

A LEFT PHENOMENOLOGICAL ALTERNATIVE
TO THE HART/KELSEN THEORY
OF LEGAL INTERPRETATION*

This paper has three parts. The first presents a summary of some elements common to the theories of legal interpretation of HLA Hart and Hans Kelsen. The second summarizes the left phenomenological alternative to legal positivism, as developed by one tendency within critical legal studies (CLS). The third attempts to clarify the alternative through a response to one of the many misreadings of the CLS position that are current in the positivist and post-positivist mainstream of United States academic legal philosophy.

I.

This part concerns the following idea common to Hart's and Kelsen's canonical brief writings on legal interpretation.² We imagine the norm that is to be interpreted as an area or space that has two parts. In Hart, there is a "core of certainty" and a "penumbra of doubt," also called a "fringe of vagueness" and an "area of open texture."³ In Kelsen, there is a "frame, encompassing various possibilities for application."⁴ Within the Hartian core, interpretation is "determinate." In the penumbra, it is a matter of discretion, or balancing of conflicting considerations, or judicial legislation, or law making. Outside the Kelsenian frame, the norm is determinate, but within the frame there are alternative interpretations between which the judge must choose, exercising discretion, making law or balancing interests, and interpretation is not determinate.

For Kelsen and Hart, determinacy of a given norm, seen as a unit, is a matter of degree. For Kelsen, constitutional norms defining the proper exercise of legislative power are relatively indeterminate as to what statutes the legislature should adopt, while statutes are relatively more determinate of the content of judicial decisions purporting to apply them. Likewise, for Hart norms can have larger or smaller penumbras, although even standards (e.g., "fair rate") have core meanings.

For positivists, it seems to me, it should be important that for both Hart and Kelsen, the existence of an area of indeterminacy is

inevitable for every single norm, and that neither of them provides a clear account of just why this should be true. Moreover, in each case, the use of spatial imagery is a major obstacle to understanding what they mean.⁵ But nothing in the discussion that follows seems to me to turn on how we interpret them with respect to this question.

It is likewise striking that both authors seem to use the word determinate in a confusing way. Sometimes, it means only that we can predict with great certainty what the interpreter will do with the problem at hand.⁶ At other times, it means that the operation is “cognitive,” in the sense that we understand it to be a judgment about a meaning, understood to be something that is independent of the observer, and with respect to which we believe there is a “truth of the matter,” even if interpreters are likely to disagree about what that truth is.⁷ Again, this will not be an issue in what follows.

What will be important for the analysis that follows is that, for cases in the area of certainty, they speak as though the cognition of a correct meaning for the core or frame, or the highly predictable choice of interpretation, were automatic and effortless, supposing good faith. Kelsen seems completely unself-conscious in assuming that a question is or is not “within the frame.” It is a matter of “cognition.”⁸ Hart is more nuanced in his description of indeterminacy. For him, it is just that “uncertainties” “may break out in particular concrete cases;” cases of unclarity “are continually thrown up by nature or human invention.”⁹ But a given case just *is*, nonetheless, always located in one metaphorical space or the other.

Perhaps for this reason, each author is sometimes characterized as a “formalist.” When they are affirming that, in a particular situation, there is only one right answer to the interpretive question, they read as literalists, however insistent they may be on the discretionary nature of questions located in the penumbra or the frame. It is clear, nonetheless, that each author sees himself as a determined enemy of the mode of legal reasoning that was called formalism in their time, namely conceptual jurisprudence.

Conceptual jurisprudence accepts that there will be situations in which there is more than one valid norm (section of the code or

binding precedent) that, *taken in isolation*, is arguably applicable to the facts, and that the different norms will give different outcomes for the case. Conceptual jurists (and their critics, e. g., Gény in *Méthode d'interprétation et sources en droit privé positif*¹⁰) have also tended to believe that there are situations that are "new" in the specific sense that no valid legal norm was specifically intended to determine them one way or another.

Their method requires the judge to deal both with conflicts and gaps as follows: he is to presuppose the coherence of "the system" as a whole, and then to ask which of the conflicting norms, or what new norm, made applicable to the case, "fits" best with closely related norms. If this is not clear, he moves to the more abstract norms, explicit or implicit in "the system," from which the particular norms are understood to derive (Savigny¹¹). Again, he will choose a norm or devise a new norm, but do so without exercising discretion, balancing, or "making law" in the sense of legislation.

From the point of view of H/K, the operation of "construction," through which a conceptual jurist deals with the conflict or gap, is discretionary and "legislative." They consider conceptual jurisprudence to overestimate the determinacy of the legal order, whether we are dealing with norms in isolation or with "the system" taken as a whole. A major virtue of positivism, as they understand it, is to acknowledge or even highlight the judicial lawmaking that conceptualism obfuscates.

Along with literalism and conceptual jurisprudence, a third method of interpretation of legal norms that is current in the Western legal domain is policy analysis, or the method of balancing or proportionality. Here, the interpreter understands himself to have a choice between norms or between formulations of the norm, a choice that is resolved by appeal to the conflicting considerations that he understands to underlie the norm system as a whole.

There are many variants of the method of policy analysis. What is balanced might be conflicting rights, powers, principles, or instrumental goals supposedly of common interest, along with administrative interests (e.g., in certainty *vs.* equitable flexibility), and

system architecture interests (e.g., in subsidiarity, or the separation of powers). Or all of the above.¹²

Hart refers approvingly to balancing of this kind as the appropriate method for the penumbra or area of open texture.¹³ Kelsen merely points out that it is not a solution to the problem of discretion because it “does not supply the objective standard according to which competing interests can be compared with one another.”¹⁴

For CLS, the important point is that the anti-formalism of H/K *presupposes* the schema according to which every case is located *either* in the area of determinacy *or* in the penumbra or frame. For our purposes, what counts is not that policy analysis is frequently required and appropriate, but that they provide no account of how the situation gets framed as one located in the penumbra or frame, so that there is no determinate right answer available.

In other words, before the policy analysis begins, whatever its content, the interpreter explicitly or implicitly frames the situation as one in which there is a conflict or a gap that exempts him from the elementary duty to apply a clear norm when the facts clearly fit within its definitions. H/K resemble the conceptual jurists and the inventors of interest balancing in that they do not theorize this initial framing.

II.

This part offers an account, first, of the process by which interpreters constitute legal situations in either of two ways: either as ones in which all that is required is application of a norm, or as ones in which, because we are in the penumbra or within the Kelsenian frame, or there is a conflict or a gap, something more than mere application of a norm is required (the “something more” being choice among eligible interpretations based on legislative discretion, coherence analysis, teleological analysis, policy analysis or whatever). Second, it offers an account of the role of “ideology” in the process of framing, and then deciding, issues implicating

significant “stakes.” Third, it applies this conception to the question of how to understand the role of ideology in legal change and legal stability.¹⁵

A.

In the Hart/Kelsen framework, shared by conceptual jurisprudence and policy analysis, there is no room for the activity that I would place at the center of a phenomenology of cores, frames, gaps and conflicts, a phenomenology that can account for determinacy and indeterminacy. This is the activity of legal “work” understood as the transformation of an initial apprehension (Husserl¹⁶) of what the legal materials making up the system require, by an actor who is pursuing a goal or a vision of what they *should* require. (The conception of work here is inspired by Marx’s *Economic and Philosophical Manuscripts of 1844-1845*.¹⁷)

Legal work, as I am using the term, whether aimed at cores or frames or at penumbras or conflicts or gaps, is undertaken “strategically.” The worker aims to transform an initial apprehension of what the system of norms requires, given the facts, so that a new apprehension of the system, as it applies to the case, will correspond to the extra-juristic preferences of the interpretive worker.

Legal work occurs after the initial apprehension of facts and norm, and after “unself-conscious rule application.” The interpreter “grasps” (a *gestalt* process, as in Kohler’s *Gestalt Psychology*¹⁸) the situation as a whole as one in which a norm governs and the question is whether particular facts within the situation trigger its application so as to produce a sanction. Someone has died, and the court is asking, first, whether the defendant killed a person, and, second, whether the killing was a legal murder, and that “depends on the facts.” Often, once the facts are found, no one will even advert to the possibility of legal work directed at the interpretation of the norm that defines and punishes murder. The facts will be understood to establish guilt or innocence “of their own accord,” as the norm “applies itself” seemingly without any agency of the interpreter.

It is familiar that the facts come into legal being through the work of investigators, so that the facts presented depend on the work strategies and levels of effort of prosecutors and parties. It is also familiar that the advocates and the judge, and, at a more abstract level, the jurist, sometimes work to transform the initial apprehension of which norm governs and what it requires. In Chapters I and II of this book, I described, in perhaps excessive detail, the various practices they deploy. Together the practices enable “strategic behavior in interpretation.”

These are three types of strategic behavior in interpretation:

First, trying to find legal arguments that will produce the effect of legal necessity for an outcome—that is, for a rule-applied-to-the-given-facts—different from the outcome that initially appeared self-evidently required, as, for example, by making it appear that there is necessarily an exception to the rule that apparently covers the case, or that the “true meaning” of the rule is different than it at first appeared.

Second, trying to make what looked like a self-evidently discretionary judicial decision (one in the penumbra or within the frame) appear to be one in which there is, after all and counter-intuitively, a particular outcome—a rule-as-applied-to-the-facts—that is required by the materials (*i. e.* the case falls within the core; there are no alternatives within the frame).

Third, trying to displace an initially self-evidently legally required outcome with a perception of the situation as one in which the judge is obliged to choose between legally permissible alternative (*i. e.* moving an interpretation from the core to the penumbra or into a frame permitting judicial discretion).

In all these cases, the interpreter works to create or to undo determinacy, rather than simply registering or experiencing it as a given of the situation.

Work presupposes a medium, something that the worker “fashions.” In this case, the medium is that body of legal materials that are considered relevant in establishing the meaning of the norm as applicable to the facts. This will certainly include the dictionary,

with its definitions, and the legal dictionary with its quite different ones, and doctrinal commentary, and the full body of valid legal norms, perhaps more abstract rights and principles, perhaps legislative debates, perhaps case law. From our point of view, the question is not what count, officially, as “sources,” but what elements are sought out and deployed in fact in the work of advocacy or justification.

The worker works using the legal materials to convince an audience of some kind (and himself as well) that an initial apprehension (his or that of another) of determinacy or indeterminacy was wrong. But there is nothing that guarantees that this enterprise will succeed. Work is neither cognition of binding law nor discretion in devising law according to “legislative preference.” It is between these two. The legal materials constrain legal work, but in the way a medium constrains any other worker. It constrains only against an effort to make the materials mean one thing or another.

To say that the interpretation of the rule was determinate is only to say that at the end of the work process the interpreter was unable to accomplish the strategically desired re-interpretation of the initially self-evident meaning of the norm as applied to the facts. In other words, critical legal studies, as I understand it, accepts fully the positivist idea that law is sometimes determinate and sometimes indeterminate. CLS rejects both the idea of global indeterminacy and the idea that there is always a correct interpretation, however obscure or difficult to arrive at. But it also rejects the idea that determinacy and indeterminacy are “qualities” or “attributes” inherent in the norm, independently of the work of the interpreter.

Strategic success against initially self-evident determinacy (or self-evident indeterminacy) is a function of time, strategy, skill, and of the “intrinsic” or essential or “objective” or “real” attributes of the rule that one is trying to change, as these appear in the context of the facts presented.

The “ontological” question is whether it is appropriate to regard the determinacy of the rule as applied to the facts, meaning its insuperably binding or “valid” quality at the end of the period allowed

for working on it, as its own attribute, something inherent to it. The alternative is that the determinate or indeterminate quality of the rule cannot be understood otherwise than as an “effect,” the “effect of necessity” or “effect of determinacy,” produced contingently by the interaction of the interpreter’s time, strategy and skill with an *unknowable* “being in itself” or “essential” nature of the rule in the given factual context.

The legal worker performs the classic phenomenological reduction or “bracketing” [epoche] (Husserl)¹⁹ of the question of whether the resistance of the rule to reinterpretation is a result of what it “really” is or merely an effect of time, strategy and skill. The worker proceeds by trying to change things, without a pre-commitment one way or another to an ontology of the norm. For the strategic interpreter nothing turns on deciding on the essence. The left phenomenological position within CLS adopts this attitude as well.

B.

Stakes determine how much work to do. Max Weber’s distinction between material and ideal stakes is useful here.²⁰ The litigants may be materially motivated, and the judge too, but judges (and jurists) are obviously often conscious of only ideal stakes. They choose a work strategy because they understand their enterprise as having to do with “justice,” understood as non-identical with law application. They also understand the duty to achieve justice as “subordinate” to law. But this duty can be operative only after law is established. The conventional definition of the judicial (or juristic) role doesn’t say anything about legal work, because the standard (positivist) model recognizes only cognition and discretion, and makes no place for work.

Those who understand interpretation as either cognitive or discretionary are likely to regard work designed to achieve a particular change in the self-evident meaning of a norm, in a direction that is determined strategically, that is, extra-juristically, as illegitimate. I think the illegitimacy argument is incorrect.

First, most people agree that judges are supposed to work at interpretation, and have to decide how to orient their work. Indeed, most jurists would regard it as a violation of the duties of the judicial role for the judge simply to act on whatever meaning of the norm was initially self-evident, once it had been pointed out that there was another possibility. The reason for this is that the judge knows that work may change the initial appearance. He cannot take it as “true” merely because it is initially legally self-evident.

Faced with the obligation to work in one direction or another, judges (and jurists) often orient their work to the goal of making their extra-juristic or legislative intuition of justice-in-rule-choice into the reality of judicial decision. These are the “activists,” in United States parlance. In contemporary legal consciousness, judges working in this way are open to the charge that they are doing this work “ideologically.”

In contemporary legal discourse, an ideology is a “universalization project” (Habermas²¹), meaning the assertion of a controversial conception of justice, alleged by some to be mere rationalization of partisan interests, but defended by its adepts as serving the interests of all—*as well as* the interests alleged by its opponents to be merely partial (Mannheim²²).

The pursuit of an avowedly ideological juristic agenda is problematic for judge or jurist, because even if we readily acknowledge that judges are obliged by their role to work to make positive law correspond to justice, it is a premise of the liberal democratic theory of the separation of powers that ideology is *not for the judiciary (or for the jurist)*, but rather for the democratically elected legislature.

Judges often respond to the dilemma by claiming to work, and attempting to work, non-ideologically—bracketing their legislative preferences in deciding in which direction they will try to move frames or cores. But when they do this, they have to contend with the fact that their audience, and they themselves, understand different outcomes to respond, in many cases with high stakes, to different ideologies.

Two very common judicial (and juristic) postures, in the presence of this dilemma, are "bipolarity" and "difference splitting." In the first, the judge establishes, for himself and others, that he is an ideological "neutral" because he unpredictably alternates between the alternatives defined by conflicting ideologies. In the second, the judge establishes his neutrality by being a "centrist," devising a solution that gives something to each side, but gives neither side all that it demands. These are bad faith solutions, in Sartre's sense in *Being and Nothingness*,²³ because they avoid role conflict through denial (in Freud²⁴ and Anna Freud's²⁵ sense).

The position of the "activist" judge, who consciously or unconsciously pursues his own ideological commitments (rather than claiming neutrality because he is a wild card or a centrist), seems to me more ethically plausible. The judge knows that work may make the rule approach his legislative preference, but may not. Suppose he is committed to applying the rule if he cannot destabilize it using accepted, conventional judicial techniques -- that is by research into the legal materials that will lead to their reinterpretation according to accepted canons of legal reasoning.

Then why shouldn't he direct his work, time, strategy and skill, to finding the argument that will make law correspond to his conception of justice? It seems plain, to me, that he would be acting illegitimately precisely if he failed to attempt this, in other words if he failed to make the attempt to rework positive law to make it correspond to his idea of justice. The judicial (and the juristic) role requires fidelity to "law" in the complex sense that combines a positive and an ideal element.

This position, which legitimates juristic work intended to inflect the law in the judge's (or jurist's) preferred ideological direction, is, of course, "anarchist" (or at least "pluralist") from the "Jacobin" point of view that locates legal legitimacy solely in the will of the people. Moreover, it faces a problem of infinite regress in deciding whether the judge has in fact destabilized the norm using only what I just described as "conventional judicial techniques." But the alternatives that condemn judicial work *a priori* are worse,

because they are incoherent, given our societal understanding of the requirements of the judicial role.

C.

If we recognize that judges can and do work to change cores or frames (whether or not we regard this work as legitimate), then a basic Hart/Kelsen notion is undermined. This is what Kelsen calls the “dynamic conception,”²⁶ in which the movement of norm creation is from the abstract to the particular or concrete. In Hart, it is the notion that adjudication “fills in” the penumbra, as well expressed by MacCormick in the following quotation.

The thesis that even the best drawn laws or lines leave some penumbra of doubt, and this calls for an exercise of a partly political discretion to settle the doubt, is not particularly new, it is but the common currency of modern legal positivism...

A crucial point, though, is that one ought not to miss or under-estimate the significance of line-drawing or *determinatio* as already discussed. The law really does and really can settle issues of priority between principles by fixing rules, and even when problems of interpreting rules arise, these focus on more narrowly defined points than if the matter were still at large as one of pure principle. Fixing rules can be done either by legislation or by precedent; most commonly, in a modern system, by the two in combination. It is one of the gifts of law to civilization that it can subject practical questions to more narrowly focused forms of argument than those which are available to unrestricted practical reason.²⁷

If strategically directed work in interpretation can disrupt initial apprehensions of cores or frames, then this statement is much too optimistic about the “gifts of law to civilization.” In my extended

treatment of this topic,²⁸ I suggested that “small” questions can have very large ideological stakes. Second, I suggested, contrary to MacCormick, that the same arguments of principle recur at each level of abstraction, so that settling issues “further down” in the pyramid will involve arguments no less controversial than those that apply at the top. This is the argument from the phenomenon of “nesting” discussed in Chapter 2 of this book.²⁹

For our purposes here, there is a quite different point: even after an interpretation is settled, work can destabilize it. This means that work can “inflect” or “shift” cores and frames. There is now a “from the bottom up” dynamic that counteracts to one extent or another Hart and Kelsen’s top down, abstract to concrete, dynamic. Rather than MacCormick’s progressively narrower focus for issues of controversy, the worker can hope to split open cores or dissolve them.

So work does more than fill the frame or the penumbra dynamically with strategically determined norm choices. Ideology inflects work, which inflects frames and cores, which in turn provide, in the coherence view, means to further destabilizations of other cores and frames.

In this view, the body of valid law, that is law that is regarded by legal workers in their initial encounter with the materials as core or frames, is well understood, first, as an historical work product of lawyers, jurists and judges who have pursued (some of the time; consciously or unconsciously) conflicting ideological projects (which may be centrist, in the above sense), and, second, as always but unpredictably subject to destabilization by future ideologically oriented work strategies.

III.

In order to understand the above position--possibly the dominant position within critical legal studies since about 1985, and, today, the only remaining explicitly argued CLS position--it may be useful to contrast it with a typical misreading of CLS from within

the mainstream of Anglo-American legal philosophy, in this case by my friend Brian Bix:

[I]n particular, CLS theorists argued for the radical indeterminacy of law: the argument that legal materials do not determine the outcome of particular cases. CLS theorists generally accepted that the outcomes of most cases were *predictable*; but this was, they claimed, not because of the determinacy of the law, but rather because judges had known or predictable biases. The legal materials, on their own, were said to be indeterminate, because language was indeterminate, or because legal rules tended to include contradictory principles which allowed judges to justify whatever result they chose (Kelman 1987). The CLS critiques have generally been held to be overstated (Solum 1987); though there may well be cases for which the legal materials do not give a clear result, or at least not a result on which everyone could immediately agree, this negates neither the easiness of the vast majority of possible disputes nor the possibility of right answers even for the harder cases.³⁰

1. The left-phenomenological CLS tendency (probably the dominant tendency) proposed that legal materials do or do not determine the outcomes of cases only in interaction with the argumentative strategies of jurists pursuing objectives with limited time and resources. The materials are one part of the determination, but only in combination with interpretive activity that is not cognitive but rather consciously or unconsciously strategic. It is not and never was the position of this tendency within CLS that “legal materials do not determine the outcome of particular cases,” but rather that their influence is mediated, and that their “intrinsic” or “essential” determinacy or indeterminacy is unknowable.

The legal materials are “indeterminate” only in the sense that sometimes it is possible to destabilize initial apprehensions through legal work—“intrinsically” or “essentially” they are neither

determinate nor indeterminate. True, we often initially apprehend them as determining the outcome of a particular case or, on the contrary, as not determining the outcome (because the case falls in the penumbra or within the frame). In one type of apparent determinacy, we predict a result *because we anticipate that no work will be done to destabilize the initial apprehension*. And it will often be possible to predict that no such work will be done, because the extant ideological projects empowered through the judiciary are likely in agreement with the initial apprehension, or in agreement that the outcome is not worth destabilizing work. We might anticipate that it would be otherwise if actors with radical or other outlying ideological projects more commonly worked as judges or as influential jurists.

In a second type of case, the legal materials appear determinate when, after legal work to the point of exhausting the time and resources available, the prognosticator finds himself or herself unable to destabilize the initial apprehension that there is an applicable norm, and that that norm decides the case for one party or another. S/he will predict a result *because s/he anticipates that work done to destabilize the initial apprehension will fail*. The prediction of an outcome of the interaction between the facts as presented, interpretive work, and the unknowable "essence" of the materials is based on the belief that the decision-maker will be unable to come up with a good argument for an alternative outcome. Again, the centrist ideologies shared by judges and jurists in capitalist countries are an important factor in this kind of prediction.

CLS writers have worked from the beginning, and continually, to figure out how rules, particularly of property and contract, that seem likely to resist even the most sustained effort at transformation through interpretation, given the moderate left or moderate right ideological preferences shared by virtually all judges in all capitalist countries, have massive and unjust impacts on oppressed groups. This is the CLS contribution to the sociology of law and left wing law and economics.

2. The notion that the indeterminacy of language explains the way in which law is indeterminate has had some influence in CLS,

particularly on the early work of Unger,³¹ and on writers like Boyle,³² who purported to speak for CLS as a whole. From the beginning, a more influential current argued that rules vary in “formal realizability,” or “administrability,” so that the simple linguistic critique is often trivial, as are all other arguments for “global” indeterminacy.³³

Bix’s attribution to CLS of a notion that “legal rules [tend] to contain conflicting principles” is puzzling. The CLS claim was, a la Dworkin,³⁴ that principles, policies and rights, and indeed world-views, are all part of the commonly deployed sources of law, but, contra Dworkin, that they are in ineradicable conflict, within each of us as well as between us. Their conflictual presence is reflected in the more concrete “valid legal norms of the system,” which CLS, following legal realism, understands to be, *always*, complex compromises of those conflicts.³⁵ Because the rules are compromises, rather than a coherent working out of one or another over-arching principle, they are much more open to destabilizations of various kinds than coherentist writers acknowledge.

3. The “biases” of judges are relevant because they orient legal work by judges (and other jurists) to transform initial apprehensions of what the materials require in the particular direction suggested by the jurist’s material or ideal interests (loosely, the jurist’s ideology). Whether the jurist will succeed in the work of making the materials conform to his ideological or material extra-juristic strategic motive is never knowable in advance (though, as with any uncertain future event, we can make odds). Jurists constantly accept interpretations according to which the positive law is contrary to their view as to what it ought to be.

Moreover, “biases” or ideology do not determine jurists’ work strategies any more conclusively than the system of legal norms determines outcomes. Ideologies are indeterminate in just the way that the legal order is. There is a hermeneutic circle at work here, in which the indeterminacies of each level get resolved by appeal to a deeper level with its own indeterminacies, and so on, back to the starting point, in which legal ideas influence ideology as well as vice versa.³⁶

4. The CLS critiques have been held to be overstated (or to indicate incompetence or insanity) within a mainstream that has misunderstood them more or less in the manner of Brian Bix in the above passage. They also are quite often misinterpreted, not as above, but as claiming “determination in the final instance” by the base, or as a vulgar Marxist claim that the judges are the “executive committee of the ruling class,” and proceed case by case to further “the interests of capital.” The misreadings derive in part from the more or less complete ignorance both of phenomenology and of critical social theory among mainstream United Statesean legal theorists, in part from the limited resources that mainstream legal philosophers devote to marginal currents (Bix is exceptional in his familiarity with CLS writing), and in part to the normal investment of mainstreams in reproducing the marginality of the margins.

5. Everyone knows that “there are cases for which the legal materials do not give a clear result.” And that there are cases in which the legal materials do not give a result “on which everyone could immediately agree.” But it is quite another matter to assert that there is a burden on the CLS type of critique to “negate” “the easiness of the vast majority of possible disputes.”³⁷ This quantitative claim has an important place in the positivist, or at least the Hartian scheme. It serves to reassure us that the recognition of judicial discretion in the penumbra poses no threat to the liberal value of the rule of law. According to Hart, the “rule-sceptic” is welcome “as long as he does not forget that it is at the fringe that he is welcome; and does not blind us to the fact that what makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast central areas of law.”³⁸

The CLS claim is that the question of what proportion of actual or imaginable disputes have determinate outcomes, given the legal materials, has to be asked taking into account the possibility that legal work will destabilize the initial apprehension of what the materials require. Determinacy is a function of the words of valid

norms, and of the content of other sources, *and also* of their interaction with the resources and strategies of whoever has the power to do legal interpretation, *and also* of the “thingness” of the materials and the facts as presented. Once we take this into account, statements about the “vast majority of disputes” or “vast central areas of law” are simply meaningless.³⁹

6. That results are not determinate in some cases, according to Bix, does not “negate the... possibility of right answers even for the harder cases.” The only intelligible meaning of a “right answer” in a case, hard or easy, given the phenomenology above, is that having worked with the time and resources available and according to a chosen strategy, the interpreter can’t find an alternative to some particular apprehension of what rule applies and what it requires when applied. In other words, after performing the phenomenological reduction, the “right answer” is the one that is produced by an argument having the “effect of necessity.” As to whether there is a right answer in the sense of one available to cognition, CLS takes the position of Kant as to the “thing in itself.”

Notes

1. The first draft of this paper was prepared for a conference on Problemas Contemporaneos de la Filosofia del Derecho at the UNAM in Mexico City under the title, “A Left Phenomenological Critique of the Hart/Kelsen Theory of Legal Interpretation” and published under that title in the proceedings of the conference, Cáceres et al., eds., *Problemas Contemporáneos de la Filosofía del Derecho* (Mexico City, 2005). That version was translated into Dutch and published as “Een linkse fenomenologische kritiek op de rechtsvindingstheorie van Hart en Kelsen,” in 3 *Nederlands tijdschrift voor Rechtsfilosofie & Rechtstheorie* 242 (2004). This is a substantially revised version. Thanks to Imer Flores and Brian Bix for helpful comments. Errors are mine alone.

2. HLA Hart, *The Concept of Law* (Oxford, 1961)[hereafter Hart]; Hans Kelsen, *Introduction to the Problems of Legal Theory* (B. Paulson & S. Paulson, trans. Oxford, 1992 [1934])[hereafter Kelsen].
3. Hart, e.g., 119-20, 123-26, 128, 131, 135, 143, 150.
4. Kelsen, 77-81.
5. See for useful discussions Letizia Gianformaggio & Stanley Paulson, *Cognition and Interpretation of Law* (Torino, 1995).
6. Hart, for example: "The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic,' are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms." At 123. For a useful discussion, see Brian Bix, *Law, Language and Legal Determinacy* (New York, 1993).
7. Hart speaks of "plain, indisputable examples of what does, or does not, satisfy [general standards]." The "general agreement" part has disappeared here. P. 128. Kelsen, when discussing the bringing in of extra-juristic considerations at the moment of law creation within the frame, speaks of "room for cognitive activity *beyond discovering the frame within which the act of application is to be confined.*" At 83.
8. Kelsen, see n. 6 above.
9. Hart, at 123, 132.
10. Francois Geny, *Méthode d'interprétation et sources en droit privé positif: essai critique*, 2nd ed. (Paris, 1919).
11. Friedrich von Savigny, *System of the Modern Roman Law* (W. Holdway, trans., Madras, 1867).
12. See generally, Duncan Kennedy, "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form," 100 *Colum. L. Rev.* 94 (2000); Duncan Kennedy, "The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought," 55 *Hastings L. J.* 1031 (2004); Duncan Kennedy & Marie-Claire Belleau, "La place de René Demogue dans la généalogie de la pensée juridique contemporaine," *Revue interdisciplinaire d'études juridiques*, vol. 56, p. 163 (2006).

13. Hart, e.g., 126-30.
14. Kelsen 82.
15. This section is largely a summary of the approach proposed in "Freedom and Constraint in Adjudication," which is Chapter 1 in this volume, and in Duncan Kennedy, *A Critique of Adjudication [fin de siecle]* (Cambridge, Mass., 1997), Parts 1 & 3.
16. Edmund Husserl, "The Natural Attitude and its Exclusion" (1913) in Edmund Husserl, *The Essential Husserl: Basic Writings in Transcendental Phenomenology* (Donn Welton, ed., 1999) 60
17. Karl Marx, "Economic and Philosophical Manuscripts" in *Writings of the Young Marx on Philosophy and Society* (L. Easton & K. Gurdatt, eds. & trans. New York, 1967 [1844]).
18. Wolfgang Kohler, *Gestalt Psychology: An Introduction to New Concepts in Modern Psychology* (New York, 1947).
19. Husserl, op cit. p. 65.
20. H.H. Gerth & C. Wright Mills, "Introduction" to *From Max Weber: Essays in Sociology* 61-65 (New York, 1946).
21. Jurgen Habermas, 1 *The Theory of Communicative Action: Reason and the Rationalization of Society* 16-19 (T. McCarthy, trans. Boston, 1984)
22. Karl Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (New York, 1936).
23. Jean-Paul Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology* (H. Barnes, trans. New York, 1965).
24. Sigmund Freud, *Sexuality and the Psychology of Love* (New York, 1963),
25. Anna Freud, *The Ego and the Mechanisms of Defense* (C. Baines, trans. London, 1937).
26. Kelsen, s. 43, p. 91
27. Neil MacCormick, "Reconstruction after Deconstruction: A Response to CLS," 10 *Oxford J. Leg. Stud.* 539, 553-54 (1990).
28. *A Critique of Adjudication [fin de siecle]*, *supra*, 172-173.
29. See Chapter II of this book. "A Semiotics of Legal Argument," 42 *Syracuse L. Rev.* 75 (1991). The extended version reprinted in this book is available in 3 *Collected Courses of the Academy of European Law*,

- Book 2, 309-365 (Kluwer Academic Publishers, Netherlands 1994)
30. Brian Bix, "Law as an Autonomous Discipline," in *The Oxford Handbook of Legal Studies* 983 (Peter Cane and Mark Tushnet, eds. New York: Oxford Univ. Press, 2003). The Kelman reference is to Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard Univ. Press, 1987). The Solum reference is to Lawrence Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," 54 *U. Chi. L. Rev.* 462 (1987).
 31. Roberto Unger, *Knowledge and Politics* 88 (New York, 1977).
 32. James Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought," 133 *U. Pa. L. Rev.* 685, 710-11 (1985).
 33. Duncan Kennedy, "Legal Formality," 2 *J. Leg. Stud.* 351 (1973); Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harv. L. Rev.* 1685 (1976).
 34. Ronald Dworkin, "The Model of Rules," in *Taking Rights Seriously* (Cambridge, Mass., 1977).
 35. "From the Will Theory," *supra*; "The Disenchantment," *supra*.
 36. *A Critique of Adjudication, supra*, 187-91.
 37. Bix, *supra*.
 38. Hart, at 150. See also p. 149, 141-21, 132.
 39. Chapter I of this volume, p. *A Critique of Adjudication, supra*, 172.