot be compromised since we are committed too much to *both*. Lawrence articulates "antitheses, contraries, contradictions."⁸⁵ He advocates a metaphysics of modernist energy, not romantic peace.⁸⁶

C. Polarity as the Discourse of Modernism: The Question of Benjamin

Lawrence was far from alone in these ideas. What is so striking about the period around the Great War is the way in which similar ideas kept springing up. We see a similar approach to contradiction and opposition in R.G. Collingwood's work, including *Truth and Contradiction*;⁸⁷ in Jung, of course, where the dark and the light exist simultaneously within us;⁸⁸ and in Freud's concept of "ambivalence," which is not treated as a feeling of indifference but rather as a desire that pulls us with equal force

83. LAWRENCE, *supra* note 67, at 340.

84. MONTGOMERY, *supra* note 69, at 21.

85. *Id.* at 17-18.

86. ANNE FERNIHOUGH, *D.H. LAWRENCE: AESTHETICS AND IDEOLOGY* (1993); JOHN B. HUMMA, *METAPHOR AND MEANING IN D.H. LAWRENCE'S LATER NOVELS* (1990); Philip Skelton, *A "Slobbery Affair" and "Stinking Mongrelism": Individualism, Postmodernity and D.H. Lawrence's Kangaroo*, 81 *ENG. STUD.* 545 (2003).

87. See RICHARD MURPHY, *COLLINGWOOD AND THE CRISIS OF WESTERN CIVILIZATION: ART, METAPHYSICS AND DIALECTIC* (2008).

88. CARL JUNG, *PSYCHOLOGY OF THE UNCONSCIOUS* (Beatrice Hinkle trans., Moffat, Yard & Co. 1916) (1912).

in two quite contradictory directions.⁸⁹ One might even detect the trace of polarity in Erwin Schrödinger's "superposition," the strange suspension of matter in simultaneously contradictory states.⁹⁰

No discussion of this period or these ideas would be complete, certainly in the context of law and politics, without reflecting on the work of Walter Benjamin. In the period immediately following the Great War, Benjamin was pondering the very same questions as Carl Schmitt and the great German positivist Hans Kelsen. Kelsen's monograph on sovereignty was published in 1920, Benjamin's *Critique of Violence* in 1921.⁹¹ Schmitt's *Political Theology* appeared in 1922 as a riposte to both.⁹² In 1928, Benjamin returned the favor with the publication of *The Origin of German Tragic Drama*, which was likewise addressed to the relationship between exception, decision, and sovereignty.⁹³ Complications arise, however, because of the enigmatic and inimitable quality of Benjamin's thought. Throughout his work there is undoubtedly a messianic and utopian strain.⁹⁴ In *Critique of Violence*, he agrees with Schmitt that the ungovernable "decision" is a necessary implication of "the curious and at first discouraging experience of the ultimate undecidability of all legal problems."⁹⁵ Of course, this is the very problem with which we began our reflections about the crisis facing the rule of law. The violence of a free decision, not the passive application of a prior norm, becomes the necessary predicate of all law. But Benjamin attempts to distinguish between different modes of violence: law-preserving violence and law-making violence in the first place, two forms of human power, and then a pure or divine violence outside of the law which *deposes* it and thus

89. SIGMUND FREUD, *TOTEM AND TABOO* (A. A. Brill trans., Moffat, Yard & Co. 1918) (1913).

90. Erwin Schrödinger, *Can Quantum-Mechanical Description of Physical Reality Be Considered Complete?*, 47 *PHYSICS REV.* 777 (1935). I do not intend to square the circle by claiming the mantle of scientific truth for the philosophical or legal notions of polarity, although I think it is fair to say that they recognize a truth-in-contradiction from an unexpected source. What I do wish to claim is that all ideas are born of a particular cultural context or *zeitgeist*, and the emergence of cognate ideas at the same time demonstrates clearly the potency of the particular historical moment to call forth a particular constellation of insights. Every era formulates its own set of problems and perspectives, and these multiple connections across very different fields demonstrate their fecundity and their continuing relevance.

91. 1 Walter Benjamin, *Critique of Violence*, in WALTER BENJAMIN, *SELECTED WRITINGS 1913-26*, at 236 (Marcus S.C. Bullock & Michael W. Jennings eds., 1996); Walter Benjamin, *Zur Kritik der Gewalt*, 47 *ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK* 809 (1920/21).

92. SCHMITT, *supra* note 35.

93. WALTER BENJAMIN, *THE ORIGIN OF GERMAN TRAGIC DRAMA* (John Osborne trans., New Left Bks. 1977) (1928); see also AGAMBEN, *supra* note 41; Samuel Weber, *Taking Exception to Decision: Walter Benjamin and Carl Schmitt*, 22 *DIACRITICS* 5 (1992).

94. The point is fundamental, in different ways, to the argument made in the following: Catherine Mills, *Playing with Law: Agamben and Derrida on Postjuridical Justice*, 107 *S. ATLANTIC Q.* 15 (2008); Michael Mack, *Modernity as an Unfinished Project: Benjamin and Political Romanticism*, in WALTER BENJAMIN AND THE ARCHITECTURE OF MODERNITY 59 (Andrew Benjamin & Charles Rice eds., 2009).

95. AGAMBEN, *supra* note 41, at 53.

makes real revolution possible.⁹⁶ Clearly, this messianic justice, this pure violence unsullied by calculation, expressive rather than teleological, and coming from *outside* either present or projected legal structures, is closely allied to a transcendental instinct and to the anti-modern hostility to calculation and system.⁹⁷ For Benjamin, this violence escapes the cycle of instrumental politics because it is not a means to achieve an intended end (as a strike is intended to raise wages or a revolution is intended to take over the State). Divine violence is an end in itself. It is an expiation of the past and provides the opportunity for an unimaginable and unpredictable future. Like Lawrence's phoenix, it is the purifying fire from whose ashes something new might rise. Benjamin writes, "But all mythic, law-making violence, which we may call 'executive,' is pernicious. Pernicious, too, is the law-preserving, 'administrative' violence that serves it. Divine violence, which is the sign and seal but never the means of sacred dispatch, may be called 'sovereign' violence."⁹⁸

That last sentence is critical. It holds the key to where Benjamin and Schmitt part company. In Benjamin, "sovereign" characterizes a force—it is an attribute of a kind of violence itself. But in Schmitt, the word "sovereign" shifts from being a subset of violence to being an agent, indeed a personification, of it. In Benjamin, "sovereign" is an adjective; for Schmitt, it is a noun. By concentrating the inevitable violence of decisions beyond-the-rules onto a particular human person, Schmitt solves the problem of rule-indeterminacy by subordinating everything to human control and state interests. Benjamin's transcendence on the other hand remains irreducible to human control and entirely outside the state. Sovereign violence for Benjamin is radical and destabilizing; sovereignty for Schmitt is reactionary and authoritarian. The Schmittian sovereign *tames* the Benjaminian divine.

The difference between the two becomes even more apparent in *The Origin of German Tragic Drama*, in which Benjamin explores the baroque concept of sovereignty. Benjamin takes from the baroque the idea of a transcendent figure (such as justice or the gods) that eludes the grasp of the state and remains strictly unattainable. In direct response to Schmitt, Benjamin argues that the role of the sovereign is not to seize supreme executive power but rather to *refuse* it as one would a temptation.⁹⁹ Furthermore, in theatrical, artistic, and philosophical terms,

96. *Id.*; Benjamin, *Critique of Violence*, *supra* note 91, at 243, 250-52.

97. Anthony Auerbach, Remarks to the After 1968 Seminar on Walter Benjamin's *Critique of Violence* (Sept. 3, 2001); Antonis Balasopoulos, *Crisis, Justice, Messianism: On Walter Benjamin's Critique of Violence* (July 9, 2011) (paper presented at Utopia/Crisis/Justice: Twelfth International Conference of Utopian Studies Society).

98. Benjamin, *Critique of Violence*, *supra* note 91, at 252.

99. BENJAMIN, *supra* note 93.

Benjamin claimed that the baroque embraced indeterminacy and played constantly with tricks of subjectivity and illusion. As Samuel Weber concludes, “[I]t is precisely the absence of such a verdict and the possibility of unending appeal and revision that marks the *Trauerspiel*. Nothing could demonstrate more clearly the distance between this eternal revision and Schmitt’s notion of an absolute and absolutely definitive and ultimate decision.”¹⁰⁰ Benjamin’s idea of a transcendent promise—a harmonized world, a perfect justice—is presented as infinitely distant from our everyday reality. This leads him to insist upon the flawed and provisional nature of decisionmaking. On the other hand, Schmitt’s idea of a transcendent order is continually located in our everyday reality. This leads him to insist upon the arrogant and unequivocal power of decisionmaking. While in some ways Benjamin’s vision is as romantic as Schmitt’s, there is nonetheless a fundamental difference between the two. We can see then that Benjamin has more in common with Lawrence and the modernist path which Schmitt rejected. Benjamin struggled to come to terms with the uncertainty, subjectivity, and rootlessness of the modern world. Like the literary and artistic modernists around him and quite unlike the reactionary modernists, he sought to turn those terms from problems to be solved into opportunities to be seized.

IV. POLARITY AND “POST”-MODERNISM

A. Deconstruction and Polarity

These arguments closely parallel those of deconstruction. This is not so surprising if we recall that Derrida’s seminal article *Force of Law* takes as its starting point a close reading of Benjamin’s critique.¹⁰¹ Derrida also recognizes the power of the undecidable to contaminate legal judgment; he also emphasizes the empty and unfillable space of transcendence, the unattainability of perfection, and the inadequacy of human calculations. In all these ways, he acknowledges Schmitt’s critique of the rule of law, and in some ways that is precisely what *Force of Law* is about. But Derrida’s principal contribution may lie in his eschewal of the messianic *waiting* for justice that we find in Benjamin just because the urgency of the demand for justice “does not wait.”¹⁰² This was Schmitt’s fundamental point too, but Derrida’s response to it is radically different. Schmitt, drawing on Hobbes here, says the sovereign’s decision is infallible because it is final. Derrida says it is neither—and a good thing too. Thus, Derrida combines Benjamin’s normative openness with Schmitt’s analytic realism.

100. Weber, *supra* note 93, at 17; see BENJAMIN, *supra* note 93, at 137.

101. See Derrida, *supra* note 8.

102. Mills, *supra* note 94, at 28-29.

Connecting the impossibility of a ground for legal violence, the necessity of that violence, and the inescapability of the decisions that give rise to it, he argues more explicitly than Benjamin for the ongoing critique of our interpretative assumptions as the best and only ground for judgment that we possess.¹⁰³ Such a judgment would in no way attempt to transcend its weakness but would instead attempt to see it more clearly and question it more closely. We can thus see in Derrida not a rejection of modernism but, on the contrary, its apotheosis.

Polarity crystallizes perfectly what Derrida adds to Benjamin's provisional openness—why a transcendence of or solution to the problem of judgment is impossible. Justice as polarity is just what Derrida is getting at in many of his later works. The tension between justice as sameness and justice as difference, between law as calculation and justice as the incalculable, describes a predicament that is *incapable* of yielding to a choice, a compromise, a balance, or a synthesis. “Between justice (infinite, incalculable, rebellious to rule and foreign to symmetry) and the exercise of justice as law or right . . . a system of regulated and coded prescriptions,”¹⁰⁴ we cannot choose. Like Freudian ambivalence, our desires pull us with uncompromising force in opposite directions without our being able to abandon or resolve either one.

Similar explorations of incommensurable and insoluble forces, called by Lawrence “the laws of polarity,” are to be found throughout Derrida's later work—in his discussions of responsibility/accountability or of communication/expression.¹⁰⁵ In *On Cosmopolitanism and Forgiveness*, Derrida discusses the “tension at the heart of the heritage” between forgiveness as the unconditional pardon of the guilty as such and forgiveness as a conditional grant, as an economy of repentance:¹⁰⁶

These two poles, the *unconditional and the conditional*, are absolutely heterogeneous, and must remain irreducible to one another. They are nonetheless indissociable: if one wants, and it is necessary, forgiveness to become effective, concrete, historic; if one wants it to arrive, to happen by changing things, it is necessary that this purity engage itself in a series of conditions.¹⁰⁷

Here and elsewhere the connection to polarity is explicit—“two poles,

103. Drucilla Cornell, *The Violence of the Masquerade*, 11 CARDOZO L. REV. 1047, 1057-58 (1990).

104. Derrida, *supra* note 8, at 959.

105. JACQUES DERRIDA, *GIFT OF DEATH [DONNER LA MORT]* (David Wills trans., 1996); JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., 1998).

106. JACQUES DERRIDA, *ON COSMOPOLITANISM AND FORGIVENESS* 34-35 (Mark Dooley & Michael Hughes trans., 2002).

107. *Id.* at 44.

irreconcilable but indissociable.”¹⁰⁸ Derrida’s posthumous *The Beast and the Sovereign* is likewise saturated with the language of “poles,” “sudden transitions,” “oscillations,” and, indeed, “superpositions.”¹⁰⁹

The moment of legal judgment is similarly torn by an ambivalence in the Freudian sense between the obligation to follow the prior rule, general and certain, and the question of its application *in this case*. This is really to say no more than was said by Justice Harry Blackmun when he concluded, at the end of his career, that capital punishment was irredeemably flawed. The problem with justice, he argued, is that we require of it both consistency and fairness, yet these two necessary attributes—the first a demand that the law be general and the second a demand that the law be specific—pull us in opposite directions. Blackmun wrote, “A step toward consistency is a step away from fairness.”¹¹⁰ There is an uncomfortable superposition here which cannot be balanced or cured. Now this gives no comfort to the positivists who think that the prior rule can be relied upon to simply tell us what to do. But neither does it give comfort to the transcendentalists or reactionary modernists from Schmitt to Berkowitz. This beyond-the-rules moment of ungoverned singularity in no way *solves* the problem of justice. It creates the problem. Polarity is not a circuit-breaker; it is, as Lawrence always said, a circuit maker.

B. Beyond Transcendence

The vital distinction between polarity and transcendence (and therefore between deconstruction and romanticism) has not always been acknowledged. In a series of influential articles Jack Balkin, for example, insisted that justice for Derrida is “transcendent” in just the sense of appealing to an unreasoned and instinctive insight as a way to escape from the paradox of justice.¹¹¹ So too for Gillian Rose, the “new ethics” of “Messianic deconstruction” ultimately abandons justification in favor of the sublime leap into the arms of a “sacralized polity.”¹¹² Although that criticism might be correct about Heidegger or Levinas, I think it is quite wrong about deconstruction.¹¹³

108. *Id.* at 51.

109. JACQUES DERRIDA, *THE BEAST AND THE SOVEREIGN*, VOLUME I: THE SEMINARS OF JACQUES DERRIDA 17, 18, 54, 65 (Geoffrey Bennington ed. & trans., 2009).

110. *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of cert.).

111. Balkin, *Deconstruction’s Legal Career*, *supra* note 46, at 737; Balkin, *Transcendental Justice*, *supra* note 46, at 740; Pierre Schlag, *A Brief Survey of Deconstruction*, 27 *CARDOZO L. REV.* 741, 746-748 (2005).

112. ROSE, *JUDAISM AND MODERNITY*, *supra* note 46, at 87; ROSE, *THE BROKEN MIDDLE*, *supra* note 46, at 293.

113. Jesse Sims, *Exceptional Justice, Violent Proximity*, in *ESSAYS ON LEVINAS AND LAW: A*

The difference between polarity or deconstruction and transcendence is this: we have not *lost* the foundations of law, we *lack* them. Paradise has not been lost, as the elegiac romantics contend. It never existed. The romantics and the reactionary modernists until early Unger, the CLS movement, and contemporary neo-romantics are united in their critique of positivism and in seeking some redemptive escape from the problems of modernity. We hear again and again echoes of the millenarian tradition in which the modern world is to blame for our “loss” of justice, judgment, and insight. Repeatedly we are invited to reclaim law as an eternal truth that we have tragically lost sight of. But this was only ever a fantasy or an ideological construction. Our tradition is not whole: it was riven from the moment of its birth. No one *did* this to it; it did this to itself, although perhaps it took a Great War (or two) to tear down the temple veil that hid it from us.¹¹⁴ From *Kangaroo* to *Force of Law*, the non-reactionary modernists, if I can put it that way, have relentlessly drawn our attention to the contradictions and ambiguities that inhere at every moment of our lives and to the toxic character of any rhetoric that purports to escape or precede or transcend them.¹¹⁵ In this task, deconstruction only recasts and expands the modernist moment at the start of the last century when thinkers from so many different fields tried to come to terms not with a loss but a *lack*.

V. TOWARDS A MODERNIST RULE OF LAW

A. *The Tug of Oscillation*

What does this mean for the rule of law and the question of legal judgment? Polarity is clearly distinct from positivism, which seizes only one end of the pole, and from transcendentalism that seizes only the other. It asks us instead to hold both ends at once and feel the current—the life—coursing through us. An argument for linguistic fluidity and responsiveness—what Benjamin called “the curious and at first discouraging experience of the ultimate undecidability of all legal problems”¹¹⁶—might initially lead us toward the romantic rejection of abstract rules, the logic of reason, or the rule of law. We seem at the mercy of a universe of instances in which justice is singular, uncodifiable,

MOSAIC 217-39 (Desmond Manderson ed., 2009); Nick Smith, *Questions for a Reluctant Jurisprudence of Alterity*, in *ESSAYS ON LEVINAS AND LAW: A MOSAIC*, *supra*, at 55-75.

114. Barbara Johnson, *The Surprise of Otherness: A Note on the Wartime Writings of Paul de Man*, in *LITERARY THEORY TODAY* 13, 18-21 (P. Collier & H. Geyer-Ryan eds., 1990).

115. See, e.g., BEARDSWORTH, *supra* note 10; SIMON CRITCHLEY, *THE ETHICS OF DECONSTRUCTION: DERRIDA AND LEVINAS* (1992); Allcitta Norval, *Hegemony After Deconstruction: The Consequences of Undecidability*, 9 J. POL. IDEOLOGIES 139-57 (2004).

116. AGAMBEN, *supra* note 41, at 53.

unrepeatable, and spontaneous. That was exactly the logic that appealed to Schmitt and appalled Tamanaha.

There is a second and countervailing element here. The Lawrentian polarities that tug at us require a constant listening and correction of received ideas. A “determinate oscillation” swings us between two irreconcilable poles—general and particular, prior rules and new circumstances—forcing us to rethink our rules, the meaning we give our words, the imagined “essences” of those words, and the purposes that are served by them. But in the end, the decision cannot wait—polarity, opposition, and contradiction are never completely resolved. The pull of singularity forces us to reflect on what the rule means and accomplishes in this particular circumstance. We are forced to reconsider, to question, to doubt. Our understanding of the rule is thus not static. The pull of generality forces us to account for the implications of our decisions for other circumstances. Our understanding of those circumstances is thus not unconstrained. The decision that we make neither surrenders to the rules nor abandons them; instead, it attempts to *understand* them.

The decision that emerges—a legal judgment perhaps, or the practical application of a rule—will always be an unstable and imperfect response to these tensions. Unlike the romantics, however, we should *never* expect our decision to transcend or heal them. The judgment we make endeavors to reassess meaning and to question our assumptions, but the result, whatever it may be, is provisional and open to reconsideration at every moment. Our understanding of the rules may have been either shifted or confirmed by our situation. Present circumstances may lead us to reflect on the meaning of the rules we thought we knew, but on the other hand, the pressure of the future may lead us to hold, despite everything, to our previous interpretation. Either way, the new decision we make necessarily attempts to impose and to justify a new stability and generality on the swirling forces around us. Thus, we are constantly thrown from one pole to the other, from the singularity of justice back to the (re-)construction of rules. Of course, as soon as we are confronted with a new circumstance, the previous interpretation must generate new tensions and a new polarity pulling us in opposite directions again. Like the moon and the tides, the experience of polarity, of the impossibility of our ever satisfying contrary expectations, will always be felt as a tug and a repetition.

B. The Necessity of Conversation

Tamanaha thinks that the critique of modernity threatens to destroy the rule of law; Berkowitz think that the rule of law threatens to destroy justice. Both are wrong. Both misunderstand what the rule of law is about. Its value does *not* lie in the legal decision itself which is, as we have seen,

of necessity unsettled and partial, but in the doubt and the challenge that comes before it and in the public discourse of reason-giving and argument that comes after it. That the promise of science or objectivity as some new and perfect ground to the rule of law is doomed to fail, I have no doubt. But it does not follow that we should give up on reasons, now in the plural, understood as an ongoing social process of transparency, justification, and response. The arguments it resolves may be less important for the rule of law than the conversations it allows. It is the movement itself that matters, the irresolution rather than the resolution—an endless polarity that ensures that we *never stop deciding*.

Derrida makes a similar point in a slightly different way. He describes the “madness of decision” as that moment in which one is forced to confront a polarity between the responsibility to “conserve the law and destroy it or suspend it enough to have to reinvent it in each case.”¹¹⁷ At the same time, as we have seen, the polarity that tugs at justice from contradictory directions and the gap that opens up between the abstract rule and the unique circumstance that sheds light on it, mean that there is a necessary *imperfection* or remainder to this process of inquiry. Due to the critical and imperfect dimension inherent in the moment of judgment, the obligation to decide is never severable from the obligation to ruthlessly and publicly expose one’s judgments, to explain, justify, and be criticized for our imperfect decisions and interpretations. All decisions are violent but not all violence is the same. The violence that sees itself as such and attempts to think through and explain the choices that are made is different from the violence that is ignorant of itself and pretends to have escaped the dilemma.

Crucially for our understanding of the rule of law, then, this eternal weaving of correction and change is not a private affair, but a public, social event. It must be articulated, explained, and criticized. “There must be resistance,” wrote Lawrence. “We ought to pray to be resisted and resisted to the bitter end There must be resistance in relationships. It is the basis of strength, of balance, of unison.”¹¹⁸ Without argument and corrigibility, there can be for Lawrence no change. Thus, Lawrence sees a moment of accountability, perhaps even of apology, as we confront others. *The Rainbow* “deals in the soul’s mistakes and self-retrieval, so that the erring course is constantly under correction.”¹¹⁹ *Kangaroo* is riddled with the same public mea culpas:

“I am a fool,” said Richard Lovatt, which was the most frequent discovery he made. It came, moreover, every time with a new

117. Derrida, *supra* note 8, at 961.

118. ANAÏS NIN, D.H. LAWRENCE: AN UNPROFESSIONAL STUDY 55 (1964) (quoting Lawrence).

119. LAWRENCE, *supra* note 74, at 83.

shock of surprise and chagrin. Every time he climbed a new mountain range and looked over, he saw, not only a new world, but a big anticipatory fool on this side of it, namely, himself.¹²⁰

Now such an approach, with its emphasis on discourse and provisionality, would have given Carl Schmitt and the reactionary modernists hives. Schmitt was a caustic critic of bourgeois democracy precisely because he thought parliamentary debate a charade that grandstanded and perpetuated differences rather than a deliberative forum in which disputes could be resolved.¹²¹ Even more centrally, Schmitt adjudged conversation itself a sign of weakness. He had a horror of “*una clase discutidor*”—what the contemporary right would call the chattering classes. “A class that shifts all political activity onto the plane of conversation in the press and in parliament,” wrote Schmitt, “is no match for social conflict.”¹²² He held “conversation” in contempt because he saw it as merely a way of avoiding conflict, “the enemy of enemies.”¹²³

Today, as in the Weimar Republic, there are naïve liberals, whom Schmitt was right to skewer, who think that if only we could sit down and talk we would all finally agree. But that is exactly what the modernists, Lawrence included, did *not* think. What Schmitt condemned as quintessentially romantic, “a world . . . without decision, without a final court of appeal, continuing into infinity,”¹²⁴ becomes transfigured in modernism for the fundamental reason that the modernists celebrated the uncertainty and the fluidity of the self. Conversation is therefore understood neither as to the mere prologue to a decision nor as a way of forever postponing it. Conversation is the framework through which identity is actually formed, and likewise sets the conditions under which it remains continually in movement. Just as the modernists thought that conversation in the sense of a fragmented and transitory inter-subjectivity was constitutive of the self, so too for a thinker like Lawrence it became constitutive of social relations and even of legal decisions. Someone like Schmitt wanted us to get past such doubt and instability, but the modernists embraced these features as intrinsic to the human condition. For Lawrence then, polarity was an integral component of all human functioning—from personal relations to political and legal structures.

Framed by the public conversation and critique established through the rule of law, the irreconcilable and irresolvable conflict between predictable rules and unpredictable circumstances is not a legal disaster,

120. LAWRENCE, *supra* note 67, at 279.

121. CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., 1988) (1923).

122. SCHMITT, *POLITICAL THEOLOGY*, *supra* note 33, at 59.

123. SCHMITT, *POLITICAL ROMANTICISM*, *supra* note 31, at 17.

124. *Id.* at 19.

but a vital opportunity. The humanness, complexity, and inadequacy of judgment are an invitation to judge the judges, to judge their justifications, and so to *participate* in the making of law. Rather than promising certainty or finality, the rule of law might promise something more human and more honest. Firstly, that a decisionmaker will be required to articulate and justify his or her decision, to relate it back to the rule even as it has been modified or developed by their experience of the context before them. Secondly, that they will be challenged on these reasons, forced to question them and think again, without ever simply being able to appeal to either interpretative certainty or personal insight as some kind of ineffable trump. Change emerges through the eternal weaving of call and answer, in which courts or judges are implicated but not alone. On this view, legal decisions prefigure not an *end* to interpretative and normative disagreement, but another text to be defended and transformed in the flux of their ceaseless oscillation. If we look around the world at societies in transition, and the profound legal problems they face, that seems to me a more important goal to advance than a promise of objectivity that is increasingly viewed with incredulity.¹²⁵

CONCLUSION

The rule of law is not an arid technical exercise, which is the ethical poverty of positivism. Neither is it an unanswerable and divine decree, which is the ethical poverty of romanticism. It becomes instead the framework for a social and human dialogue, which is as it should be. That pluralism and that modernism Schmitt, for one, simply could not fathom.¹²⁶ But without the antiphonal response of reason-giving and contingent justification, which Lawrence calls “call and answer,” the law would cease to offer us—all of us, whether citizens or lawyers or judges—the possibility of learning something about ourselves and the world.

This too, I think, reflects a crucial distinction in how we might think about the rule of law. On the one hand, positivism does not conceive of judges as learning something new. Judges, on the standard model, merely apply what they already know: the answer is to be found in the rules written down on the page in front of them. So the dialogue in a courtroom

125. RUTI TEITEL, *TRANSITIONAL JUSTICE* (2000); *THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE* (Martin Krygier & Adam Czarnota eds., 2007); Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in *RELOCATING THE RULE OF LAW* 49 (Gianluigi Palombella & Neil Walker eds., 2011).

126. The importance of the state and of a homogeneous society, and Schmitt's consequent hostility to liberal pluralism, became increasingly clear in his writing. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (G. Schwab trans., 1996) (1927); see also DYZENHAUS, *supra* note 36.

is all one-way. Only the parties to a dispute learn something: what the law means and how to obey it. Such a model of legal judgment is resolutely hierarchical.

But this will not do. Judgment—literary, personal, political, or legal, it hardly matters—is a constant process of learning. There is no learning without resistance and struggle. On this model, the judge listens and, having heard something new (about the world, perhaps, or the people who live in it) must correct his or her assumptions of what a proper application of legal principles requires. Arrogance is the worst crime for any judge to commit—and the most typical. A judge, like the rest of us, *must* be prepared to make the frequent discovery that he or she is a fool. The rule of law thereby cedes its mythical certainty, but by listening, deciding, explaining, and listening again, law becomes better connected to its community and able to develop, step by step, while always remaining publicly answerable for its decisions. The rule of law facilitates a structure of oscillation capable of learning from us rather than merely instructing us.

On the other hand, the word “insight,” the romantic foil to rule following, appears equally to acknowledge no argument or struggle or explanation. It is as hierarchical as its positivist counterpart. Justice appears like a revelation, as the product of a purely inward process by which one intuits the big picture. Every page of Berkowitz’s *The Gift of Science* exudes this static and non-discursive image of judgment. To speak of law as a “natural or traditional insight” “that grows of its own accord” implies that intuition arrives without need of any interrogation, modification, or argument.¹²⁷

But this will not do either. As Lawrence made so clear in all his work, *nothing* in this world is free, natural, or manifest. What we learn about justice—and, of course, this continually changes in a world of bewildering complexity and endless polarity—we *earn*, precisely by going through the ordeal of justification and reasons, and through the resistance provided by others. Insight is not the opposite or transcendence of reasons. On the contrary, like wisdom and foolishness, they are productively related, the one chiseled out of us by the constant nagging of the other. “Trial and error” is not an insult. It is the methodology of the rule of law.

Understanding the rule of law through the lens of modernism, and in particular through that of polarity, disturbs the hegemonic reason of positivism and the hegemonic unreason of romanticism alike. Polarity’s backwards-and-forwards movement of constant correction, adjustment,

127. BERKOWITZ, *supra* note 56, at 51, 29.

and metamorphosis cannot resolve the opposition between general rules and specific circumstances, between paying attention to uniqueness and difference and the public demand for an articulated and defensible interpretation of existing principles. Instead, both sides remain continually in play. The imperfectability of justice turns the rule of law into an endless process of reassessment and learning. The irreducible tension of polarity or contradiction generates a public process of call and answer, in which our opinions are constantly amended and tested against the challenge of the voices of others.

Against positivists' assertion of law's perfection and the romantics' of its perfectibility—the former a claim of purity centered on the past and the second a dream of it focused on the future—the current approach seeks to find in the critique of modernity a way to understand the rule of law while fully embracing our present imperfection, our fragmentation, and the imperfection and fragmentation of justice with us. My argument has been for us to learn to accept and build on these qualities of the human condition, with which modernism was so absorbed, rather than to fear or deny them. Indeed, an awareness that lack lies at the heart of the human condition implies an abiding humility about our human capacities with specific relevance to the claims that institutions might make. In the wake of the First World War, modernist art and literature in particular seems to have striven to achieve greater understanding not by maintaining its closure, determinacy, or authority, but by undermining it. That is a trick that the rule of law might do well to emulate.

