

OUBLIEZ CRITIQUE (forget critique)

Costas Douzinas

Law and Critique

We are all critical today in the same sense that we are all in favour of human rights or of democracy. No academic, politician or commentator is considered interesting or important unless he takes critical positions. Indeed you cannot be an academic if you are not in some sense critical, even if that critique may relate only to tastes, styles and fashions. But what does critique mean today?

Starting with etymology, the Greek word *diakrinein* means to distinguish or separate. As a diacritical model, critique aims to distinguish between the true or just manifestations of a phenomenon and their inauthentic counterparts. Secondly, *krinein* means literally to cut or cut through, in the way of Socrates cut through the common opinion (*doxa*) of the many and came up with his dialectical-maieutical conclusions. Critique is a cutting force, a process of violent distinction and separation, a severing by means of a knife, dagger or sword. A third meaning associates critique with the concept of crisis. Crisis is a turning point; when we say, the economy, or a patient, is in a critical condition, they are in a serious situation, which may lead to their decay, disintegration or death. A critical situation denotes a grave turn of affairs and may lead to a serious change of direction.

Critique and crisis, two predominantly modern concepts, are intimately linked. The private, bourgeois practice of critique unleashed by the Enlightenment took the form of a judgment on the religious, scientific, cultural practices and eventually the politics and ideology of the Absolutist state. Crisis, on the other hand, referred to an objective historical process. Reinhart Koselleck has shown that the practice of critique paved the way for political upheaval and led to the 18th century revolutions.¹ The importance and

Costas Douzinas is the Dean, Faculty of Arts and Humanities, Birkbeck College.

¹ Reinhart Koselleck, *Critique and Crisis* (Cambridge, Mass., MIT Press, 1988)

the closeness of the link between the critical process and political radicalism was not apparent to the participants but has defined the politics of the last two centuries.

In all three meanings, critique is intimately associated with law, with courts and with judgment. As Koselleck puts it, 'in the eighteenth century, history as a whole was unwittingly transformed into a sort of legal process...the tribunal of reason, with whose natural members the rising elite confidently ranked itself, involved all spheres of activity in varying stages of its development. Theology, art, history, the law, the State and politics, eventually reason itself – sooner or later all were called upon to answer for themselves.'² But critique is also the result of crisis, in the sense that a critical condition objectifies and defamiliarises received patterns of thought and accepted forms of life. It allows their assumptions and premises to come to the surface, lose their naturalness and, under observation, turn from unquestionable grounds into challenged ideologies. Crisis offers the necessary distance or gap between thought and the given from which critique emerges. As the prompter or the result of crisis, critique was a turning away from the existent; it was distinguished by a certain *gravitas*, it cut away but also spelled trouble. And it is in both these senses that critique has come under attack recently. The wider crisis of modernity, of its received forms and values, calls for a critical response similar to that of early modernity, which launched juridical procedure and judgment as the form and substance of critique. But critique has been unwell for some time now. At least since the fall of the Berlin Wall, the critical project has been in a critical condition. It may be useful therefore to examine some of the basic premises of critique.

The court-like character of critique is strikingly evoked in the opening pages of Gillian Rose's *Dialectics of Nihilism*.³ Rose, commenting on the *Critique of Pure Reason*, defines critique, following Kant, as the tribunal of reason. According to Kant, the business of critique is to overcome philosophical dogmatism and skepticism, to allow man to develop his own intellect beyond the tutelage of dead tradition as a precondition for becoming free and autonomous. Critique tries to lay bare the transcendental

² id. 9-10.

³ Gillian Rose, *Dialectic of Nihilism* (Oxford, Blackwell, 1984), 11-49.

conditions of possibility of a phenomenon, a discourse or faculty, the trans-historical presuppositions that underlie knowledge, moral deliberation and aesthetic judgment on the side of experience against a metaphysical type of knowledge which, while valid and worthy, is not open to reasoning. The aim of critique was to introduce a limit attitude, to ‘dare people to know’ beyond the given but also to delineate what ought to remain off limits to knowledge because it does not belong to its kingdom.

In Rose’s imagery, the First Critique is a trial in which Reason is presented as the ‘ensemble of the three fictitious persons of the law: the judge, the litigant/witness and the clerk of the court.’⁴ Let us examine these three personas in turn. The judge, reason as consciousness, ‘compels the witness to answer questions which he himself has formulated’ and this involves making an ‘*inventory* of all [its] possessions, through *pure* reason systematically arranged.’⁵ The tribunal interrogates reason, takes evidence about its power and limitations and finally passes judgment, setting boundaries and imposing strict lines that should not be crossed by speculative reason. Critique ensures that reason does not veer into areas of idle speculation and does not trespass upon property that is off-bounds. There is a proper and a propriety use of reason and the job of critique is to decide what belongs to reason and what not and then to keep reason within its boundaries. The use by the tribunal of critical reason of Roman legal categories, which protect absolute property through the ‘juridical fictions of persons, things and obligations’ introduces into philosophy, history and society the antinomy of law: ‘the opposition and implication between law and fact, morality and legality, autonomy and heteronomy, good will and natural desire.’⁶ As long as critique sees itself as a court and is wedded to the old *quaestio quid juris*, it keeps reproducing and confronting the juxtaposition of law and fact, is and ought, or rule and regularity which undergird the structures of legality and cannot be resolved within the parameters allowed by legal procedure.

⁴ id. 6.

⁵ Kant, op.cit. A 84-5 and B xiii.

⁶ Rose, op.cit., 2.

Critique comes before the law and is shaped according to legal protocols, peculiarities and procedures. Critique finds in law its essence and form, it becomes law-like. Consistent with Kant's monological conception of the subject, critique becomes either adjudication or policing, the critic a judge or a guard, something not far removed from the Freudian conception of the law-like character of conscience or the superego. The critic is either the judge who makes distinctions, passes judgment and sets limits, or the policeman who guards those limits and ensures that the judicial *fiat* is translated into daily practice. We are well aware of these two positions in intellectual life and their expressions in the legal academy. Critique takes its severe and austere stance from the protocols of legal propriety and sobriety.

But critique is not just a tribunal. It is also a policing operation; its judgment establishes boundaries while its border guards police the line between inside and outside, a function that appeared from the beginning to be excessively and essentially negative. Kant argued in the First Critique that 'to deny the service of critique is of any positive utility would be as much as to say that the police are of no positive utility because their chief business is to put a stop to the violence that citizens have to fear from other citizens so that each can carry their affairs in peace and safety'.⁷ Critique's business is to prohibit and exclude, to keep ideas safe and protected. As all judgment and setting of limits, critique both prohibits and enables.

Hegel's turn to inter-subjectivity introduced a different type of critique, in which the critic acts like a witness in the tribunal of reason. This is the immanent critique, which Marx developed further into the critique of ideology. The critic is immersed within his object of critique, the society he lives in and his testimony aims at contrasting the ideology of society with its reality. Marx explored the theme of dissonance between ideal and real using the concepts of alienation and ideology, emphasizing more the 'objective' laws of economy and society and less their ideological misrepresentations. In post-Marxist theory, the critic places much greater importance on social fantasies and bears

⁷ Immanuel Kant, *Critique of Pure Reason*, Paul Guyer trans. (Cambridge, Cambridge University Press, 1998) 'Preface to the Second Edition', 115.

witness to the gaping cleavage between real and its idealized, ideological representations. This type of critique was developed by the early Frankfurt School. Max Horkheimer, in his 1937 essay ‘Traditional and Critical Theory’, proposed an immanent, dialectical critique and emphasised that ‘true theory in a period of crisis is more critical than affirmative’.⁸ Critique has society as its object and investigates it through the dialectical tool of political economy. For Horkheimer, critical theory tries to ‘take seriously the ideas by which the bourgeoisie explains its own order – free exchange, free competition, harmony of interests and so on – and to follow them to their logical conclusion [a process which will] manifest their inner contradiction and therewith their real opposition to the bourgeois order.’⁹ For this type of critical theory there is no outside, no factors that remain external to the production of knowledge. Indeed while traditional theorists separate their scholarship from their life as citizens, the critical approach rejects the division between ‘value and research, knowledge and action’ and unites theory, politics and action.¹⁰

Immanent critique has the whole of society as its object and emancipation as its aim. Otherwise the critic becomes the victim of ideology: ‘The thinking subject is not the place where knowledge and object coincide or consequently the starting point for attaining absolute knowledge. Such an illusion about the thinking subject under which idealism since Descartes has lived, is ideology in the strict sense, for in it the limited freedom of the bourgeois individual puts on the illusory form of perfect freedom and autonomy.’¹¹ If we replace the ‘thinking subject’ with the ‘legal person’, Horkheimer’s axiom could become the defining motto of critical theory, the axiom of a critical legal ontology upon which the radical critique of society could be based. But this challenge has been taken up rarely.¹² Recently, immanent critique, pre-occupied with the ideological ascendancy of liberal capitalism, has turned its attention to dominant ideas

⁸ Max Horkheimer, ‘Traditional and Critical Theory’ in *Critical Theory: Selected Essays* (New York, Continuum, 1995), 218.

⁹ id. 215.

¹⁰ 208.

¹¹ 211.

¹² A recent important use of immanent critical theory in law is found in Susan Marks, *The Riddle of all Constitutions* (Oxford, Oxford University Press, 2000), Chapters 1 and 4.

and discourses and, abandoning political economy, it has been juxtaposing the normative self-understanding of a society to its material actualisation. Critique is addressed at the totality of the social bond and, while it may adopt a perspectival stance, it is from the angle of the whole that the gap between norms and their realisation is judged.

Hegel's dialectical method placed the critical project on the world historical stage leaving behind the monological subject of Kantian critique. Here the tribunal of reason has been replaced by the tribunal of history. Reason after its long apprenticeship in the Inns of Court appears to have developed a special cunning that allows it often to hoodwink the tribunal and to get the verdict against the intentions of the judge. Critique can now adjudicate the infamies of historicism and the transience of events in the name of a beginning or end of history - that is of a philosophy of history which turns either into philosophical anthropology or historical eschatology. Hegel's end of history, Marx's communism, Bloch's spirit of utopia, Benjamin's angel of history, Derrida's messiah without the messianic are all judges in the court of final appeal, or more accurately the court of the last judgment, in other words they are legislators. Despite their differences, they set history's law which is both inside history as its motivating power and outside as the all-seeing eye and looks back from the future. Law-giving acts as a judgment that judges the present from the perspective of a violence-free past or future. Here we have the completion of the juridical positioning. Critique becomes legislative; the critic as lawmaker, the prophet of a justice that unites the whole in the movement of history.

Finally, the clerk. The clerk replaces judgment with description, performative with constative, justice with truth, Ought with Is. The critic as clerk is outside the rule of law, external to the game of justice, his legislation is not law but knowledge, his judgment not normative but epistemological. If the legislator and the judge/policeman give and apply the law, the clerk turns away from law, to find his law in another register, be that knowledge, reality or desire. Indeed the critic as witness of crisis is in a critical and clinical condition, in a certain psychoanalytical sense. He is the psychotic who denies the law, turns away from the symbolic and towards the real. This is how Marx and Engels

painted the Young Hegelians as extraneous practitioners of ‘criticism’, people who considered the object of their intervention external to their interpretative practice.

If Kantian critique, Hegelian philosophy of history and observation and truth-telling introduce us to the trinitarian identity of the critic, as judge, witness and clerk, and their corollary the legislator, law is both itself and its critique. The law has always/already co-opted the possible critical positions and critique is condemned to follow and try occasionally to subvert the protocols of legal practice. Critique is immanent to law and the more the critic denies and decries the law, the more he expresses his subjection and love for the law. I am not saying much more here than modernity can be described as the era of *nomophilia*. The centrality of law for modern culture is apparent at various levels: in the replacement of the idea of good life by that of right, of life according to rules; in the claim that the rule of law will pacify social and political conflict by turning it into technical disputes about the interpretation and application of legal rules entrusted in the hands of rule experts; in the hallowing out of morality which has been turned into a private domain of conflicting ‘subjective’ convictions arbitrated by the ‘objective’ and public rules of law; in the emphasis placed on form and procedure. These are outward manifestations of modernity’s unconditional love for the law which conditions subjectivity in the following schema: we are taken by the law, we are subjected to its interdictory and directive force well before we know what the law commands, what its demands require of us. The structure of critique as a legal operation makes the critic as much a nomophile as the law-abiding citizen.

Let me remind you here in passing two types of law that place the ego under their command before it can fully understand its injunction. Consider first the moral law. Every moral command involves an answer to the question ‘what ought I to do or to become in a particular situation’. But before any formulation of an actual command, the fact that a moral command exists indicates that the law as a fact of reason has taken hold of me. To enquire about what I should do in a moral dilemma implies that I already feel that I ought to do something, that a feeling of being bound, of having been put under an obligation comes before any particular obligation and command. In following the law we

become rational and free: rational by subjecting the multitude of chaotic representations and feelings to the coherence of concepts and categories, free by obeying the moral law but acting as if we were the legislators of its commands. The modern subject is created in a double movement in which we are subjected to the law while at the same time we imagine being autonomous and ruling ourselves.

Freud, too, reminds us that we are subjected to the law and we obey it before any knowledge of its content. Our subjectivity and our ideal ego comes into being through our pre-Oedipal separation from Lacan's maternal object and our introduction to the symbolic order of language and paternal law. This originary separation opens and determines our destinies, but as it comes before the ego and before the scene of representation, it cannot be represented and remains repressed and forgotten. Entry to the law not only checks the absolute power of the (m)other; it also allows the subject to enter the realm of desire. Our *eros* obligates us before the announcement of any particular obligation and subjects us to the law before we can know its demands. But conversely our love confronts us as a necessity, as a fate pleasurable and painful, structured by the law. There is a close link between law and desire. The law represses desire but it also structures it and gives it direction.

There is no better evidence of this than the writings of Peter Goodrich: his accusation that critics love the law is nothing more than a statement of the obvious and it takes an analytically minded critic to make a great discovery out of the obvious.¹³ In this context, we can understand Peter Goodrich's accusation against the Brit Crits. Goodrich indicts his comrades with indifference, ignorance or even hostility to the law, which however disguises a deep commitment or affection towards legality. The legal organisation of the psyche and the centrality of law for the social bond has been a persistent theme of psychoanalytical jurisprudence and in particular of the writings of Pierre Legendre that Peter extensively utilized, translated and imported in this country. Peter's major contribution to English-speaking legal scholarship was the introduction of a number of

¹³ Peter Goodrich, 'The Critic's Love of the Law', 10 *Law and Critique* 3, 343 (1999).

Legendrian themes, such as the social unconscious, the reference, the religious provenance and sacral operation of legal institutions, the paternal function of law, etc.¹⁴

But Legendre's extravagant claims about the inevitable and desirable attachment to law, whose weakening in modern democracies leads to anomie and social disintegration, were counter-intuitive for critical legal thought and only a few scholars, critical or otherwise, adopted them.¹⁵ While the *nomophilia* of modernity emphasizes the importance of the legal form for subjectivity and sociality, Legendre (and less so Goodrich) claims that the law *tout court*, both in its form and content is what has created western civilization. From that perspective, the paradoxical or dialectical combination of love and hostility, dependence and indifference become all too apparent to the psychoanalytically seduced critic, who theoretically deconstructed the law but whose life was punctuated by encounters with the emissaries of patriarchy and the emblems of institutional power. Psychoanalysis loves the law; the superior knowledge-cum-power of the 'discourse of the master' depends for its action and effects on legality. It is in this sense that psychoanalysis becomes the law: if critique recognizes itself in the juridical, psychoanalysis asks you to believe in the law, to identify with it and this belief establishes both emotional attachments and friendships and, paranoid dislikes.

A short history of critical legal studies

'Reading lawbooks is like eating sawdust' wrote Kafka to a friend. We all have the experience of sawdust in the mouth, even our jurisprudence books have not escaped the woody taste as most students of jurisprudence attest. And yet jurisprudence is the prudence, the *phronesis* of the law, both its consciousness and conscience.

¹⁴ Peter Goodrich, *Languages of Law* (London, Weidenfeld, 1990); *Oedipus Lex* (Berkeley, University of California Press, 1995); *Law and the Unconscious: A Legendre Reader* (Peter Goodrich ed.) (London, Macmillan, 1997).

¹⁵ Pierre Legendre, 'The Other Dimension of Law', 16 *Cardozo Law Review* 3-4 (1995), 943.

First, the consciousness of law. All great philosophers from Plato to Hobbes, Kant, Hegel, Marx and Weber had a detailed understanding of the law and made juristic issues the centre of their concerns. Aristotle's *Constitution of Athens* as much as Hegel's *Philosophy of Right* are attempts to examine the social bond, to discover and promote what attaches the body to the soul, what keeps them together and links them to society and its institutions. But this first meaning of wisdom cannot be separated from a second: jurisprudence is the conscience of law, the exploration of law's justice or of an ideal law or equity at the bar of which law is always judged. Plato's *Republic* is the first and most complete search for the meaning of justice, while his *Laws* a complete guide to legislation well before Bentham. Seen from the perspective of the *longue durée*, the law represents the principle of social reproduction, of passing on, what survives our sojourn in this world. Whenever philosophy occupied itself with the meaning of the social bond it turned to law and became legal philosophy, the great source from which political philosophy and then the academic disciplines emerged in the 17th and 19th centuries respectively.

But this birth of the disciplines out of the womb of legal philosophy led to an impoverishment of legal study and modernist jurisprudence. Two types of poverty: first, legal scholarship became an entomology of rules, a guidebook to technocratic legalism, a science of what-legally-exists and a legitimation of current policies. A kind of mathematical logic that Edmund Burke called 'metaphysical speculatism'¹⁶ replaced the humanistic immersion into the legal text and its hermeneutics. But rule formalism was a woefully inadequate representation of the legal enterprise even at the level of description. As a result, legal scholarship became academically peripheral, the understanding of law totally unnecessary for the other social sciences and disciplines and legal education took on the form of vocational study and was treated as such by both students and the rest of the academy. When legal academics complain about student lack of interest in theoretical or other 'extracurricular' issues, we have only ourselves to blame. For some one hundred years, we have set ourselves up as purveyors of a formulaic knowledge, the recipients of

¹⁶ Edmund Burke, *Reflections on the Revolution in France* (JGA Pocock ed.) (London, Hackett, 1987), 51.

which are there to memorise and repeat it in even more condensed and formulaic forms. But as Nietzsche said of his own studies, when the only organ addressed by the Professor is the ear, it grows disproportionately by eating away at the brain.

The second type of poverty is ethical and is much worse. It is based on the separation between subject and object, characteristic of the metaphysics of modernity and is reproduced in the legal dichotomies mentioned above, such as those between facts and norms, objective law and subjective morals or rules and opinions. A main aim behind legalism is to keep moral responsibility out of the domain of law in the belief or hope that the strict logic of rules and deduction can adequately translate social conflict into technical questions about the logic of rules, which can be safely entrusted into the hands of rule technicians.

It was this type of impoverished approach to legal study that has been challenged in the last thirty years by legal theory. Contemporary jurisprudence can be divided into external and internal approaches. External theories, typically socio-legal studies or the sociology of law, bear witness: they treat reasons, arguments and justifications as 'facts' to be incorporated in wider non-legal explanatory contexts. The task is to identify the causal chains, which shape or are shaped by legal practices, to derive justice from knowledge. Socio-legal studies claim to have no normative agenda. It would not be difficult to show of course that in most cases, they start with a description of reality which impliedly, consciously or unconsciously, involves a normative position (the importance of pluralism or ADR) and then conclude, if they can be bothered, by teasing out of the Is the Ought they started with. Like those agnostics who are more obsessed with God than the most devout Christian, socio-legal scholars are law's most faithful subjects, the devout who follow the law most when they claim to be ignoring or doing away with it. Sociological and criminological research was initially linked to the needs of the welfare state and was associated with the demand for social justice. But as the welfare state retreated, its scientific interests and research funds were re-directed to the tasks of managerialism, efficiency and an audit culture, a main purpose of which is its own self-reproduction. If statistics started as the science of the state and were linked first with the project of state

aggrandizement and later with that of re-distribution, applied research has become today part of the attempt to identify society and state. Politics mutates into bio-politics and law becomes the ever-present but empty form of state and power. Like many previous radical movements or theories, socio-legal studies and research may retain a progressive political motivation but their work is, unintentionally or not, co-opted to the endless reproduction of the same hierarchies and patterns.

Internal theories, on the other hand, typically the hermeneutical jurisprudence of value and principle and much of American Critical Legal Studies, adopt the point of view of the lawyer or judge and try to theorise the judicial process of argumentation and reasoning. For the orthodoxy, wider normative commitments potentially coincide with doctrinal developments while for the critic the two diverge. The antagonists actually exist in a continuum, the only difference being the nature of divergence as secondary and remediable or fundamental and inescapable, not a position that many American Critics have seriously sustained despite the lip service paid to concepts such as the ‘fundamental contradiction’, ‘legitimation crisis’ etc.¹⁷

Various poststructuralisms retorted that this type critique remains immanent to the regime of power and discourse, whose claims it seeks to adjudicate, that it is implicated in the very relations it judges. Immanent critique however has carried the day: it unites Habermas and Dworkin, social democrats and liberals, and became the standard bearer of critique *tout court*. But as Leo Strauss wrote, ‘when knowledge and reason are subjected to authority they are called “theology” or “legal learning” but they cannot be philosophy.’¹⁸ Acts of power cannot be used to undermine power. Indeed the idea that the law will offer the resources for its effective critique can appeal only to those who have been seduced by it. The immanent normative critic remains the mirror image and companion of the judge, he discovers and applies the law with the same severity as his counterpart.

¹⁷ Costas Douzinas, ‘Law and Justice in postmodernity’ in Stephen Connor ed., *The Cambridge Companion to Postmodernism*, (Cambridge, Cambridge University Press, 2004), 196.

But there is a second type of critique modeled on the critique of ideology as practiced by the pre-Habermasian Frankfurt School and its neo-marxist critique of culture and institutions. It shuns the premises upon which a discourse or practice rests and attacks them for factual error, moral infelicity and political domination. This is why radical critique must always include a crucial utopian moment.¹⁹ If critique remains normative and subservient to the dominant understandings of a society, even if these are constructed ‘in their best possible light’, its critical purchase will be at best to urge the matching of the normative ‘deep structure’ and its surface manifestations. But when these ‘structures’ pattern domination and exploitation, we need to transcend them rather than adjust fully to their normative requirements. A distance must always remain, a gap excess or lack must separate normative positions and radical alternatives. To a certain extent, the critic must be a foreigner (to his own tradition), a degree of incomprehension must enter and colour her most accurate description and intimate evaluation.

We need to imagine or dream a law or society in which people are no longer despised or degraded, oppressed or dominated and from that impossible but necessary standpoint to judge the here and now. But this dream is no longer given or accepted by most in the legal academy and to this extent critique appears to be losing its radical edge. Today, critical legal theory must be re-linked with emancipatory and radical politics. In equal measure therefore a critical movement is theoretical and political and a critical legal movement addresses the theory and politics of law as an institution, doctrine and practice and the theory and politics of law’s self-understanding in the form of jurisprudence and legal theory. But this is critique from the point of view of radical change.

British critical legal scholars have been associated both with the deconstructive and the utopian instances of critique. Unlike contextual approaches, BritCrits read carefully legal texts and legal history and treat them as the privileged terrain of study. But unlike internal theories, they read these texts not just for their normative coherence but also for their omissions, repressions and distortions, signs of the oppressive power and symptoms of

¹⁸ Leo Strauss, *Natural Law and History* (Chicago, Chicago University Press, 1965), 92.

the traumas created by the institution. If there is patriarchy or economic exploitation, it will be traced in the text, in its rhetoric and images, in its certainties and omissions, which will then be followed outside of the text in the lives of people and the history of domination. Neither just in the text nor only outside of it ‘in the world’, critical theory explores the textual and institutional organisation of the law: as a system of signs, part of the symbolic order, the law is both necessary and fictitious. But law’s fictions operate and change the world, they help establish the subject as free and/because subjected to the logic of the institution.

Critical legal thought was never a monolithic group or theory. It started in America in the Seventies and was first introduced in Britain in the early Eighties. But despite the common descent from the political movement of the Sixties, not much links the two sides. American Critical Legal Studies (CLS) was a political movement with little politics. Its main intellectual activity was the critique of the judicial institutions and reasoning, while the politics of the movement were largely exhausted in the intrigue of the academy and the endless search for media exposure. European critical scholars found the pre-occupation of leading members of the American CLS were with the internal (in)coherence of judicial reasoning a little bizarre. The reasons for the American obsession with judicial reasoning and interpretation are many and cannot be fully addressed here. They include the acute *nomophilia*, the centrality of law, litigation and judges in American culture; the constitutional tradition, which has staked the legitimacy of the polity on the claims of reasoned consistency and historical loyalty of judicial discourse; and, last but not least, the desire of academics to be accepted as privileged participants in public discourse and as valuable commentators of current affairs.²⁰ American academics see themselves as judges in a Super Supreme Court, a court beyond

¹⁹ Costas Douzinas, ‘Human Rights and Postmodern Utopia’ in Douzinas ed., *The Future of Critical Legal Thought*, 11/2 *Law and Critique* (2000), 219-240.

²⁰ In a variant of this approach, therapy, psychoanalytical theory and personal friendships/animosities replace politics. But how can therapy help critique? One suspects that analysis has political purchase, if the main purpose of collective activity is to bring together the overblown egos of various leaders who will endlessly confirm their charisma and power in public shows of admiration and subordination by their followers. When public activity veers between adulation and humiliation and the political becomes exclusively personal, one ‘critical’ position may indeed be individual psychoanalysis or/and public group therapy, a kind of Gerry Springer show for the *cognoscenti*. See Peter Goodrich, ‘The Omen in Nomen’, *Cardozo Law Review*

that of the last instance that will give the (legal or political) right answer to all social ills.²¹

European scholars are often struck, when visiting America, by the large number of legal academics invited by the media to pronounce on aspects of domestic and international life, from foreign wars to the desirability of genetically modified food and the treatment of pets. In this sense, the Monica Lewinski affair was the triumph of lawyering as a form of life: important questions about the balance of power between institutions and parties, about domestic and foreign policy (the affair coincided with Anglo-American bombardment of Iraq) were side-stepped and public discussion focused for months on Starr's effort to 'save' the rule of law and Clinton's legalistic interpretation of the meaning of 'sexual intercourse'. Similarly, while during the immediate aftermath of the 2000 presidential election, Al Gore and the Democrats gave the impression that they would resist dynamically the theft of the election by the Bushes, the disreputable 5-4 decision of the Supreme Court silenced criticism and opposition. It has been said, rather unkindly, that America moved from barbarism to decadence without passing through civilization. It is more accurate to say that it has moved from constitutionalism to terminal legality without passing through (self) critique.

The attempt by the American critics to show that the reasoned coherence claimed by the mainstream does not work presents an inverse picture of the orthodoxy and inadvertently or otherwise upholds the ideology of constitutionalism. Its main political message was addressed at judges and replaced the complacency of the Dworkinian 'right answer' with the slight smugness of the 'indeterminacy thesis' or doctrinal 'trashing'. Literary theory with its many marvels has shown however how easy it is to present a series of texts as internally incoherent; the challenge for the critic is to show how institutional texts hang together, why despite their obvious *non-sequiturs* they succeed in making sense

²¹ In an extraordinary show of disdain for politics, a leading critical international lawyer has publicly reprimanded British and Australian critical academics who, in the run-up to the Iraq war, wrote to newspapers expressing the view that the planned military action was illegal. The critic argued that by using international law as if it could give answers or stop the war, the critics had seriously undermined the critique of formalism to which they were all committed. Lenin said that he would use the rope capitalism

politically and culturally and in underwriting and promoting asymmetries of power and inequalities in real and symbolic capital.

The second characteristic of American Crits is their adoption of what one could call the ‘poor man’s star system’. The obsession with real or perceived fame and the material accoutrements that follow from it colours all aspects of academic life. American academics are preoccupied with the league table of law schools and their salaries and this affectation is a permanent and rather annoying feature of the critical scene too.²² A life spent in an attempt to get to a ‘better’ school means that arrival at such a place often leads to the abandonment of political commitment. The ‘diagonal focus syndrome’, a term coined by Duncan Kennedy, well represented the politics of the American CLS. Its victims went to conferences and seminars for the main purpose of meeting colleagues from ‘better’ institutions and attracting their sponsorship. Duncan Kennedy used to advise those suffering from an acute case of DFS to try and isolate their prey in dark corners away from the main body of the conference, because otherwise their attempts would be in vain. If someone from the Cardozo Law School, for example, had placed himself strategically in the vicinity of a colleague from Columbia or NYU and was about to start extolling his virtues, he should always keep in mind that she would also be looking from the corner of her eye at the labels of passers by, trying to locate and eventually attract the attention of someone from Yale or Harvard. The star system is apparent in the endless production of articles about the history of CLS. More articles appear to have been written about the history of CLS than about its political, theoretical or ideological beliefs and principles.

The British Critical Legal Conference (CLC), on the other hand, is an intellectual movement with lots of politics. The annual CLC started in 1984 and has taken place without interruption ever since. In all these years of operation no officers or posts, chairmen and secretaries, committees or delegates were created. There is no

produced to hang capitalism. But when law has replaced politics, as is the case in America, the critical opponent of this substitution often ends up not with good law but with bad politics.

²² In a telling anecdote, it is rumoured that Stanley Fish, the critical literary theorist, became a Law Professor in order to fulfil his ambition to be the highest paid academic in the Humanities.

organization. The conference was and remains just that: a conference and an umbrella name. We could call the CLC 'a community always to come', a broad church that exists for three days once every year in its gathering and ceases existing once it is over. Every September the place for the next conference is decided and people bid their good-byes for another year, leaving it to the next organiser to put together the programme. No honour, power or position attaches to the conference, no promotion preferment or move to better posts follows organisation or participation. There is only an annual conference and people who turn out every year because they love ideas and they are concerned about the role of law in society and their own role within the institution. Over the years, these conferences introduced themes, schools of thought and movements unknown or dismissed by legal scholarship. Western marxism, postmodernism and deconstruction were the main theoretical influences of the early conferences but soon the new radicalism of race, gender, queer and post-colonial theory were introduced in the legal academy through the CLC. Indeed these conferences were the only academic venues in which such themes were discussed for many years before they became respectable and entered, albeit marginally, mainstream academia.

If anything, participation at critical conferences and critical scholarship attracted disapproval and opprobrium in the early years of the movement and many Law Schools shunned critical academics. When I started my academic career in the early Eighties, I was told by my Head of Department, that if I persisted with my theoretical interests, I would have to publish twice as much as someone doing doctrinal research to get similar recognition. A few years later, an article by Ronnie Warrington and myself was rejected by a law journal because a few words, including 'deconstruction' and 'logocentrism', could not be found in the OED or were thought unclear. In one particularly scandalous case, British and Australian Universities aborted their appointment procedures when it became clear that the best candidate for a Chair was a leading English critic. Other critical scholars who were made unwelcome in their Schools had to leave England. The story of the first generation of CLC is of low-level persecution, emigration and political and cultural red-baiting.

This all has come to an end in the last ten years with the acceptance of critical theory and methodology as a peripheral but legitimate participant in academic life. We know that our effectiveness is limited as in all academic life and production. But life at the university is as real as any other type of life and the oft-repeated accusation that we do not live in the real world is spurious. Our world is the university and it is as real as any other, indeed it is inhabited at any one point in time by far more people (students and academics) than most other walks of life or professions. It was the theoretical audacity, moral commitment and political perseverance of critics, which allowed the development and eventual tolerance of critical legal theory by the orthodoxy. The word 'deconstruction' has appeared repeatedly on essay titles in the *Oxford Journal of Legal Studies*, the bastion of orthodoxy and an interest in theory is a positive advantage for young scholars applying for academic posts. Theory has slowly but steadily seeped down to all levels of legal scholarship and has led to a renaissance in legal study. Indeed whatever their shortcomings and problems, BritCrits have reintroduced legal scholarship where it always belonged, the heart of the academy.

But what was theoretically specific about the BritCrits? Without doubt deconstruction, played a central role in the early days of the British critical movement. Derrida claims controversially in the 'Force of Law' that while the law is deconstructible, deconstruction is justice.²³ The deconstruction of positive law intervened and unraveled either the historical claims to continuity, legitimacy and order the law makes or the systemic claims to coherence, rationality or moral rights-based argumentative integrity. The strategy was premised on a number of moves that had immense theoretical importance in the 80s. The first was to approach the law as a text rather than as a system of norms or a depository of principled wisdom. Traditional normativism was replaced by a joyful textuality and systemic approaches by literary theory. The second was to situate law within its various contexts, economic, political, policy, social etc. but, against law in context approaches, the line between text and context was seen as porous, the bipolarity was multiplied ad infinitum and strategies, such as iterability, grafting and supplementation undermined the textual tranquility of legal studies. One could say indeed that the law is offering the

²³ Jacques Derrida, 'The Force of Law' 11 *Cardozo Law Review* 5-6 (1990), 919.

perfect terrain for the operations of deconstruction, as it seems to follow loyally all the standard textual principles that a deconstruction attacks. Every follower of Derrida, Paul De Man,²⁴ J. Hillis-Miller,²⁵ Barbara Johnson,²⁶ Chris Norris,²⁷ Jonathan Culler,²⁸ Geoffrey Bennington,²⁹ all the luminaries of deconstruction became for a short while critical legal scholars

Applied to law, the dynamics of impure writing were discovered behind the claims of self-presence and coherence of legal texts. The close reading adopted as the method of early postmodernism was aimed at deconstructing *logonomocentrism* in the texts of law. Indeed, according to the critic Jonathan Culler the encounter between deconstruction and law ‘seems nearly pre-ordained – they seem in some sense made for each other.’³⁰ It is not difficult to see why. Jurisprudence is obsessed with order. Its task has been to present law as a system that follows a strict logic of rules or a disciplined and coherent arrangement of principles, a procedure that would hopefully give law identity, dignity and legitimacy. The corpus of law is presented literally as a body. It must either digest and transform the non-legal into legality, or it must reject it. God’s law in naturalism, the *grundonorm* and rule of recognition of the positivists, the principles and the right answers of the hermeneuticians are the topoi of order, identity and unity. It is not surprising that when the question of law’s legality becomes dominant, the various answers will offer a definition of essence, they will construct a system of essential characteristics and will inscribe legality within a history conceived exclusively as the unfolding of meaning. The effort to distinguish the legal from the non-legal progresses from the search of an

²⁴ Paul de Man, *Allegories of Reading* (New Haven, Yale University Press, 1979). It discusses Rousseau’s *Social Contract* and legal concepts of contract and property.

²⁵ J. Hillis Miller, ‘Laying down the Law in Literature’ 11 *Cardozo Law Review* 5-6 (1990), 1491.

²⁶ Barbara Johnson, *The Critical Difference* (Baltimore, Johns Hopkins University Press, 1980). It discusses standard jurisprudential themes such as natural law, positivism and mercy through a reading of *Billy Budd*.

²⁷ Chris Norris, ‘Against a New Pragmatism: Law, Deconstruction and the Interests of Theory’, XXI *Southern Humanities Review* 4, 301. An assessment of Derridean critical legal theory and comparison with postmodern literary theory.

²⁸ Jonathan Culler, *Framing the Sign* (Oxford, Blackwell, 1988). It discusses extensively American Critical Legal Studies.

²⁹ Geoffrey Bennington, *Legislations: The Politics of Deconstruction* (London, Verso, 1994). Discusses the role of the literary critic and philosopher as jurist.

³⁰ Culler op.cit., 150.

exhaustive list of markers that map out the whole field to the stipulation of a single law of the genre, the law of law. The law can claim its empire because it can be clearly delineated from its outside, its context and terrain of operations. But according to forceful deconstructive principle, which receives its most compelling application in law, a field is self-sufficient only if its outside is distinctly marked so as to frame and constitute what lies inside. The exterior, morality, politics, economics is as much part of the constitution of the field as what is proper to it.

The legal deconstructors addressed the concepts, the argumentation and the discursive organization of legal texts. They showed that concepts are never simple or sovereign. They are constituted within conceptual networks which disallow closure and self-consistency. Basic principles such as free speech are defined and structured by their presumed exceptions such as the police powers of the state, obscenity, privacy etc. At the level of argumentation, contradictions intervene between the premises and aims of an argument and its actual operation, as when the freedom and autonomy that contract law allegedly promotes is shown to lead to its exact opposite. Finally, textual arrangement reveals semiotic and rhetorical discrepancies and inconsistencies, which undermine its surface semantic aspirations and unhinge the most rigorous argument. The early deconstruction rejected all epistemological foundations and considered them contingent, while normative values were replaced by situated historical genealogies or enabling scripts. Difference, writing and the trace replaced binary oppositions such as same/different, inside/outside, fact/value, rule/policy. The resoluteness of moral decisions and legal distinctions was replaced by the both/and and the neither/nor, by the necessary attempt to choose between oppositions made impossible by the workings of undecidability. In a joyful transformation, the cunning of reason became the cunning of texts, and the ability of texts themselves to undermine their own logic was celebrated. Critique was transformed into semiotics, a process of re-signification in which texts were teased or turned against themselves in order to release their radical potential.³¹ Deconstruction kept its distances from critique since critique assumes normative

³¹ Peter Goodrich, *Reading the Law* (London Blackwell, 1986); Douzinas, Warrington and McVeigh, *Postmodern Jurisprudence* (London, Routledge, 1991).

yardsticks against which passes judgment. The early deconstructor, on the contrary, was an ironic witness who paid tribute to the law by wishing that it or he was not there.

While distancing itself from critique, deconstruction remained immanent to the regime of legal discourse and within the gravitational pull of the texts whose claims it sought to trash; it was far too closely associated with a will to truth. Things changed in the early Nineties with the ethical turn. Deconstruction was now identified with justice, which meant that it left the text for the context. The emerging strong ethical position was facilitated by the importation of the quasi-transcendental or indeed transcendent concept of the Other and the associated gambits of the arrival of a justice, or a messiah or a democracy yet to come. Pushed theoretically by the German new moralists and politically by the incoming new world order, Derrida adopted the position of the legislator, of a strange lawgiver who speaks in the place or better in the name of the Other. BritCrits supported and often adopted the position of the legislator not least in arguing for a new conception of utopia based on the imaginary domain. But the welcoming of the other, the emergence of justice, the coming of the messiah or the happening of the event appeared on the theoretical horizon at the point when the historical conditions of their (impossible) realisation appear to retreat and the possibility of impossibility becomes impossible. We can see that in the relationship of law to justice as posited in the 'Force of Law'. There are two types of justice, the first a historico-political one which helps redress, redirect the law when it forgets its own promises. But justice proper, both inside and outside the law judges the whole of the law in the name of a transcendent other-based principle. For reasons I have tried to explain elsewhere³² both these appear exhausted not theoretically but empirically.

Oubliez Critique

³² Costas Douzinas, *Human Rights and Postmodern Just Wars* (London, Reaktion), forthcoming 2005.

The internal conflicts between various type of critique are increasingly becoming irrelevant, I believe, as we enter an epoch which, to avoid confusion, I will simply call the New Times (NT). The NT have 3 well-known characteristics: 1. global exportation of mass democracy, 2. the post-Cold War gradual weakening of sovereignty and its replacament by international organisations under the control of the Major Powers and 3. the ubiquity of murky and intertwined financial military and technological networks. In the NT, the philosophical and critical *nomophilia* of modernity has now become a general condition of the social bond, a kind of infectious *nomocracy*. Law is no longer the form or the instrument, the tool or restraint of power but it has started becoming the very operation, the substance of power. Legal form is squeezed and undermined by the privatization of public areas of activity and the simultaneous publicisation of domains of private action. Legal content, on the other hand, becomes co-eval and co-extensive with the operations of power. Law as an empty signifier that attaches to everything from pavement walking to smoking and Iraqi liberation is auto-poetically reproduced in a loop of endless validity but is devoid of sense or signification.

The global biopolitical turn of the NT and the new international order mean that the main normative claims of modern law, typically human rights, have now become an integral part of power relations, that they precede, accompany and legitimise the penetration of all parts of the world by the new order.³³ As a result, the gap between normative principle and its realization, underlying structure and surface appearance has all but disappeared. As a result, immanent critique has little purchase while the utopian dream has atrophied, chased from the public domain by those who have the power to turn their interests and desires into normative commonsense.³⁴ To put it another way, while the law in modernity expressed both the will of a community to live together from which it drew its normative strength and energies and, the structure of domination and subjection or subjectivation, in the New Times that divide, precarious as it always was, has all but disappeared. All immanent critique, which means all critique proper, is now either naïve or in bad faith. Foreignness and nomadism have lost their status, the critic has been

³³ Costas Douzinas, 'Postmodern Just Wars' in John Strawson ed., *Law after Ground Zero* (London, Glasshouse, 2002).

domesticated. In the New Times no outside exists. It is in this sense that I would say: Forget critique. Is there an alternative?

It is at this point that I want to make some tentative and probably wild suggestions. Foucault's comments on Kant have accepted that critique consists in reflecting and controlling limits. But while Kant explores the outer limits of knowledge, establishing a cognitive border police, for Foucault the role of critique should be positive and transgressive. Critique seeks 'in what is given to us as universal, necessary, obligatory what place is occupied by what is singular, contingent and the product of arbitrary constraints. The point, in brief, is to transform the critique conducted in the form of necessary limitations into a practical critique that takes the form of a possible crossing over.'³⁵ Critique means developing *l'art de n'être pas tellement gouverné*, not being ruled so much or in this way. The business of critique is linked with resistance to governance or governmentality and with acts of desubjectification, attempts at detachment from the demands of bio-political power.

Foucault put it as follows in a series of seminars under the general title 'Defending Society':

The role of the one who speaks is not that of legislator or the philosopher between camps the figure of peace and armistice, in the position Solon had dreamt or Kant. To establish oneself between adversaries at the centre and above them, to impose a general law on each and to found an order that reconciles: this is not what is at issue. At issue is the positing of a right marked by dissymmetry, the founding of a truth linked to a relation of force, a weapon truth and a singular right. The subject that speaks is a warring - I won't even say a polemical - subject.³⁶

This is neither epistemological nor immanent critique, of the hermeneutical or the critical legal type. It comes close to a critical warfare born out of crisis, the operation of a

³⁴ Russell Jacobi, *The End of Utopia* (New York, Routledge, 1996).

³⁵ Michel Foucault, 'What is Enlightenment' in *Ethics* (Paul Rabinow ed.) (New York: New Press, 1997), 315.

³⁶ Michel Foucault, *Il faut défendre la société* (M Bertani and A Fontana eds) (Paris, Seuil/Gallimard, 1997), 46.

historical ontology in which power is re-discovered as a potentiality that changes self and world.

This is for me the most important lesson of Carl Schmitt too, although it has been neglected because it makes more uncomfortable reading than the various esoteric discussions of the meaning of sovereignty. Without the universalising position of the philosopher or jurist/critic, the subject is a warring subject placed on the battlefield, surrounded by enemies, out to attain a particular victory and with a perspectival view of truth. Foucault agreed with Benjamin's critique of violence when he said that war is raging under the cover of peace. War as the model of the social bond facilitates a different type of critique, which would no longer be critique proper but acts of critical resistance, critical subversion or even a events of critical rebellion. The intent of *New Times* is precisely to relieve us of the anxiety of war under universalising claims, which include both human rights and the grossest possible saturation of the world by capitalist exploitation and technological dependence. The semiotics and ethics of the era rename conflict as competition, domination as market penetration and war as liberation and humanitarianism. Against this attempt to use war in the interests of domination while denying its name, the Foucaultian critic must revive the tradition of war in acts of fashioning different selves and of confronting the power or governance with the potentiality of praxis.

This is why I love Bush when he says again and again that whoever is not 'with us' is the enemy of America. In his quest to deliver the world into a state of perpetual peace, or *pax americana*, he has re-introduced the principle of antagonism as a transitional and provisional necessity, he has become the enemy and, in a touch of Schmittian irony, revitalized politics. It will not take long for the people of the world to take to the streets shouting 'down with human rights' in the same way that the Spanish soldiers during the Napoleonic invasion used to shout 'down with freedom'. This is how I understand the debate around empire and globalisation: whatever has actually happened to the Sovereign or the Emperor, I would say that we need to erect a false Sovereign, we need a Bush to resurrect the ghost or keep up the trappings of sovereignty. Sovereignty is presented as a

principle of unification and wholeness, of exclusion and sameness. But in the New Times, sovereignty is also the unwitting provider of an antagonistic pole an unintended underminer of the normalisation of governance. Sovereignty calls for a counter Sovereign or a counter action not a counter principle; it offers itself as the creation and creator of antagonism, the personification of enmity. Acts of resistance can come forth even in the absence or against the normative claims of the New Times. Indeed a real or phantasmatic sovereignty may allow cynical westerners and gullible easterners to see through the universalising claims into the daily, routine, mundane operations of power and law. This would not be critique as judgment within or without history but acts of cutting neither applying the law nor hoping for a redemptive epiphany. Early critique led to crisis and prepared the ground for the revolutions. Our current critical condition may help revive radical thought and action. It is by forgetting (the dominant types of) critique that we might be able to defy the law.