

# THE CRITICAL IMPERATIVE

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“Between the idea / And the reality / Between the motion / And the act / Falls the Shadow”<sup>1</sup>

“Between the acting of a dreadful thing / And the first motion, all the interim is / Like a phantasma or a hideous dream”<sup>2</sup>

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<sup>1</sup> T.S. Eliot, *The Hollow Men*, in *SELECTED POEMS* 75–80, at 80 (New York: Harcourt Brace Jovanovich, 1936).

<sup>2</sup> WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 2, sc. 1.

## PART I

Thank you very much for your generous introduction. Thanks, too, to the University of Idaho College of Law and to the editors of the journal *the crit* for cosponsoring this Critical Legal Studies Conference and for inviting me to speak to you today. Most of what I will attempt to communicate this morning can be distilled into a series of similes and metaphors, even if my figures of speech can seem opaquely allegorical and may leave you wondering how I will ever be able to connect them up to any credible diagnosis of the situation of critical legal thought in today's troubled world. But since my own students will tell you that I have the tendency to think out loud in florid images much (or perhaps too much) of the time, I might as well come right out and offer you my first simile now, while saving the others for later.

*The language of law and politics stalks real human beings like a predator stalks its prey, and with the same intent: to kill the living creature and consume it from snout to tail, transforming the victim's flesh into the predator's own form while leaving the inedible bits of its carcass to the mercy of the elements.*

The conventional philosophical term used to describe some (but not all) of what this metaphor is attempting to say is “dialectics.” Theodor Adorno defined dialectical thought, well enough for my purposes, as follows: “The name dialectics says no more . . . than that objects do not go into their concepts without leaving a remainder [and] that they [eventually] come to contradict the traditional norm of adequacy.”<sup>3</sup> This implies that no mere concept of social reality, no matter how “correct” according to the standards of conventional thought at any given point in history, could ever prevent its own subversion by the inevitably anarchic movements of real, living human beings. Even a robot can learn to copy analytic categories.<sup>4</sup> But only a thinking human being is capable of noticing that a legal concept, just like every other abstraction, “does not exhaust the thing conceived.”<sup>5</sup> This is why sensitive law students are right to be skeptical about their professors' claims that contract law enforces the will of the parties, or that the law of property is “really” about the efficient allocation of resources. I apologize for burdening you so soon with another metaphor, but I will do so nevertheless. The language of the law, like a cookie cutter, stamps some of the dough of reality into tidy little shapes, but it also sweeps the much larger unstamped mass of reality off the table as irrelevant waste material.

Having thus seemed to privilege the real over the conceptual, let me quickly reassure you that I do not despise conceptual language—how could I, given that I am uttering these very concept-laden words? Nor do I intend to give you a boring lecture about dialectics or dialectical materialism. Rather, I wish to bring out for reflection the distinctly *ethical* implications of what seems to me to be one of the most fundamental laws of history. Expressed in the language of my first metaphor, that law of history is as follow: The very moment human beings open their mouths to approve of what is just, or denounce what is unjust, they play a role that is closely analogous to that of the hungry predator stalking its prey. Or, as Nietzsche put it in his own inimitably corrosive way, “[t]o impose upon becoming the character of being—that is the supreme will to power.”<sup>6</sup>

Will to power to the contrary notwithstanding, however, it is likewise true that at the very same moment human beings act to praise the just and denounce the unjust they are also not,

<sup>3</sup> THEODOR ADORNO, *NEGATIVE DIALECTICS* 5 (E.B. Ashton trans., London: Routledge, 1973).

<sup>4</sup> *Id.* at 29–30.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 330 (Walter Kaufmann ed., Walter Kaufmann and R.J. Hollingdale trans., New York: Vintage Books, 1968).

strictly speaking, a “they.” Each individual human being is also *a self* and not just some indifferent person or other whom a social critic or moral theorist might criticize from the outside. We do not experience *ourselves* as automatons or historical figures whose behavior towards others can and should be deduced from or explained by their past determinations. Rather, when seen from the inside, each singular one of us is a “me” confronting a future that is, ethically speaking, a *tabula rasa* that he or she is always just on the verge of filling up with the scribble of her deeds. The one ethical question *par excellence* is not “*What* should I do?”—as if somehow it made sense to distinguish me from the sum of my life’s performances. I am content to leave speculation about the eternal soul and its hereafter to the theologians. For those who dwell here on earth, I have always thought that the most important ethical questions always come down to asking, more or less constantly, “*Who* am I?”<sup>7</sup>

What this brief catalogue of simple existential truths might mean for the critical legal project will take the rest of my allotted time to bring into view.

## PART II

The brochures scattered around this building indicate that the official title of this conference is “Momentum: Critical Thought, Critical Action.” Etymologically speaking, “momentum” can be traced to the Latin verb *movere*, “to move,” while the word “critical” derives from the Greek term *krinein*, which means “to separate.” The conference title, by separating critical thought from critical action, only to join them together again in the same phrase under the influence of the idea of movement, immediately brings to mind Marx’s famous eleventh thesis on Feuerbach. “The philosophers,” Marx wrote, “have only *interpreted* the world, in various ways; the point, however, is to *change* it.”<sup>8</sup>

A widespread desire for some kind of progressive change in our social arrangements does seem to be in the air these days. I cite, by way of evidence, the recent Occupy Wall Street protests, not to mention countless conversations I have had with many existentially discontented young law students in the past several years. Robert Reich’s somewhat tepid definition of modern American progressivism will be sufficient for present purposes:

Progressives believe in openness, equal opportunity, and tolerance. Progressives assume we’re all in it together: We all benefit from public investments in schools and health care and infrastructure. And we all do better with strong safety nets, reasonable constraints on Wall Street and big business, and a truly progressive tax system. Progressives worry when the rich and privileged become powerful enough to undermine democracy.<sup>9</sup>

Unfortunately, a widespread desire for progressive change is not the only thing that can be found in the air these days. A yearning for *regressive* change—the kind that rejects many if not all of the values Reich mentions—also floats there, like a miasma, as evidenced by the recent ascendancy of the Tea Party movement in America and various rightwing political parties in

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<sup>7</sup> For more on the crucial distinction between “what” and “who,” see MARTIN HEIDEGGER, *LOGIC AS THE QUESTION CONCERNING THE ESSENCE OF LANGUAGE* 32–36 (Wanda Torres Gregory and Yvonne Unna trans., Albany: SUNY Press, 2009).

<sup>8</sup> Karl Marx, *Theses on Feuerbach*, in *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 243–45, at 245 (Garden City, New York: Anchor Books, 1959).

<sup>9</sup> Robert Reich, *The Rise of the Regressive Right and the Reawakening of America* (Oct. 16, 2011), <http://robertreich.org/post/11511074902>.

Europe. Like Europe in the early 1930s, alongside the left's demands for social justice and greater popular inclusion in the political process one hears, on the airwaves and in the streets, an ugly rightwing rhetoric of racial and ethnic exclusion and scapegoating. At the end of the day, however, whether civilization's current discontents<sup>10</sup> would call themselves progressive, regressive, or something in between, this much is clear: lots and lots of ordinary people—on the left *and* the right of the conventional political spectrum—are feeling pretty pissed off right now about the way things are going in the social, political, and economic spheres.

Thus, speaking as someone who identifies himself as a progressive, I daresay the historical moment for convening a conference such as this could not be more propitious. As of today (October 21, 2011) the Occupy Wall Street protests in New York City have entered their fifth consecutive week. They have spread to scores of American cities, including my own home town, Seattle, not to mention nearby Boise. Last Saturday similar protests were held in some 950 cities in eighty-two countries around the world. And while it is true that as yet no single grievance or agenda of grievances unites all of these protests and protestors, it is nonetheless possible to venture a reasonable hypothesis about what ultimately underlies these palpable expressions of discontent. The worldwide Occupy Wall Street movement is not just protesting the obvious malfeasances and excesses of the world's political and financial elite in precipitating the Great Recession, as if a few bad apples had spoiled a barrel that is otherwise perfectly sound. In one way or another, this upwelling of anger seems directed at the structure of the barrel itself—a barrel that has pre-formed and codetermined a way of life that increasingly seems broken and unsustainable.

“The Beginning is Near!” So proclaimed an early protest sign carried at New York City's Liberty Plaza,<sup>11</sup> as if the inevitable collapse of existing social and economic arrangements were a foregone conclusion and the only remaining issue is what will replace them. This sign implies a distinction that the centrist and rightwing critics of the Occupy Wall Street protestors do not or will not grasp. It is the distinction between a critique that blames particular bad or greedy actors for their financial or political excesses, or for owning too much and paying too little in taxes, and a more radical critique aimed squarely at the entire institutional structure within which the material and cultural reproduction of society is carried on by *everyone* who acts in it, whether his or her individual moral character is good, bad or indifferent. As Stephen Lerner put it recently, “Occupy has cracked open the door that lets us imagine that another world is possible.”<sup>12</sup>

Nearly two-and-a-half millennia ago the Greek poet Pindar managed to put his finger very precisely on the fundamental distinction between, on the one hand, good and bad actors, and, on the other hand, what *all* actors unreflectively take for granted about the way the world works. Today's political pundits and other talking heads on cable news shows would do well to read and reflect on his words, though I somehow doubt they ever will. “Custom [*doxa*, in Greek] is the lord of everything,” declared Pindar, “Of mortals and immortals king. / High violence it justifies, / With hand uplifted plundering.”<sup>13</sup> Custom, in Pindar's sense, is not the same as natural instinct. Custom is historically contingent rather than universal, and it is learned by each of us through socialization. The customary is what pretty much everyone comes to take for granted about the rightness and naturalness of existing social arrangements. William James, who called this sort of

<sup>10</sup> Cf. SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS*, tr. James Strachey (New York: W.W. Norton, 1962).

<sup>11</sup> The Editors, *Occupy America*, THE NATION, Oct. 24, 2011, at 3.

<sup>12</sup> Stephen Lerner, *Horizontal Meets Vertical*, THE NATION, Apr. 12, 2012, 20–21, at 20.

<sup>13</sup> Pindar, *The Power of Custom*, in THE OXFORD BOOK OF GREEK VERSE IN TRANSLATION 330 (T.F. Higham and C.M. Bowra eds., 1938).

custom “habit,” said its ethical implications are “numerous and momentous,”<sup>14</sup> and remarked that “[i]t alone is what keeps us all within the bounds of ordinance, and saves the children of fortune from the envious uprisings of the poor.”<sup>15</sup> Indeed, it would not be too bad a definition of the concept “critical legal thinking” to say that it is the kind of thinking that tries to take as little for granted as is humanly possible about the customs and habits of the existing legal system and its social presuppositions.

Perhaps the best metaphor I have ever seen used to describe the modern world economy as a whole is Walter Benjamin’s, and even though it was written ninety years ago, I think it rings more true today than it ever did before. To paraphrase Benjamin, the modern global economy, seen as a whole, resembles much less a well-oiled productive machine that happens to be standing idle due to circumstances beyond human control (e.g., a downturn in the business cycle) than it does a beast that goes berserk the minute its tamer’s back is turned.<sup>16</sup> How else can one explain the existence of great material hardship and misery for scores of millions around the globe *at the very same time* that scientific and technological advances during the past century have at long last given humanity the wherewithal to pacify the struggle for existence for all, and not just some, of its members? What else can one say about an amazing economic capacity such as ours (I mean *humanity’s* and not just America’s) that seems utterly lacking in the will to use it for everyone’s sake?

I could be completely wrong about this, but I read the zeitgeist of 2011 as reflecting a kind of deep revulsion against what is beastly in our economic relations, and not just garden variety disappointment about what is technically unproductive and inefficient in them. More and more people, especially the young, are beginning to feel that their mutual coexistence—their common *social* existence—has become fundamentally unjust in the Greek sense of being *adikia*. The meaning of this term, which is usually translated into English as “unjust,” ranges far beyond our own predominantly juridical or moral notions of injustice. For the ancient Greeks, when *adikia* holds sway all is not right with things—indeed, the very cosmos is “out of joint” in some fundamental way,<sup>17</sup> even if it is not immediately clear how this disjointedness could be ever be fixed.

Earlier I admitted that I may be wrong to diagnose the current zeitgeist in this way. The reason for my uncertainty is partly generational. It could be that the biggest obstacle confronting the worldwide Occupy Wall Street movement is not a lack of enthusiasm or a failure of immediate programmatic focus on the part of the relatively small number of demonstrators. The biggest obstacle might come from a contradiction in perspectives and aspirations between the protestors and the much larger (but silent) group of their supporters on the outside.<sup>18</sup> To quote Professor Todd Gitlin of Columbia: “The young people [in the demonstrations] really think they are headed for no future. No jobs. Ice caps are melting. Misery in the offing. [They] want a new

<sup>14</sup> 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 120 (1904).

<sup>15</sup> *Id.* at 121.

<sup>16</sup> Walter Benjamin, *Critique of Violence*, in *REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS* 277–300, 292 (Peter Demetz ed., Edmund Jephcott trans., 1978) (1920).

<sup>17</sup> MARTIN HEIDEGGER, *EARLY GREEK THINKING* 41 (David Krell and Frank Capuzzi trans., Harper & Row, 1975).

<sup>18</sup> *Compare Occupy Wall Street and the media: Talking about a revolution*, *THE ECONOMIST*, Apr. 7, 2012, at 92 (“[Its] pluralism makes the Occupiers very good at talking to themselves but less good at making themselves understood to outsiders, even sympathetic ones.”) with Marina Sitrin, *What Does Democracy Look Like?*, *THE NATION*, Apr. 2, 2012, at 17 (“The movement’s goal is not based on creating a program or a political party that will put forward a plan for others to follow. The purpose is not to determine *the* path the country should take but to create the space for a conversation in which all can participate and determine together what the future should look like, while at the same time attempting to prefigure that society in our social relationships.”).

civilization,” whereas “most of the people who support [them] ... don’t want a new civilization. They want to be middle class.”<sup>19</sup>

The egoistic feeling that I personally am entitled to my rightful share of the American dream—one that I might feel is being denied to me at the moment—is a perfectly understandable human emotion. But this emotion, however justly felt in any given case, has a dark side. It can also knit a moral blindfold that no light can penetrate. That is because there is a strong psychological temptation not to *see* the suffering of others who do not lie within the immediate circle of our concern, for continuing to grieve on account of a suffering humanity is not a particularly joyful experience. Fortunately for those people who prefer to maintain a consistently happy consciousness, Wittgenstein supplied the remedy: “What the eye doesn’t see,” he said, “the heart doesn’t grieve over.”<sup>20</sup>

The philosopher William James, whose work Wittgenstein admired, was wrong to think that even the most fortunate among us must necessarily realize that their happy state is the result of little more than luck.<sup>21</sup> But James’s description of the real existential situation of those who imagine they have earned and personally deserve their imagined security was spot on. What a “hollow security” theirs is, he said, and moreover,

What kind of a frame of things is it which the best you can say is, “Thank God, it has let me off clear this time!” Is not [the] blessedness [of this security] a fragile fiction? Is not your joy in it a very vulgar glee, not much unlike the snicker of any rogue in his success?<sup>22</sup>

Speaking of the vulgar glee of those who enjoy their good fortune with perfectly clear consciences, it would be well to remember that the oppressed, the hungry, the homeless, and the desperately poor have *always* experienced the world as a pretty brutal and unforgiving place to live. For history’s unfortunate losers and also-rans, everyone else’s normally prosperous everyday world is all-too-securely *in* joint in the ancient Greek sense. Seen from the point of view of even the moderately affluent in society—those who occasionally do receive justice in normal times—there appears to be very little wrong with the world. But seen from the point of view of those who struggle at the bottom of society, justice always seems to be what *other* people have a chance of getting. I take it that this is part of what the romantic poet Percy Shelley had in mind when he wrote this famous denunciation of conventional justice:

For Justice, when triumphant, will weep down  
Pity, not punishment, on her own wrongs,  
Too much avenged by those who err.<sup>23</sup>

What seems different to me about today’s social environment is that the barely affluent and formerly affluent middle class, to whom global capitalism had always promised so much, have

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<sup>19</sup> Chris Hawley and David Caruso, *Can ‘Occupy’ Protests Last Without Leaders?*, SEATTLE TIMES, Oct. 16, 2011, [http://seattletimes.nwsourc.com/html/nationworld/2016520088\\_apuswallstreetprotestwhosincharge.html](http://seattletimes.nwsourc.com/html/nationworld/2016520088_apuswallstreetprotestwhosincharge.html).

<sup>20</sup> LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS 205 (G.H. von Wright, et al. eds., G.E.M. Anscombe trans., 1983).

<sup>21</sup> See John Banville, *The Most Entertaining Philosopher*, N.Y. REV. BOOKS, Oct. 27, 2011, 40–42, at 41.

<sup>22</sup> WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 116 (2008) (1902).

<sup>23</sup> Percy Bysshe Shelley, *Prometheus Unbound*, in SELECTED POEMS 214–289, at 227–28 (Edmund Blunden ed. 1954).

awoken from their long, debt-induced slumber to find that the world is not in fact what they had always dreamt it to be. More and more people are becoming profoundly disillusioned. Paul Gilding, the Australian environmentalist and author of the book *The Great Disruption*,<sup>24</sup> describes the current state of affairs this way:

I look at the world as an integrated system, so I don't see these protests, or the debt crisis, or inequality, or the economy, or the climate going weird, in isolation – I see our system in the painful process of breaking down. Our system of economic growth, of ineffective democracy, of overloading planet earth – our system – is eating itself alive. Occupy Wall Street is like the kid in the fairy story saying what everyone knows but is afraid to say: the emperor has no clothes.<sup>25</sup>

In a 1998 essay marking the 100<sup>th</sup> birthday of Herbert Marcuse, Jürgen Habermas drew attention to what Marcuse had called, “the hideous concept of progressive productivity according to which nature is there gratis in order to be exploited.”<sup>26</sup> Habermas tried to refute this “productivist model of social emancipation”—one that continues to exert such a powerful stranglehold on the imaginations of our politicians—by drawing attention to a recent scientific estimate that the entire gross national product of the world's prosperous OECD countries could, in theory, be produced by only twenty percent of the population able to work. “But if a constantly increasing part of the working population becomes ‘superfluous’ for the reproduction of society,” remarked Habermas, it follows that, “the close connection between occupational success and social recognition can hardly be maintained.”<sup>27</sup> It is true that with the help of our ancestors we have constructed a social and economic system in which unemployment, “is not only a privation of merit,” as Heidegger put it, but also a “mental shattering.”<sup>28</sup> But if Habermas is correct about the increasing technological superfluity of millions of the working population, why must we continue to construe merely *occupational* success and its absence in such a hateful and soul-crushing manner?

Habermas is referring to enormous structural changes in the world economy that we have only just begun to think about, but of which the Tea Party and Occupy Wall Street protests are symptomatic. To quote an old Buffalo Springfield song from the sixties to characterize the macro-level social significance of what is going on around us, “There's something happening here,” even if “What it is ain't exactly clear.”<sup>29</sup>

The *New York Times* recently ran a story with the headline: “In Private, Wall Street Bankers Dismiss Protestors as Unsophisticated.”<sup>30</sup> I think the bankers are correct to call today's protestors “gullible and unsophisticated,” as the story reports, if what they mean by “gullible and unsophisticated” is not having a clearly defined, hierarchically well-coordinated political agenda and being willing to support a movement for change without knowing exactly what that change might be or how best to manipulate the existing levers of institutional power to achieve results.

<sup>24</sup> PAUL GILDING, *THE GREAT DISRUPTION* (2011).

<sup>25</sup> *Id.* quoted in Thomas Friedman, *Something's Happening Here*, N.Y. TIMES, Oct. 11, 2011, at A21.

<sup>26</sup> Jürgen Habermas, *The Different Rhythms of Philosophy and Politics for Herbert Marcuse on his 100<sup>th</sup> Birthday*, in HERBERT MARCUSE, *TOWARDS A CRITICAL THEORY OF SOCIETY* 233-38, at 236 (Douglas Kellner ed. 2001).

<sup>27</sup> *Id.*

<sup>28</sup> HEIDEGGER, *supra* note 7, at 127.

<sup>29</sup> BUFFALO SPRINGFIELD, *For What It's Worth* (1967).

<sup>30</sup> Nelson D. Schwartz & Eric Dash, *In Private, Wall Street Bankers Dismiss Protestors as Unsophisticated*, N.Y. TIMES, Oct. 15, 2011, at B1.

The bankers quoted in this article imagine that being gullible and unsophisticated in the immediately practical political sense I have just described is a fatal defect. I cannot agree with them. All this really says is that some mass movements in history are not *utopian*, but rather *mythical*, in their origins and motivations.

A utopian movement is well-organized and knows in advance what it wants to achieve; it lays down a blueprint in advance that can be evaluated and criticized for its verisimilitude and immediate practicality. It is always possible to refute a utopia by showing that it is, “inconsistent with the necessary conditions of modern production,” as the nineteenth century anarchist Georges Sorel put it.<sup>31</sup> “A myth,” however, “cannot be refuted since it is, at bottom, identical to the convictions of a group, being the expression of these convictions in the language of movement.”<sup>32</sup> Mythological movements are unanalyzable as parts apart from their whole to be trivialized on Sunday morning talk shows. They are expressions of pain, of rage at the machine itself, and as such they are just as refreshingly distant from sophisticated and bureaucratic “programs for change” as the language of the law is from the real life that it aspires to regulate.<sup>33</sup>

### PART III

Myth plays an important role in any socio-political environment that has grown too hegemonic to permit the formulation of a credible utopia but also too sclerotic to do anything about ubiquitous human suffering. Nevertheless, *mythos* and *ethos*, like *Eros* and *Thanatos*, must always remain in close view of one another, lest what Benjamin calls “the extreme case of the revolutionary killing of the oppressor”<sup>34</sup> degenerate into the bloody-minded routines of a Robespierre.

The title of my presentation to you today, “The Critical Imperative,” attempts to situate my remarks at the confluence of four different verbal streams (yet another metaphor!) about so-called moral imperatives. A moral imperative is what one ought to feel obliged to do if one aspires to act ethically in the world. Although I mean now to discuss the moral dimension of the radical critique of law and legal institutions, I should warn you in advance that my conclusion will not be about *what* to do to make the world a better place, but rather about something else, namely, the *attitude* that I think one ought to have in attempting to make it so.

#### *A. First Verbal Stream*

The philosophically-minded in the audience will have noticed that my title is a play on Immanuel Kant’s famous idea of the categorical imperative. Kant said, in his first version of the imperative: “Act as if the maxim of your action were to become by your will a general law of nature.”<sup>35</sup> By this he meant, among other things, that all of our actions ought to be predetermined by abstract norms (“laws”) that each of us, as free and rational moral beings, should legislate in advance to govern our behavior. In brief, the Kantian imperative forbids all forms of spontaneity

<sup>31</sup> GEORGES SOREL, REFLECTIONS ON VIOLENCE 29 (Jeremy Jennings ed. 1999) (1906).

<sup>32</sup> *Id.*

<sup>33</sup> Cf. Michael Moore, *The Purpose of Occupy Wall Street is to Occupy Wall Street*, THE NATION, Apr. 12, 2012, at 12 (“Do they know where their path will lead? Not necessarily—but that’s the beauty of Occupy Wall Street. The mystery of what’s ahead is the lure.”).

<sup>34</sup> Benjamin, *supra* note 16, at 298.

<sup>35</sup> Immanuel Kant, *Metaphysical Foundations of Morals*, in THE PHILOSOPHY OF KANT: IMMANUEL KANT’S MORAL AND POLITICAL WRITINGS 154–229, 187 (Carl Friedrich ed., 1993) (1785).

in the moral sphere. It says you should do nothing that you have not first carefully planned to do, and in such a way that you would be rationally content to have everyone else do the same sort of thing in similar circumstances.

### *B. Second Verbal Stream*

Standing in contrast to the coldness of Kant's abstract legalism, Karl Marx spoke of a somewhat warmer sort of categorical imperative. Marx the humanist and critic of all forms of bourgeois ideology, including religion, believed that "man is the supreme being for man."<sup>36</sup> Given this premise, he concluded that there is a "*categorical imperative to overthrow all those conditions* in which man is an abased, enslaved, abandoned, contemptible being."<sup>37</sup> Here we find expressed an attitude towards moral action that attends first and foremost to universal human suffering in all of its concrete reality, instead of one whose primary task is the construction of abstract laws to justify vast regions of what convention calls "necessary" or "unavoidable" human misery.

### *C. Third Verbal Stream*

Kant himself had remarked in another, equally famous expression of the categorical imperative, that we have a duty to "[a]ct so as to treat [humanity], in your own person as well as that of anyone else, always as an end, never merely as a means."<sup>38</sup> The philosopher and social critic Walter Benjamin replaced this formulation with one of his own: "One might . . . doubt whether this famous demand does not contain too little," he said, "that is, whether it is permissible to use, or allow to be used, oneself or another in *any* respect as a means. Very good grounds for such a doubt could be adduced."<sup>39</sup> This third verbal stream takes Kant's categorical imperative in a radical, if not scandalous, new direction. It says you ought never to *use* people at all. Period. Benjamin's words also begin to cast doubt on Marx's version of the imperative; for it is not clear how it would be possible, even in principle, to ease the suffering of the masses without repressing those who resist social change—i.e., without using them as a means.<sup>40</sup>

### *D. Fourth and Final Verbal Stream*

Whatever you may think of Kant's, Marx's and Benjamin's different versions of the categorical imperative, they do have one thing in common: they all purport to offer guidelines for action. They all play the role of a moral roadmap to be consulted in advance of a journey. Standing in stark contrast to their sort of moral rationalism is the unreflective and gratuitous expression of what the Russian journalist and novelist Vassily Grossman called "senseless kindness."<sup>41</sup> Senseless kindness lacks any sort of program; but it is instrumentally irrational in a

<sup>36</sup> Karl Marx, *Contribution to the Critique of Hegel's Philosophy of Right*, in KARL MARX: EARLY WRITINGS 43–59, 52 (T.B. Bottomore trans., 1964) (1843–5).

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> Kant, *supra* note 35, at 195.

<sup>39</sup> Benjamin, *supra* note 16, at 285 (emphasis added).

<sup>40</sup> Cf. Samuel Freeman, *Why Be Good?*, N.Y. REV. BOOKS, Apr. 26, 2012, 52–54, at 53 ("Clearly Kant cannot mean we should *never* rely on others as means to achieve our purposes; for it would be hard to make it through life without the services of others").

<sup>41</sup> VASSILY GROSSMAN, *LIFE AND FATE* 408–09 (Robert Chandler trans., 1985) (1959).

way that is hard to despise. It blossoms forth as pure manifestation rather than as a means to some well-conceived end. Grossman observed many instances of senseless kindness (along with terrible cruelty, of course) during the Second World War. In one particularly good example, he describes an incident in which a Russian peasant woman gave a small measure of human comfort to a wounded German soldier whose comrades were elsewhere massacring all the men in her village, including her own husband. Her first thought had been to strangle the enemy soldier, but after he piteously called out to her for water all thinking disappeared and she just gave him what he needed. Grossman recounts that later, after she told people about what she had done, “no one could understand; nor could she explain it herself.”<sup>42</sup> The peasant woman’s behavior constituted what the philosopher Emmanuel Levinas called a “‘small goodness’ from one person to his fellowman [that] is lost and deformed as soon as it seeks organization and universality and system, as soon as it opts for doctrine, a treatise of politics and theology, a party, a state, and even a church.”<sup>43</sup> Surely Kant would have condemned this sort of kindness, since it tends to be profligate, lawless, and even rationally undeserved. Marx, too, would have denounced any irrational display of soft-heartedness that did not advance (or worse still, retarded) the goal of revolutionary change in the name of liberating a suffering humanity.<sup>44</sup> Nevertheless, Grossman does not hesitate to maintain, against most of the moral philosophers who have ever lived, the sort of “stupid kindness” that he describes “is what is most truly human in a human being . . . the highest achievement of his soul. No, it says, life is not evil.”<sup>45</sup>

The four verbal streams I have just described may appear to you to hopelessly contradict one another. But I have always thought that their waters do not so much contradict one another as swirl and intermingle in a way that I find uncannily compelling. They seem to murmur to me, all at once, an impossible or nearly impossible command:

*You, the person that calls himself Louis Wolcher, have a moral obligation always to stand up against the abasement of human beings by other human beings (Marx), albeit in a rationally defensible and effective way (Kant), but only so long as (a) you do not seek to hurt anyone else in order to achieve your ends (Benjamin) and (b) you let yourself succumb to irrational expressions of compassion for others even though doing so may work to undermine your own plans (Grossman).*

That makes for quite a mouthful, doesn’t it? Kant, Marx, Benjamin and Grossman were nothing if not radical thinkers in the etymological and metaphorical sense of grasping things by the root.<sup>46</sup> But, in considering the swirling waters of this particular confluence of imperatives, it would be well to remember that even the most radical thinkers, like all of us, harbor pre-critical orthodoxies of their own. And these orthodoxies can prevent them from noticing the inhumane tendencies of their own theories—tendencies that always lie concealed like dandelion spores in the inevitable cracks of even the most excellent of critiques.

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<sup>42</sup> *Id.* at 409.

<sup>43</sup> EMMANUEL LEVINAS, ON THINKING OF THE OTHER *ENTRE NOUS* 230 (Michael Smith and Barbara Harshav trans., 1998) (1991).

<sup>44</sup> See TONY JUDT, THINKING THE TWENTIETH CENTURY 94 (New York: Penguin, 2012) (referring to the reasoning of the leaders of the Bolshevik Revolution of 1917 to the effect that “if we are in the omelette-making business, this is not the moment to coddle the eggs”).

<sup>45</sup> GROSSMAN, *supra* note 41, at 409.

<sup>46</sup> Marx, *supra* note 8, at 245 (“To be radical is to grasp things by the root.”).

## PART IV

I hope you will forgive me if I inflict one last metaphor on you.

Legal concepts classify facts in the way wrenches turn nuts and bolts: both instruments are premade to accommodate only certain types of other premade objects. Every practicing lawyer knows that what the law calls “facts” are not just out there, in the world, waiting to be picked up like random hunks of metal lying on the ground. Facts are selected and crafted by human beings out of something that precedes them in reality, something messily particular that always leaves an unclassified remainder when pressed into the Procrustean bed of a juridical statement that formally relates “the facts” to “the law.”

The relationship between an abstract legal concept and the *particular* situation that confronts it on any given occasion is, therefore, fundamentally different than the relationship between the law and the facts of a case. The word “particular” gestures at something that has yet to be subdued in the form of *any* sort of statement—something that might very well surprise us and cause us to rethink the standard conceptions we have hitherto used to organize and express our experiences.<sup>47</sup> To ignore the continuing emergence of the particular in reality in favor of a single-minded quest to subsume premade facts into premade concepts is to engage in what Adorno called “peephole metaphysics.”<sup>48</sup> A critical mind afflicted by unwavering attachment to this sort of metaphysics is inherently sclerotic: it could never bring itself to respond sensitively to changes in the world around it.

I will close by explicitly stating the conclusion that I have been hinting at all along.

The enemy of justice, and the source of all injustice, is *the will to deny the particular*. Everything that happens in the living world—indeed every moment of historical time—contains infinitely more than its conceptual determination could ever subdue in the form of a statement, or even a book full of statements. What is is always more than it is. This implies that the merely correct is never the same as the real, and that what is real can never be impressed into a logical form without leaving a remainder. Abstract conceptual correctness about the nature of justice—or indeed about anything at all—is always immediately contradicted by the truth of the living reality that it seeks to subdue.

Law and politics know too little about justice, but they nonetheless insist on telling you all about it. The real world, on the other hand, knows all too much about injustice, and yet it remains, sadly, tongue-tied and mute. If there were a critical imperative that somehow managed to straddle these two points of view, it would have to begin with this: Let injustice be resisted, and let there always be hope that justice is possible. But may we never, ever believe that justice has arrived.

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<sup>47</sup> Cf. ADORNO, *supra* note 3, at 172.

<sup>48</sup> *Id.* at 138.