

ESSAY

THE REENCHANTMENT OF LAW

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INTRODUCTION

The religious revival observed throughout the world since the 1980s¹ is making its mark on legal theory, threatening to shift the ju-

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¹ The thesis that since the 1980s the world has been experiencing a “religious revival” and a publicization of religion—a reversal of the tide of its privatization—has been crucial to religious studies as well as the study of secularization and modernization processes; it has been debated ever since. See, e.g., JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994); Thomas Luckmann, *Shrinking Transcendence, Expanding Religion?*, 51 *SOC. ANALYSIS* 127, 127–28 (1990).

risprudential battleground from debates over law's indeterminacy and power to conflicts over law's grounds, meaning, unity, coherence, and metaphysical underpinnings.² Following the immense impact of the legal-realist movement on American jurisprudence,³ the major jurisprudential conflicts in the United States throughout the twentieth century revolved around the themes of the indeterminacy and power inherent in adjudication (and the resulting delegitimization of it), pitting theories that emphasized these critical themes against schools of thought that tried to reconstruct and reconstitute the determinacy and legitimacy of adjudication.⁴ I argue in this Essay, however, that over the past couple of decades, a new jurisprudential dividing line has emerged without attracting much notice or attention. This new divide, which I draw in this Essay, is between thinkers who adhere to a disenchanted, instrumentalist, and secularized view of the law and theoreticians who try to reenchant it by reintroducing a degree of magic, sacredness, and mystery into the law; by reconnecting it to a transcendental or even divine sphere; by finding unity and coherence in the entirety of the legal field; and by bringing metaphysics "back" into the study of law.⁵

The different reenchanting schools of thought dispute the characteristics that the disenchanted view of law attributes to law: its instrumentality and functionality, its secularism, its pragmatism, its profound historicity, its dubious moral grounds, its fragmentary nature, and its lack of a transcendental meaning or essence.⁶ Not all those whom I call reenchanters, however, attack all of these traits of the disenchanted law; for different scholars, some of these traits are more problematic than others. Yet I argue in this Essay that they share a position that is antithetical to the basic tenets of the disenchanted view of law, which still dominates, by and large, American legal theory.

² In fact, the move toward reenchantment is, I would argue, what also underlies the religious revival. Put differently, mystical and irrationalist trends, which were for a long period marginalized in both religion and law, are moving to the forefront, regaining prominence and influence.

³ The legal realists did not only impact the realm of jurisprudence. Their voluminous writings, as well as their different careers and professional trajectories, dealt with and influenced legal institutions, substantive legal fields, legal reforms, and the entire structure of government. For recent works discussing the diverse and far-reaching impacts that legal realists had on these various aspects of the legal system, see, for example, DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* 2–8 (2007); SPENCER WEBER WALLER, *THURMAN ARNOLD: A BIOGRAPHY* 76–78 (2005); Roy Kreitner, *Biographing Realist Jurisprudence*, 35 *LAW & SOC. INQUIRY* 765, 765–67 (2010) (reviewing TSUK MITCHELL, *supra*, and WALLER, *supra*).

⁴ See Kreitner, *supra* note 3, at 784–88. For a recent articulation of the impact of the debate between realists and formalists in the U.S., see Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 *IOWA L. REV.* 195, 199–200, 223–43 (2009).

⁵ See *infra* Part II.

⁶ See *infra* Part II.

Thus a new stage in the evolution of modern legal theory is emerging in which formal legal rationality is no longer the high point of legal disenchantment (as Max Weber saw it)⁷ but a model for law's reenchantment as against the almost universally accepted disenchanting legal theories.⁸ And although the question of legal interpretation—and the possibility of objective and legitimate adjudication—is still motivating some of these theories,⁹ the reenchanting theories aim to shift the jurisprudential debates from questions of the consequences of legal principles and rules to fundamental questions concerning the grounds of law. This ground shifting might invoke new jurisprudential conflicts between secularism and religiosity, between pragmatism and metaphysics, and between critical and magical thinking.¹⁰

I first describe the concept of disenchantment, both of the world and of the legal spheres. Then I turn to describe four exemplary (though not exhaustive) modes of legal reenchantment that have emerged over the last thirty years. Lastly, I evaluate the ramifications and significance of these reenchanting theories and their possible futures.

I

THE DISENCHANTMENT OF LAW

Weber's shattering description of Western society as one that has been gradually "disenchanted"¹¹ has profoundly affected the field of social theory for nearly a decade. Key to understanding the modern West's uniqueness and distinctness, disenchantment is a rich and multifaceted concept bundling together and illuminating processes of secularization, fragmentation, bureaucratization, division of labor, and rationalization.¹²

⁷ 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, 1050 (2004). For further elaboration on this point, see *infra* Part I.B.

⁸ Ironically, these *disenchanting* theories are the progenies of what for Weber symbolized the *reenchanting* and irrational moment in law: legal realism. See *infra* Part I.B.

⁹ See, e.g., Alan Brudner, *The Ideality of Difference: Toward Objectivity in Legal Interpretation*, 11 CARDOZO L. REV. 1133, 1198–210 (1990) (developing a formalist-inspired theory of legal interpretation that also enables interpretative objectivity).

¹⁰ See *infra* Part II.

¹¹ According to Weber, the process of disenchantment of the Occident has been going on "for millennia." See MAX WEBER, *Science as a Vocation*, in *SOCIOLOGICAL WRITINGS* 276, 286 (Wolf Heydebrand ed., Hans A. Gerth & C. Wright Mills trans., 1994).

¹² As one commentator argues, disenchantment is "the key concept within Weber's account of the distinctiveness and significance of Western culture." Ralph Schroeder, *Disenchantment and Its Discontents: Weberian Perspectives on Science and Technology*, 43 SOC. REV. 227, 228 (1995). Weber himself alternated between several of these concepts—rationality, instrumental rationality, rationalization, and disenchantment—and was not necessarily committed to a strict usage of one rather than the other. One argues, however, that Weber distinguished between religious disenchantment and Occidental rationalization and that religious disenchantment was limited to the period that ended with Protestantism. See

A. The Disenchantment of the World

Disenchantment is not a concept merely describing an objective process that modern Western societies are experiencing. It is both “an existential or phenomenological category” aimed at capturing the essence of the way humans experience the modern world and modern man’s mode of being in a growingly disenchanted world.¹³ Hence, disenchantment is a subjective-objective category that refers to real, objective transformations and to their ideal, subjective correlates (and vice versa).¹⁴ It thus brings together tangible changes in reality—scientific discoveries; changes in art, politics, and sexuality; and a radical transformation in religions—and the mental-existential alterations that the human subject is undergoing.¹⁵ And what disenchantment entails is a set of losses and gains: loss of faith and gains of knowledge, loss of magic and gains of causality, and loss of mystery and gains of calculability.¹⁶

It is important to note that disenchantment, as a general phenomenon, is prevalent throughout the social world in every realm of human activity. And it is, first and foremost, a process that happens in and to *religions*. Magic and revelation are no longer main avenues to reach salvation; rather, they have been declared sacrilegious and superstitious.¹⁷ In their stead canon law has evolved and church bureaucracy has appeared.¹⁸ In other words, religion itself—that domain which might be thought of as *the* locus of enchantment—has become disenchanted, detached from the miraculous and the other-

Friedrich H. Tenbruck, *The Problem of Thematic Unity in the Works of Max Weber*, 31 BRIT. J. SOC. 316, 321–23 (1980). Regardless of this position (which concerns *religious* disenchantment), it is clear that disenchantment as a general phenomenon has not ended with the rise of Protestant ethics and is still taking place. See Richard Jenkins, *Disenchantment, Enchantment and Re-Enchantment: Max Weber at the Millennium*, in 1 MAX WEBER STUD. 11, 15–20 (2000); Kennedy, *supra* note 7, at 1032 (suggesting that “the contemporary mode of legal thought [is] an episode in the sequences of disenchantment and reenchantment suggested by Weber’s philosophy of history”).

¹³ See Kennedy, *supra* note 7, at 1057.

¹⁴ See *id.* at 1056–57; Tenbruck, *supra* note 12, at 319–23.

¹⁵ See Kennedy, *supra* note 7, at 1056–57.

¹⁶ See *id.* There is no way to overemphasize the importance of calculability in Weber’s depiction of the evolution of the industrialized West. The development of a calculable and rational legal system is imperative for the functioning of a sophisticated economic market. See 1 MAX WEBER, *ECONOMY AND SOCIETY* 336–337 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1968). For a detailed discussion of this point, see David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 732–45.

¹⁷ See Tenbruck, *supra* note 12, at 319 (quoting W.M. Sprondel’s response to Weber’s work: “That great religious historical process of disenchantment of the world . . . disavows all magical ways to salvation as a superstition and sacrilege. . . .”).

¹⁸ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM WITH OTHER WRITINGS ON THE RISE OF THE WEST* 48–49 (Stephen Kalberg trans., Oxford Univ. Press 4th ed. 2009); see Tenbruck, *supra* note 12, at 319.

worldly, while undergoing processes of rationalization and bureaucratization.¹⁹ Magic and revelation are not eradicated from religions altogether, however. On the contrary, these elements are elevated and celebrated within religious mysticism, a religious form that flourishes—albeit marginally—alongside the disenchanting, rational, and bureaucratic religions.²⁰ Therefore, disenchantment is always coupled with its correlative yet marginalized “other,” which I call in this Essay *reenchantment*: the irrational, the mystical, the magical, and the transcendental.²¹

The process of disenchantment has been happening simultaneously in science, economy, art, politics, and sexuality.²² Each of these domains of human action has been gradually detached from religion and the divine (i.e., secularized) and has been rationalized and bureaucratized.²³ The combination of such processes—disengagement from religion, rationalization, and bureaucratization—results in the appearance of these various domains as autonomous, each operating according to its own distinct inner logic and internal procedures.²⁴ Hence, disenchantment involves the experience of loss of unity of the world (unity that existed in religion); its fragmentation; and inability to make sense of, or find meaning in, the cosmos as a whole.²⁵ Actors within each sphere are bound by its growing bureaucratization and rationalization and are hence locked within the famous “iron cage of modernity.”²⁶ Disenchantment is therefore closely tied to the modern mode of domination: bureaucratic authorities that rule—and obtain their legitimacy—through the mechanical and formal application of the various logics of the distinct spheres.²⁷

¹⁹ See I WEBER, *supra* note 16, at 399–635; Kennedy, *supra* note 7, at 1056–57, 1061–63; Tenbruck, *supra* note 12, at 333–42.

²⁰ See Kennedy, *supra* note 7, at 1057.

²¹ Another way of articulating the relationship between disenchantment and reenchantment is that the latter is the “dangerous supplement” of the former: the marginal, repressed, and denied “complementary” of the main development or activity that threatens to replace and fully supplant it. See JACQUES DERRIDA, *OF GRAMMATOLOGY* 141–64 (Gayatri Chakravorty Spivak trans., The Johns Hopkins Univ. Press 1976) (1967) (developing and discussing the structure of “dangerous supplement” in Rousseau’s philosophy). I am thankful to Roy Kreitner for suggesting this idea to me.

²² See Kennedy, *supra* note 7, at 1063.

²³ See *id.*

²⁴ See Schroeder, *supra* note 12, at 232–33 (describing how, in Weber’s view, the inner logic of the scientific worldview led to the view’s autonomy as its own intellectual sphere).

²⁵ See Luckmann, *supra* note 1, at 134–35.

²⁶ The idea of the evolution of distinct and autonomous intellectual and vocational spheres is developed in great detail in Weber’s famous works concerning science and politics. See, e.g., MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 77–127 (H. H. Gerth & C. Wright Mills eds. & trans., Routledge 1991) (1948) [hereinafter WEBER, ESSAYS]; WEBER, *supra* note 11, at 276–304. For a discussion, see Kennedy, *supra* note 7, at 1060.

²⁷ See Kennedy, *supra* note 7, at 1058. On the legal mode of domination characterizing western modernity, see Trubek, *supra* note 16, at 731–39. The famous “iron cage of

Yet, alongside the growing disenchantment, rationalization, and bureaucratization, and alongside the “iron cage of modernity” narrative, there exists an opposing Weberian narrative. In this account of occidental modernity, there always lurks the possibility of the emergence of the irrational, the mystical, the undecided, and the transcendental.²⁸ The stronger the grip of the disenchanting processes is on a certain domain, the more resistance develops within that domain.²⁹ This “flight into the irrational”³⁰—an insistence that mystical and non-rational forms of knowledge exist—is the source of the development of “sects” that resist the formal and rational dogmas of their respective domains.³¹ Although this aspect of Weber’s sociology is sometimes marginalized, it too is central to his analysis of the process of the disenchantment of the world and of the uniqueness of Western development.³²

B. The Disenchantment of Law

In the context of the *legal field*, disenchantment therefore means, first of all, the growing detachment of law from religion, both in law-making and in adjudication (which Weber calls “lawfinding”).³³ Although in law the process of disenchantment took place over many centuries, this Essay concerns developments that happened after the nineteenth century—when this process reached its peak, at least in continental Europe.³⁴ Positivism is the theory that most clearly manifests this idea: law is not developed through divine revelation nor

modernity” was extremely influential on the development of Michel Foucault’s idea of “power/knowledge” and the emergence of disciplinary power. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Pantheon Books 1977) (1975); MICHEL FOUCAULT, *POWER/KNOWLEDGE* (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980) (1972).

²⁸ See Kennedy, *supra* note 7, at 1061–63.

²⁹ See 2 MAX WEBER, *ECONOMY AND SOCIETY* 889 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1968).

³⁰ *Id.*

³¹ See Kennedy, *supra* note 7, at 1057–58.

³² Kennedy emphasizes this point. For him, the main tension within Weber’s work lies in the opposition between the “iron cage of modernity” narrative, which implies that agents within each sphere are truly bound by formal rationality and cannot bona fide refuse to apply it mechanically, and the irrational/decisionist narrative, which suggests that “all bureaucrats would have the possibility of agency within their jobs, rather than being condemned to vocational formalism.” See *id.* at 1055, 1061–69.

³³ 2 WEBER, *supra* note 29, at 880–95; see also Kennedy, *supra* note 7, at 1039, 1059, 1064 (describing Weber’s notion of “lawfinding”); David M. Trubek, *Reconstructing Max Weber’s Sociology of Law*, 37 STAN. L. REV. 919, 925–33 (1985) (reviewing ANTHONY T. KRONMAN, *MAX WEBER* (1983)).

³⁴ In his “sociology of law,” Weber describes evolutions and developments in law and legal theory, which span from antiquity until the early twentieth century. See 2 WEBER, *supra* note 29, at 641–900.

is it revealed by an oracle or any other prophetic form.³⁵ And the gradual process of disenchantment further rejected even natural law theory, according to which law is the unfolding of “reason.”³⁶ Rather, what gives law legitimacy is that a formally authorized entity enacts it.³⁷ And law collapses into politics because it is understood as the pragmatic compromise between competing groups and interests.³⁸ Adjudication, too, is disenchanting: the application of the laws—legislatively postulated—is not performed by “wise men” whose authority stems from their charisma or ability to execute religious rites such as the ordeal or trial by fire. Rather, it is a rational operation performed by judges whose authority derives from a clear and positive authorization.³⁹

Initially, disenchantment produces three important consequences in the legal field: the divinely revealed laws lose their power and legitimacy; divinely authorized traditional authorities (such as the king) lose their legitimate power to give commands;⁴⁰ and divinely authorized judges lose their legitimacy to adjudicate concrete disputes and to apply the laws.⁴¹ As the processes of rationalization and

³⁵ See Kennedy, *supra* note 7, at 1046 (defining positivism as the “view that lawmaking is a secular process through which a state claiming the monopoly of the legitimate exercise of force enacts valid legal norms as compromises of conflicting interests”).

³⁶ See 2 WEBER, *supra* note 29, at 873–75; see also Kennedy, *supra* note 7, at 1048 (describing the disintegration of natural law).

³⁷ See 2 WEBER, *supra* note 29, at 865–76.

³⁸ See Kennedy, *supra* note 7, at 1048, 1064. As Weber puts it:

The disappearance of the old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all too visibly, indeed, as the product or the technical means of a compromise between conflicting interests.

2 WEBER, *supra* note 29, at 874–75. It is important to note that in this paragraph Weber is not suggesting that lawyers who operate in a formal rational legal system are political actors; on the contrary, Weber argues that actors within a formal legal system are merely applying law, regardless of its substantive content or its “political” consequences or intentions. Law collapses into politics, therefore, in the sense that *legislation* is understood as a compromise between competing interests and groups that the political branch—the legislator—undertakes, not as the elaborated articulation of “reason” or as the revelation of divine law. See *id.*

³⁹ On the possibility that lawyers (and judges) are performing “practical wisdom” that is neither technical nor magical but instead an endeavor committed to the idea that the law is aspirational and manifesting normative ideals (since it is legislated through political compromise and has political implications), see *infra* Part II.D.1.

⁴⁰ See 2 WEBER, *supra* note 29, at 1057. On classical legal thought, see DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 3 (Beard Books 2006) (1975) (describing classical legal thought as a “way of thinking [that] amounted to a rationalistic ordering of the whole legal universe”); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 6 (1983) (defining five major traits that legal systems possessed according to classical legal thought: comprehensiveness, completeness, formality, conceptual order, and acceptability).

⁴¹ Weber calls this process the “substantive rationalization of sacred law.” 2 WEBER, *supra* note 29, at 815–31.

bureaucratization continued, however, all previous forms of lawmaking and lawfinding (adjudication), including natural law, lost their legitimating force, and formal legal rationality took over. This school, known in the United States as “classical legal thought,” assumes that the application of norms in concrete cases is completed through a logical deduction of specific norms in light of the entire legal system.⁴²

For Weber, formal legal rationality symbolized the height of this disenchantment process, as it manifests a detachment from substantive value judgments; is based on general rules rather than on ad hoc assessments; and strips the adjudication process (as well as lawmaking) from any remains of sacredness, magic, and charismatic authority.⁴³ American legal realism and its European variants (the German free-law movement,⁴⁴ Scandinavian realism,⁴⁵ and the social jurists⁴⁶), which were already highly influential when Weber was writing about the legal sphere, seemed to him to be only partially disenchanted, somewhat primitive modes of legal reasoning, to be superseded by formal legal rationality.⁴⁷ This was the case because these legal movements advocated the application of substantive rationality and ad hoc considerations in adjudication.⁴⁸ Weber regarded such considerations as irrational and a form of premodern biased kadi justice, bound to give way to the inevitable process of disenchantment and to the domination of formal legal rationality.⁴⁹

In retrospect, however, Weber might have been wrong in his prediction, or at least it remains an unresolved question, since realism outlived formalism.⁵⁰ If one looks at elite legal academic discourse in the United States and some U.S.-influenced jurisdictions, legal realism and policy analysis, rather than formal legal rationality, seem to have prevailed as the preferred mode of legal reasoning in the second half

⁴² See Kennedy, *supra* note 7, at 1057.

⁴³ See *id.* at 1040–41.

⁴⁴ On the German “free law movement” see James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 407–19 (1987).

⁴⁵ See Heikki Pihlajamäki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 AM. J. COMP. L. 469, 474–75 (2004).

⁴⁶ These social jurists included Rudolf von Jhering, Otto von Gierke, Eugen Ehrlich, Francois Géný, and others. See *id.* at 474–75. On the social jurists and Weber’s critique of them, see Kennedy, *supra* note 7, at 1049–50, 1052–55.

⁴⁷ See Kennedy, *supra* note 7, at 1054–55.

⁴⁸ See 2 WEBER, *supra* note 29, at 815–30; Kennedy, *supra* note 7, at 1071–76.

⁴⁹ See Kennedy, *supra* note 7, at 1053–54.

⁵⁰ Hence the famous, almost cliché saying, “we are all realists now.” See LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, at 229 (1986); see also Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 610 (2007).

of the twentieth century.⁵¹ This development can be understood not as a withdrawal from disenchantment to a premodern mode of legal reasoning or as a “flight into the irrational.” Rather, realist-inspired theories—e.g., critical legal studies, law and economics, legal feminism, law and society—should be seen as thoroughly disenchanted, adhering to secularist, positivist, and rationalist conceptions of law. They deny law’s unity, ahistorical essence, or transcendental meaning. In this sense, they are far more disenchanted than the formal legal rationality that Weber hailed as the apex of legal disenchantment. As Duncan Kennedy points out:

The critique of [legal formal rationality] disenchant[s] it because it deprives the decision maker of the illusion . . . that ‘the system’ in some sense produces the norms that decide cases, rather than either some particular earlier jurist enunciating some particular rule, or we ourselves imposing meaning in the presence of a gap⁵²

Legal realism and its descendants disenchant law because they take the themes of loss of unity and loss of meaning to their radical conclusion: not only is “the world” disenchanted and fragmented but also the legal domain is broken into “small” (or narrower) doctrinal areas, case-specific principles, and “situated” legal categories.⁵³ And not only does “the world” lose its systemic structure due to the loss of a divine, external, transcendental meaning, the law, too, is stripped of its systemic coherence and metaphysical underpinnings because its enactment had been unmasked as a product of political compromise between competing interests and groups,⁵⁴ and its concrete articula-

⁵¹ See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19, 21, 63–71 (David M. Trubek & Alvaro Santos eds., 2006) (describing three periods of the “globalization of legal thought” and particularly the last globalization, in which American policy analysis has disseminated throughout the globe); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467–68 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986)). Alongside the triumph of legal realism and policy analysis in elite law schools, large portions of legal practitioners in the United States remained committed to a fairly formalistic mode of legal reasoning. It is indeed a question whether policy analysis—an accepted practice—is dominant or marginal outside the elite of law schools, judiciary, and the bar. And outside the United States, in continental Europe (especially in Germany and France), Asia, Latin America, and other European-influenced countries, formal rationality remained a favorable mode of legal reasoning, even in elite law schools, until very recently.

⁵² Kennedy, *supra* note 7, at 1068.

⁵³ The need to create concrete, “smaller,” and situation-sensitive legal categories and rules that will replace the broad and abstract concepts and categories was a major theme that legal realists developed. See, e.g., Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931). Indeed, as Dagan points out, the fragmentation of the legal field by no means unveils its political nature. In various normative discussions, it merely indicates the need to adapt the law to needs and interests, which require case or situation sensitivity, hence breaking down overly broad categories into narrower ones. See Dagan, *supra* note 50, at 647–51.

⁵⁴ 2 WEBER, *supra* note 29, at 874–75.

tion, execution, and interpretation is a result of an infinite number of decisions taken by administrators and judges, not of philosophical contemplation or metaphysical meaning.⁵⁵

For the purposes of this discussion, I will leave aside the question whether judges, “legal scientists,” and other legal actors in the period of classical legal thought—nineteenth-century formal legal rationality—were actually “enchanted” according to Weber since they were in denial of the fact that they were constantly making decisions and choices, experiencing them as mandated and coerced by “the system.” Although Weber clearly refers to such a mode of operation as “disenchanted,” thus supposedly denying the possibility that formalist judges and jurists were in fact enchanted, his arguments about the “decisionist” element inherent in human action—that within each sphere of activity (law, economics, and so forth), formal rationality runs out and actors are faced with the need to decide without any guiding rules—point in the opposite direction as well: disenchantment actually means a loss of faith in formal rationality, and therefore the height of disenchantment is the decisionist moment. According to this alternative Weberian narrative, the denial of choice and decision within legal operations amounts to enchantment.⁵⁶

Despite Weber’s influence on twentieth-century sociology and on some prominent legal theorists,⁵⁷ over the twentieth century, disenchantment, rationalization, secularization, and even bureaucratization never became the organizing themes around which the important jurisprudential debates revolved. Starting with American legal realism, the two interlinked problems which scholars dealt with and fought over concerned the indeterminacy of adjudication and the power (or violence) that the law exerted over its subjects.⁵⁸ The responses to these two challenges, which the legal realists opened up, solidified two agonistic camps: on one side, critical theories that

⁵⁵ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–21 (1935) (critiquing the “transcendental” and metaphysical mode of legal reasoning, as opposed to the realist, functional mode).

⁵⁶ Kennedy, *supra* note 7, at 1061–62.

⁵⁷ See, e.g., ANTHONY T. KRONMAN, *MAX WEBER* (1983); Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber’s Sociology of Law*, 21 LAW & SOC. REV. 487 (1987); Trubek, *supra* note 16; Trubek, *supra* note 33.

⁵⁸ See Singer, *supra* note 51, at 470–503. I do not suggest that the realists did not proffer an impressive, perhaps even convincing, attempt to deal with these challenges by themselves. Nor am I suggesting that the realists’ legal conception denied the possibility of all normativity; on the contrary, alongside their critique, the realists paved the way for what could be called a “disenchanted reconstruction/normativity.” Indeed, they offered a wide array of reconstructive suggestions to their critique of legal formalism, most notably the social-scientific response—law’s indeterminacy can be resolved through the application of social science to legal questions—and the practical reason/wisdom response—legal actors neither merely apply the law nor exert crude power but work within this tension by applying practical wisdom. See Dagan, *supra* note 50, at 652.

stressed the indeterminacy and fluidity of legal rules and concepts that skeptically viewed the ability to adjudicate neutrally and objectively and worried about the power and domination in which the law was implicated;⁵⁹ and on the other side, reconstructivist theories that aimed to rehabilitate the legitimacy of adjudication by emphasizing that judges are bound by objective constraints and by offering various means that might curb judicial power and discretion.⁶⁰

A growing number of important contemporary jurisprudential debates, I argue, sidestep these century-old conflicts and, even without explicitly using the terminology of dis- and reenchantment, return to the constitutive moment of the emergence of legal realism to resurrect the possibility of an enchanted law. This circumstance is somewhat ironic because, as I have shown before, the theory that preceded legal realism—classical legal thought or formal legal rationality—was, at least in Weber's terms, a thoroughly *disenchanted* legal theory.⁶¹ As a matter of the present, however, it matters less what formalism's exact content was earlier in the twentieth century; it is far more important to consider its historical lineage and genealogy, its current use and articulation, and its future trajectory. As I demonstrate, contemporary antirealists are less interested in resisting the rehashed themes regarding law's indeterminacy and power—the familiar legal-realist challenges. Rather, they are offering the idea that there is “more” to law than its instrumentality, power, and distributive impact.⁶² This insistence on “more,” I argue, lies at the heart of legal reenchantment. In the next Part, I map some of the various reenchanting legal theories.

⁵⁹ See Singer, *supra* note 51, at 469–70. Giving a comprehensive list of various critical legal theories would be impossible. The leading ones, however, are: critical legal studies, critical race theory, (critical) law and society, some strands of legal feminism, and critical legal history. For a comprehensive overview of the critical legal projects, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997). See also *LEFT LEGALISM/LEFT CRITIQUE* (Wendy Brown & Janet Halley eds., 2002) (reviewing the state of the art of critical legal projects).

⁶⁰ See Singer, *supra* note 51, at 470–71. More difficult than listing all the critical theories is naming all the legal-reconstruction projects and theoreticians. Those most dominant and influential are: the legal process, law and economics, normative legal feminism (also referred to as governance feminism, see JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006)), normative law and society, legal formalism, and empirical legal studies.

⁶¹ See *supra* Part I.B.

⁶² As I elaborate in the following section, this “more” is quite different for different theoreticians: law is immanently rational, see *infra* Part II.A.; a mode for expressing and inculcating virtue, see *infra* Part II.B.; a form of art, see *infra* Part II.C.; or charismatically authoritative, see *infra* Part II.D.

II

THE REENCHANTMENT OF LAW

When I talk about reenchantment or reenchanting theories, I primarily mean that at this point of American jurisprudence, legal theoreticians are developing and using themes and ideas that oppose disenchanted law and try to resist law's instrumentality, fragmentation, and loss of transcendental meaning.⁶³ Some do so explicitly and overtly, while others are more covert about their reenchanting tendencies. Although the rejection of disenchanting themes is central to some theories, for others it is an undesirable—though perhaps unavoidable—side effect. Interestingly, none of these theorists—even those that are openly rejecting the traits of the law associated with the disenchanted view of it—calls himself a “reenchanter.” And although some might not oppose that title, others might find it surprising, if not offensive.

In the following subparts, I mostly discuss theoreticians who develop reenchanting themes as either an explicit or a hidden, yet central, component of their conception of the law. I also briefly analyze theoreticians who would vehemently object to their characterization as reenchanters yet whose theory, to my mind, produces an unintentional reenchanting “supplement.” It is therefore my goal to tease out reenchantment threads—explicit, implicit, and unintended—and show how they connect seemingly distinct theoretical endeavors under the umbrella of legal reenchantment. Hence, sometimes I point to reenchanting themes that are a direct presentation of the writers, while in other cases I discuss the theories critically, teasing out hidden—or even denied—reenchanting tendencies that they include.⁶⁴ The four reenchantments that I discuss below are by no means exhaustive of the reenchantment of law that I aim to expose in this Essay. Indeed, there are more schools of legal thought that should be read, in my mind, as exemplifying this new mode of legal

⁶³ See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 225–75 (1986) (charismatization of legal authorities); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 1–17 (1991) (virtue); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 104–09 (1982) (morality); Philippe Nonet, *In Praise of Callicles*, 74 *IOWA L. REV.* 807 (1989) [hereinafter Nonet, *In Praise of Callicles*] (law as art); Philippe Nonet, *In the Matter of Green v. Recht*, 75 *CALIF. L. REV.* 363 (1987) [hereinafter Nonet, *Green v. Recht*] (law as a form of art); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949 (1988) (legal formalism).

⁶⁴ In this sense, my argument is hermeneutic rather than empirical or positive, as I offer a new interpretative framework for a significant volume of scholarly works. I do not claim to have discovered any new data or facts, but merely suggest that the set of works that I discuss are best read in light of the conceptual framework that I offer.

thought, and which merit a more detailed discussion than this Essay provides.⁶⁵

A. The Reenchantment of Formalism

A particularly interesting development in contemporary legal scholarship is the resurgence of formalism as a legal theory. Since the late 1980s, the writings of Ernest Weinrib⁶⁶ have spurred and inspired a renewed interest in legal formalism and managed to reintroduce conceptual discussions into legal theory.⁶⁷ Weinrib's position might have been considered almost heretical or incomprehensible when he first began articulating it.⁶⁸ Yet, over time his position grew popular in various academic circles and made a significant impact on contemporary legal theory. In areas such as torts, contract, property, criminal law, constitutional law, and family law,⁶⁹ scholars have reworked their fields to demonstrate that such areas can be understood—indeed

⁶⁵ One such major strand of legal thought includes scholars influenced by the writings of political theologians such as Carl Schmitt, Walter Benjamin, Jacques Derrida, and Giorgio Agamben. These philosophers, in distinct ways, advance the idea that modernity still carries remnants of the theological and of theological modes of reasoning. For legal scholars working in that vein, there is a formidable task to uncover, as Lavi points out, “the sacred past or a transcendent future that lurk beneath the surface of rational-secularized law.” See Shai Lavi, *Enchanting a Disenchanted Law: On the Jewish Ritual and Secular History in Nineteenth Century Germany*, 1 U. IRVINE L. REV. (forthcoming 2011). Some such legal writers unveil law's profound theological structure and content in order to reenchant it and find in it the metaphysical, the divine, and the ideal. See, e.g., Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 U. TORONTO L.J. 185 (2006); Lior Barshack, *Notes on the Clerical Body of the Law*, 24 CARDOZO L. REV. 1151 (2003); Chris Tomlins, *Toward a Materialist Jurisprudence*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS (Alfred Brophy & Daniel Hamilton eds., forthcoming 2011).

⁶⁶ See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995) [hereinafter WEINRIB, *PRIVATE LAW*] (discussing formalism as a means of understanding private law); Weinrib, *supra* note 63 (defending legal formalism); Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583 (1993) [hereinafter Weinrib, *Jurisprudence*] (refuting the notion that formalism is dead).

⁶⁷ See, e.g., ALAN BRUDNER, *PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE* 28–58 (2009) (arguing that, despite its limits, formalism is a necessary framework for interpreting and developing a liberal theory of penal justice); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997) (developing a formalist-inspired conception of property law); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 287–95, 314–18 (2009) (defending the notions of formal equality and formal wrongdoing).

⁶⁸ For example, Weinrib writes: “Formalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors.” Weinrib, *supra* note 63, at 950.

⁶⁹ The list is lengthy and includes BRUDNER, *supra* note 67, at 28–48 (criminal law, constitutional law); PENNER, *supra* note 67, at 103–04 (property); RIPSTEIN, *supra* note 67, at 30–56 (contracts, property, constitutional law, criminal law); WEINRIB, *PRIVATE LAW*, *supra* note 66, at 23–55 (torts); Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 800–01 (2003) [hereinafter Weinrib, *Kant's System of Rights*] (property); Ernest J. Weinrib, *Restoring Restitution*, 91 VA. L. REV. 861, 862–63 (2005) [hereinafter Weinrib, *Restoring Restitution*] (reviewing HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* (2004)) (restitution).

ought to be understood—as “immanently intelligible normative practice[s],” “social arrangement[s] responsive to moral argument,”⁷⁰ coherent and unified articulations of “juridical relationships in a sophisticated legal system,”⁷¹ and, crucially, autonomous vis-à-vis politics.⁷²

But it seems surprising—not to say contradictory—that I refer to formalism as a mode of reenchantment. The surprise comes from the fact that in Weber’s sociology of law, as we have seen earlier, formal legal rationality represents the height of the rationalization and bureaucratization of the legal system and, hence, its utmost disenchantment.⁷³ Indeed, contemporary formalism looks, at least at first glance, as if it adheres to Weber’s characterization of disenchantment. It insists that the law is a domain enclosed within itself (immanence), operating according to its own distinct rationality, in which justification is made according to internal juridical concepts, with special attention given to rules and principles that were developed *within* the legal field.⁷⁴ And like Weber’s depiction of disenchanted formal rationality, contemporary formalism stresses the necessity of *form*—rather than a specific *content*—to the legal justificatory process.⁷⁵

Yet upon closer examination, and paradoxical as it may sound, current formalism is reenchanting. First, it is radically ahistorical and essentialist in the sense that it seeks “the essential characteristics of juridical relationships,”⁷⁶ which largely are fixed over time and cultures. The return of contemporary formalists to philosophers such as Kant (Weinrib⁷⁷ and Ripstein⁷⁸), Hegel (Brudner⁷⁹), Aquinas (Weinrib⁸⁰), and Aristotle (Weinrib⁸¹) is crucial to the formalist move because it proves, they claim, the profound and inescapable truth of the formal nature of law. In Weber’s terms, however, formal legal rationality is historical through and through. It is a stage in the evolution of legal modes of justification and legitimization. And although Weber made no attempt to predict what will follow it, formality was

70 Weinrib, *Jurisprudence*, *supra* note 66, at 583.

71 Weinrib, *supra* note 63, at 966.

72 *See id.* at 973, 985–99.

73 *See supra* Part I.B.

74 *See* Weinrib, *supra* note 63, at 952–55.

75 *See id.* at 962–63, 966–84.

76 *See id.* at 966.

77 *See, e.g.,* Weinrib, *Kant’s System of Rights*, *supra* note 69, at 795–828.

78 *See* RIPSTEIN, *supra* note 67, at 1–30.

79 *See* BRUDNER, *supra* note 67, at 34–35, 45–48, 231–32; Brudner, *supra* note 9, at 1183–98.

80 *See* Weinrib, *supra* note 63, at 954 n.14 (citing Aquinas as the “classic account” of formalism).

81 *See id.* at 977–81 (noting that Aristotle was the first to describe juridical abstractions in his discussion of justice).

not an eternal essence or characteristic of legal systems.⁸² The timelessness and essentialism that current formalism advances colors law in magical and traditional shades. They depict law not only as an ideality—rather than a reality—but also as an *eternal* ideal, which was already revealed to the ancients (Aristotle and Aquinas).

Second, despite its claim to deal with the *forms* of legal justifications, contemporary formalism is far more ambitious and substantive. Disenchanted formalism was formalistic in a stricter sense. In Weber's depiction, legal forms were truly vacuous; it was crucial for the process of disenchantment that whatever specific content the legislator decided upon could fit into the formal legal system, which was operated mechanically and logically by administrators and judges.⁸³ But, for formalists such as Weinrib, Ripstein, Brudner,⁸⁴ and Penner, the legal *forms* are extremely rich, thick, and full of content. From the legal forms, they extract and imply—objectively, rationally, and apolitically—which standard of liability should be adopted,⁸⁵ what level of protection private property should receive,⁸⁶ what acts should be criminalized,⁸⁷ what remedies should be given for breach of contract,⁸⁸ and more. Upon closer examination, the substance that is imbuing the forms with their concrete meaning and content is *freedom*, as understood and interpreted by some contemporary formalists.⁸⁹ Hence, current formalism is a reenchanting legal theory—not only because it is in fact substantive (for Weber, this was a mark of a primitive and enchanted legal system) but also because the concrete content is determined through an elaboration of metaphysical assumptions about the essence of the human subject, human relations, and the meaning of “freedom.” That every norm can be traced back to profound ideals about morality and humanity is indeed the opposite of the disenchanted vision that sees legal norms as the product of political compromise (or its technical application).⁹⁰

⁸² The profound historicity of legal formalism is obvious in Weber's sociology of law because all modes of legal thought are historical and change over time.

⁸³ Weber claimed that legal positivism was an essential part of the evolution of legal disenchantment because it meant that no matter what the legislator determined, the legal system would be able to work it into an elaborate system of rules, bureaucratically applied. 2 WEBER, *supra* note 29, at 875–76.

⁸⁴ See BRUDNER, *supra* note 67, at 21–55. Although Brudner claims that formalism has limits and that a full normative account requires considerations of morality and policy, he generally accepts formalism as a necessary framework for legal theory. See *id.*

⁸⁵ See WEINRIB, *PRIVATE LAW*, *supra* note 66.

⁸⁶ See PENNER, *supra* note 67.

⁸⁷ See BRUDNER, *supra* note 67.

⁸⁸ See Weinrib, *Restoring Restitution*, *supra* note 69.

⁸⁹ I refer here especially to Ripstein and Brudner, who are explicit about their commitment to freedom as the titles of their books suggest: for Ripstein it is *Force and Freedom* and for Brudner *Punishment and Freedom*.

⁹⁰ See Kennedy, *supra* note 7, at 1064.

Before I move to the third point, I would like to clarify that the reason I refer to contemporary formalists as reenchanters is not just their normativity—that is, their attempt to direct the law in various desirable directions—or their mere insistence that the law serves as a reservoir for various ideals and values, some of which come from morality. In this sense (almost) all legal theories are normative, and to name all of them “reenchanting” would render this Essay superfluous. What is unique—and reenchanting—about the normativity of the formalists is that it is essentialist, ahistorical, and dependent on highly conceptual and metaphysical reasoning, feeding on monistic morality rather than consequences, effects, or realities.

This brings me to the third point, which is the centrality of philosophical contemplation regarding the law—especially Kant’s and Hegel’s (but also Aristotle’s and Aquinas’s)—in contemporary formalism. This centrality embodies the strange twist that formalists give to the notion of law’s autonomy and immanence—a twist that is a mark of formalism’s reenchantment because, to my mind, it means that contemporary formalism is neither immanent nor truly autonomous despite the declared presentation by its advocates. Although the underlying claim exists that legal justification must be free from external influences such as economics, psychology, and “politics,” both morality and philosophy—also extralegal domains—clearly impact the legal domain.⁹¹ Its proponents do not articulate this influence as “invasion” or as a direct interference with law’s autonomy. It is also not presented as law’s submission to some transcendental meaning but as law’s necessary “responsiveness” to moral arguments.⁹² Indeed, at least Weinrib would vehemently deny that moral or philosophical considerations have independent weight and would insist that philosophy only serves as the framework that defines the limits of law—not its concrete forms or content. However, Brudner and Ripstein admit that philosophy (or morality) has an independent significance in determining concrete rules and principles, and convincing readings of Weinrib suggest that he too bases specific norms and principles on fairly thick metaphysical ideas regarding the nature of the individual and of intersubjective interactions.⁹³ And when compared with other

⁹¹ See, e.g., RIPSTEIN, *supra* note 67, at 255 (“Kant is certainly committed to the idea that ‘right must never be accommodated to politics, but politics must always be accommodated to right.’”).

⁹² The problem of law’s special relation to morality is obviously one of the themes that twentieth-century jurisprudence deals with most extensively (even more so over the past thirty years) and is not unique to contemporary formalism. Indeed I argue that the renewed interest in natural law and in law’s morality is another marker of the reenchantment of law. See *infra* Part II.B.

⁹³ Some have therefore argued that Weinrib’s formalism is reminiscent of natural law. See George Brencher IV, *Formalism, Positivism, and Natural Law in Ernest Weinrib’s Tort Theory: Will the Real Ernest Weinrib Please Come Forward?*, 42 U. TORONTO L.J. 318, 350 (1992).

normative legal efforts, what is distinct—and reenchanting—about the formalist use of philosophical contemplation is that it takes primacy over any other consideration in determining legal rules and principles. Thus law becomes a purely ideal realm—an otherworldly domain devoid of any realistic considerations.

Fourth, disenchanted legal formality, in Weber's articulation, actually relied upon the collapse of legislation into politics rather than on their strict separation⁹⁴ (which current formalists hail⁹⁵). Stripped of its divine legitimacy and any other traditional charisma, disenchanted law is understood to be fully man-made. Even natural law theories lost their legitimating power along the process of disenchantment, Weber claims, and law was "unmasked . . . [as] the technical means of a compromise between conflicting interests."⁹⁶ This disenchanting realization is therefore closely linked with the realist understanding that law (over which the legislators fight and reach compromises) is a *means* for achieving social ends. Current formalist refusal to consider these "political" and "instrumental" aspects of the law—indeed their vehement rejection as threatening the true essence of the law—is what leaves the legal domain as an enchanted sphere equivalent to love, as Weinrib claims: "Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an extrinsic end. Love is its own end. My contention is that, in this respect, private law is just like love."⁹⁷ Although Weinrib only means to point to the *intrinsic* value of private law—and to deny it being an instrument to achieve social goals—it is extremely telling that he compares law to *love*. In Weber's analysis, in our disenchanted epoch, the domains of love (or intimacy and eroticism) and art take the place of religion in leaving room for experiences of revelation, salvation, and magic.⁹⁸ To turn law into love is indeed to reenchant it, to reinscribe the magical, the mystical, and the prophetic into a domain that has become rationalized, bureaucratized, and instrumentalized to its core.

94 See Kennedy, *supra* note 7, at 1064 ("Weber's theory of the disenchantment of law-making ended with its fusion into politics—specifically legislative politics.").

95 See, e.g., Weinrib, *supra* note 63, at 985–99.

96 2 WEBER, *supra* note 29, at 874–75.

97 See WEINRIB, *PRIVATE LAW*, *supra* note 66, at 6.

98 "It is not accidental that our greatest art is intimate and not monumental, nor is it accidental that today only within the smallest and intimate circles, in personal human situations, in *pianissimo*, that something is pulsating that corresponds to the prophetic *pneuma*, which in former times swept through the great communities like a firebrand, welding them together." MAX WEBER, *The Origins of Modern Capitalism*, in *SOCIOLOGICAL WRITINGS* 151, 155 (Wolf Heydebrand ed., Frank H. Knight trans., 1994).

Last, contemporary formalism manifests what Schlag calls an “enchantment of reason.”⁹⁹ Coming after a hundred years during which reason’s objectivity and deductivity has been severely challenged (if not shattered altogether), and during which reason’s ability to produce legal principles, rules, and concrete outcomes in cases from highly abstract ideas (such as “freedom,” “liberty,” “dignity,” “personality,” “property,” and the like) has been delegitimated in the legal sphere, it seems almost magical to put faith in reason to do just that. Indeed, it requires a leap of faith, a forgetting of so much that had been written and taught, and an ignorance of evidence that demonstrates reason’s vulnerability. This is not to say that such leap of faith is unfruitful, nor does it mean that such an act of belief is not required by the high aspirations that some of us might share. It means, however, that “philosophical reason,” which is being used by current formalists—those influenced by Kant’s and Hegel’s writing, in particular—is not performing the same disenchanting function that it did when it was originally articulated (by Kant and Hegel, who both secularized law and stripped it of its magic and religiosity). Indeed, it is not their sheer Kantianism or Hegelianism that renders the formalists reenchanters; it is the fact that they utilize these philosophical traditions to regain faith in procedures and institutions that were debunked throughout the twentieth century as plagued by subjectivity, arbitrariness, and ideology unless a thorough pragmatic, realist critique was placed upon “reason.” The formalist return to this discredited “reason” is therefore a reenchantment of the legal field that was stripped of its “metaphysical dignity.”¹⁰⁰

B. The Reenchantment of Virtue

Over the past few decades, we have witnessed the resurgence of “virtue” in political theory as well as in legal theory.¹⁰¹ Writers from the right, left, and center—often associated with Catholic thought—

⁹⁹ See PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 1 (1998). In a book review, Kennedy identifies four different meanings of the phrase *enchantment of reason* in Schlag’s theorization: first, an immoderate confidence, an excessive belief in one’s own reason; second, the rule of reason; third, denying reason’s vulnerability; and fourth, “‘an odd conjunction of the magical and the technological’ in thinking about law.” See Duncan Kennedy, *Pierre Schlag’s The Enchantment of Reason*, 57 U. MIAMI L. REV. 513, 516–39 (2003).

¹⁰⁰ 2 WEBER, *supra* note 29, at 874–75.

¹⁰¹ Classical works advocating the need to reinsert virtue into our political and legal systems include PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 1–19 (1978); GLENDON, *supra* note 63, at 1–17; ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 210–46 (1981); SANDEL, *supra* note 63, at 104–09; Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in 13 *MIDWEST STUDIES IN PHILOSOPHY: ETHICAL THEORY* 32, 32–34 (Peter A. French et al. eds, 1988). Bonnie Honig argues that contemporary-virtue theorists (such as John Rawls and Michael Sandel) use the concept of “virtue” to quench real politics, which is about irresolvable contests and disagreements. See BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 126–213 (1993).

have begun arguing that our legal order needs to be responsive to and advance the inculcation of various personal virtues.¹⁰² Such theories aim to bring back “character” (not the real or concrete character but the ideal character) into legal discussions¹⁰³ and to offer “a substantive conception of the human good or flourishing . . . [and] to answer the questions ‘What sort of person should I be?’ and ‘How will a particular course of action guide me toward or away from becoming that sort of person?’”¹⁰⁴ Virtue-centered jurisprudence hence asks how can the law help in making citizens virtuous.¹⁰⁵ Although much of the writing in this vein relies on Aristotle and the Greeks,¹⁰⁶ this group does not include only neo-Aristotelians. As Martha Nussbaum notes, virtue theorists should not be seen as offering a third position which opposes both Kantianism and utilitarianism, since both Kant and the British utilitarians were in fact deeply concerned with virtue and developed a theory of it.¹⁰⁷ When I refer to legal-virtue theorists, therefore, I do not mean to exclude some scholars who are actually interested in Kant’s or Hegel’s theory of virtue (such as Weinrib,¹⁰⁸ Brudner,¹⁰⁹ or Ripstein¹¹⁰).

Although earlier discourse on virtue was a predominantly—and almost exclusively—religious (Catholic) project and was therefore mostly the business of expressly religious scholars and published in religious-oriented law reviews, such discourse has recently penetrated mainstream academic discussions in doctrinal fields such as property law, environmental issues, contracts, torts, and criminal law.¹¹¹

¹⁰² See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 860–87 (2009).

¹⁰³ See Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 179 (2003) (arguing for a “virtue-centered theory of judging,” which looks to encourage certain desirable characteristics of judges and which can account for the role that judges play in the legal system). It is important to distinguish the interest that virtue theorists find in “character” and the attention that legal realists’ interest gave to the concrete character of legal actors, especially judges. While for virtue theorists character is an object of interest due to the importance of intentions to the evaluation of the actions (and therefore it is important that judges, for example, would have an ideal character), see *id.*, for realists the investigation of the character of judges was necessary to predict what they might do in a specific dispute.

¹⁰⁴ See Peñalver, *supra* note 102, at 864.

¹⁰⁵ See Solum, *supra* note 103, at 181 (“Virtue ethics has implications for an account of the proper ends of legislation. If the aim of law is to make citizens virtuous . . . , what are the implications for the content of the laws?”).

¹⁰⁶ See, e.g., Peñalver, *supra* note 102, at 863–64 (reintroducing the Aristotelian ethical tradition into the study of property and land use).

¹⁰⁷ See Martha C. Nussbaum, *Virtue Ethics: A Misleading Category?*, 3 J. ETHICS 163, 164–67 (1999).

¹⁰⁸ See, e.g., Weinrib, *supra* note 63, at 977 n.8.

¹⁰⁹ See, e.g., BRUDNER, *supra* note 67, at 26.

¹¹⁰ See, e.g., *id.* at 1–30.

¹¹¹ See, e.g., Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 113 (1995) (“The practice of

The current quest for virtue in law occupies a special oppositional spot vis-à-vis the disenchanting vision of the legal domain, as an action is made virtuous not due to its conformity to rules or principles; rather, “[a]n action is virtuous because it is the sort of action a virtuous person undertakes The category of virtuous conduct . . . goes well beyond the range of behavior that mechanical rules can adequately describe and calls for the skillful exercise of judgment guided by practical wisdom.”¹¹²

I will now explain on what account virtue theory is reenchanting law, but before that I would like to clarify that, as with my analysis of contemporary formalism, it is not my intention to point to the errors of, or problems with, virtue theory in law. Indeed, I expect that more and more jurisprudential attention will be given to examining the pros and cons of such approach and that scholarly works will be dedicated to working out the ways in which virtue should and could (or should not and could not) occupy a larger space in the law. My aim, therefore, is to show that virtue theory and the responses it might provoke displace the realist debates regarding law’s indeterminacy and power with questions that belong to a reenchanting legal realm. Such questions and responses include—rather than exclude—metaphysical and idealist pondering about issues of character, the human, and the good.

The first reenchanting element is, thus, that virtue theories are overtly and explicitly seeking legal meaning and substantive content of norms by recourse to a transcendental domain—a metaphysical idea about the “well-lived life” or what “human flourishing” might mean.¹¹³ Needless to say, if the law is always geared toward such goals,

law as a profession presupposes a commitment to civility in rational discourse.”); Robert John Araujo, *Justice as Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 PEPP. L. REV. 377, 378–79 (2002) (using theories of virtue in assessing the role of justice in legal, political, and human history); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CALIF. L. REV. 329, 378–86 (1994) (using Aristotle’s theory of virtue to defend the argument that communities must morally educate citizens to make politics more deliberative); Linda R. Hirshman, *The Virtue of Liberty in American Communal Life*, 88 MICH. L. REV. 983, 987, 1012 (1990) (arguing that America’s problem of a “permanent underclass” reflects a failure of virtue); Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1425 (1995) (premising his view of the criminal-justice system on Aristotle’s theory that criminal law serves the greater good of humanity by promoting virtue); David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U. TORONTO L.J. 325, 340 (2003) (describing Western property regimes as exhibiting “some teleology of virtue”); Eduardo M. Peñalver, *supra* note 102, at 862–87 (introducing virtue as an alternative to economic land-use theory); Solum, *supra* note 103, at 178–79 (introducing a virtue-centered theory of judging).

¹¹² See Peñalver, *supra* note 102, at 865.

¹¹³ Peñalver includes most liberal values and virtues within a “fully developed conception of human flourishing” thus leaving the enormous task to balance between them at the hands of the judge (as well as the administrator and even the landowner). See Peñalver,

and if judges and other actors are expected to act in a manner that reflects this almost-religious meaning, our law has once again been infused with cosmic and transcendental meaning.

Second, given the complexity and substantive (as opposed to formal) nature of the work of the judge, we are further removed from the disenchanting view of the judge and the administrator as bureaucrats, managers, or scientists who either technically apply the law¹¹⁴ or fall onto some other field of knowledge (economics, for example) that decides the case for them. Judges—virtuous judges, that is—are required to be in possession of the most important virtue of all: practical wisdom, which enables them to take into account and balance the various virtues that need to be inculcated and the different values that need to be promoted.¹¹⁵ Thus, their authority is not a result of their objective knowledge, positive authorization, unique institutional capacity, reasoned elaboration, or technical skills; rather, the judge's (or the state administrator's) authority is a derivative of his or her character and wisdom or, to put it differently, personal *charisma*.¹¹⁶

Before I move to the next type of reenchanting theory, I want to make the point that unlike contemporary formalists, at least some virtue theorists (such as Eduardo Peñalver) actually endorse—rather than reject or totally ignore—the realist critique of indeterminacy and power. Peñalver admits that “virtue theory[] lack[s] . . . an algorithm for social decision making,” but he argues that “far from being a fatal weakness, [it] is actually a point of strength.”¹¹⁷ Rather than surrendering to the reconstructivist demand that a normative theory overcome conflicts and quench deliberation, Peñalver claims that “[i]nstead of burying the tension among plural values inside homogenizing numerical measures of dubious validity, . . . virtue theory brings that tension to the foreground and invites reasoned deliberation about an appropriate response to it.”¹¹⁸ It is here, however, that we can detect the reenchanting move of virtue theory: although economic analysis cannot truly solve law's indeterminacy (it is, argues

supra note 102, at 867–74, 869 n.197; see also Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L.J. 732, 748 (2007) (“Drawing the appropriate limits around permissible state action in the private sphere ultimately depends upon the consideration of the effectiveness of legal norms in particular contexts as well as the development of an adequate account of human flourishing and the role of human freedom within that account.”).

¹¹⁴ See, e.g., Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing the rise of “managerial judges” in U.S. civil procedures).

¹¹⁵ See Peñalver, *supra* note 102, at 865.

¹¹⁶ This is, to my mind, the crucial difference between *virtue* theory of adjudication and an institutional theory such as the one developed by Owen Fiss. See also *infra* Part II.D (discussing the reenchantment of legal authorities).

¹¹⁷ See Peñalver, *supra* note 102, at 876.

¹¹⁸ See *id.*

Peñalver, largely an illusion that cost-benefit analysis provides determinacy),¹¹⁹ virtue largely solves the problem that lies behind law's indeterminacy, which is plurality of values. It does so through the reasoned deliberation of charismatic decision makers who possess the virtue of practical wisdom. It is true that Peñalver's position could also be interpreted in a slightly less enchanted way; it is possible that he merely suggests that given the indeterminacy of the system, virtue provides an aspirational horizon rather a permanent solution. And practical wisdom need not be necessarily construed as a magical virtue; it could be understood as a trait that any applier of rules must possess, even in the most disenchanting system.¹²⁰

Despite these qualifications, reenchantment seems to be appearing in virtue theories of the law as an almost unwanted supplement of irrationality (which in Weberian terms means ad hoc and substantive) once the focus of the theory changes from rules, principles, procedures, and, most importantly, consequences and outcomes to evaluations of character, personality, and the meaning of "the good life."

C. The Reenchantment of Law as Art

Perhaps the most vehemently anti-instrumentalist, antirealist approach to law-legal scholarship—and therefore, I will argue, a radically reenchanting one—was sparked by Philippe Nonet's writings.¹²¹ Cast as an assault on "law and . . ." scholarship, his famous *In the Matter of Green v. Recht* began his profound contemplation on the nature of modern law and legal theory, examining their state of affairs as a manifestation of humanity's decline, self-defilement, and self-abasement.¹²² Over the past twenty years, this approach—resisting the term *theory*¹²³—gained much interest and support, and a group of young scholars (mostly students of Nonet such as Marianne Consta-

¹¹⁹ See *id.* at 887.

¹²⁰ Dagan advocates this position, according to which the realist conception of law is based on judges applying practical wisdom in order to deal with the tensions inherent in any legal system. See Dagan, *supra* note 50, at 644–45, 648, 652.

¹²¹ See, e.g., Nonet, *Green v. Recht*, *supra* note 63; Nonet, *In Praise of Callicles*, *supra* note 63; Philippe Nonet, *What Is Positive Law?*, 100 YALE L.J. 667 (1990) [hereinafter Nonet, *Positive Law*]; Philippe Nonet, *Sanction*, 25 CUMB. L. REV. 489 (1995); Philippe Nonet, *Time and Law*, 8 THEORETICAL INQUIRIES L. 311 (2006).

¹²² See Nonet, *Green v. Recht*, *supra* note 63, at 375–77.

¹²³ Lavi eloquently explains this resistance in his contribution to this issue. Theory, he argues, suggests a perspective that is therefore already limited by the position of the observer. It is, he claims, part of the move to epistemology, which has given up on truly knowing the object. See Shai Lavi, *Turning the Tables on "Law and . . .": A Jurisprudential Inquiry into Contemporary Legal Theory*, 96 CORNELL L. REV. 811 (2011).

ble,¹²⁴ Roger Berkowitz,¹²⁵ Linda Ross Meyer,¹²⁶ Mark Antaki,¹²⁷ and Shai Lavi¹²⁸) ventured into studies in distinct fields of law such as torts, criminal law, bioethics, international law, and more.

It is hard to capture the essence of, and the similarity between, these scholarly works. Yet at their heart lies a complete rejection of law's instrumentality and an insistence that the age of positive law and the theories that accompany it is one of the darkest (if not *the* darkest) moments in human history. It is tempting to refer to them as "metaphysical" studies of law, but they are far more specific than being merely generally "metaphysical."¹²⁹ These works share a very specific metaphysical position, highly influenced by the writings of Friedrich Nietzsche and of Martin Heidegger, lamenting modernity, fearing the dangers which are implicit in it while also accepting it as unavoidable, and perhaps even celebrating it.¹³⁰ The decline of law that these scholars document, however, took place not in a matter of decades but over many centuries (at least).¹³¹

In a way, this decline parallels law's disenchantment according to Weber, but there is a change in emphasis and a catastrophic undertone (as compared with Weber's mild pessimism). While for Weber disenchantment is a process of rationalization, secularization, and bureaucratization that locks us in "the iron cage of modernity" and enables economic growth and prosperity,¹³² for Nonet—following Heidegger—it is a story of man's desertion by the gods and of human-

¹²⁴ See MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 9–14 (2005); MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994) [hereinafter CONSTABLE, *THE LAW OF THE OTHER*]; Marianne Constable, *Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law*, 19 *LAW & SOC. INQUIRY* 551, 554–55 (1994).

¹²⁵ See ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION* 1–10 (2005); Roger Berkowitz, *Friedrich Nietzsche, the Code of Manu, and the Art of Legislation*, 24 *CARDOZO L. REV.* 1131, 1134–35 (2003).

¹²⁶ See Linda Ross Meyer, *Herbert Morris and Punishment*, 22 *QUINNIPIAC L. REV.* 109, 109 (2003); Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 *GEO. L.J.* 647, 648–52 (1998).

¹²⁷ See Mark Antaki, *The Critical Modernism of Hanna Arendt*, 8 *THEORETICAL INQUIRIES L.* 251 (2007); Mark Antaki, *The World(lessness) of Human Rights*, 49 *MCGILL L.J.* 203, 205–06 (2004).

¹²⁸ See SHAI J. LAVI, *THE MODERN ART OF DYING: A HISTORY OF EUTHANASIA IN THE UNITED STATES* 1–14 (2005).

¹²⁹ Lavi argues that the needed move is not to bring metaphysics back into the law but actually to engage in an ontological investigation of it, which will enable us to see "the law as it is" rather than as it is perceived by various perspectives or disciplines. See Lavi, *supra* note 123, at 816–17.

¹³⁰ See Nonet, *Green v. Recht*, *supra* note 63, at 377 ("A dark age has come. Welcome it. Be grateful that your fate was to live in a time when the absence of spirit would demand so much thought. . . . Perhaps the light will shine more brightly when it rises in darkness.").

¹³¹ See CONSTABLE, *supra* note 124; Nonet, *Positive Law*, *supra* note 121, at 669–72.

¹³² See Kennedy, *supra* note 7, at 1055–61.

ity's utter downfall.¹³³ For other writers in this group, the story might be told a little differently: it is about the disappearance of justice (and the rise of fairness),¹³⁴ the decline of law as art (and the rise of technique and regulation),¹³⁵ the eradication of community (and the rise of identity politics),¹³⁶ and so on.

Even if the other writers in this group are not as harsh and cataclysmic in their view of modern law, they dedicate their scholarly efforts to revealing moments in the history of law in which law lost its dignity and artful form and turned into a machine, an instrument, and a vehicle for achieving external ends. Thus, this group rejects the usual modes of historicizing that reveal personal interests, social conflicts, and political battles behind our laws.¹³⁷ Instead, they excavate untold histories of ancient legal glory and its decline, the destruction of law as an art form—when law had a “sacrosanct bond to the ethical activity of life”¹³⁸—and its degradation into positive law, policy, and technique.

But aside from the fallen and degraded contemporary law that these scholars point to, they discover the traditional, often ancient “good laws.”¹³⁹ These “good laws,” however—obviously not our contemporary positive laws—are *not* identified through a science-like method of practical wisdom like modern natural-law theorists such as Finnis and Grietz claim them to be. Rather,

good Law, like all nobility, requires a certain dulling of the mind; an instinctive distaste for and dismay at displays of quickness, learning or ‘culture’; a trained (or is it feigned?) incapacity to understand any sentence that smacks of jesuitical quibbling, word stretching, hair splitting, astute analysis, or logical scaffolding.¹⁴⁰

¹³³ Nonet describes “law and . . .” as follows:

[T]he odors of law and . . . are among the foulest. . . . Look at the people with whom law and . . . has populated the earth. Look at that swarming mass of busy, hurried, restless, racing, ratlike humanity. . . . See what and how these beings are: wanting and needing, being deficient, crippled, hence dependent, eager recipients, sufferers, motivated, acted upon . . . never responsible, never punishable, never deserving, only able to have their future predicted, therefore also superstitiously crawling at the feet of fortunetellers in abject fear of pain and death. . . .

In law and . . ., though not by it, humanity is defiled.

Nonet, *Green v. Recht*, *supra* note 63, at 376–77.

¹³⁴ BERKOWITZ, *supra* note 125.

¹³⁵ LAVI, *supra* note 128.

¹³⁶ CONSTABLE, *THE LAW OF THE OTHER*, *supra* note 124.

¹³⁷ Indeed, the main of legal history could be labeled as another disenchanting theory of law, which strips it off its metaphysical dignity, unity, and coherence by exposing law as the outcome of mundane and profane processes and interests. For a critique of this disenchanting mode of historicizing see Tomlins, *supra* note 65.

¹³⁸ BERKOWITZ, *supra* note 125, at xiii.

¹³⁹ See Berkowitz, *supra* note 125, at 1134 (finding exemplary, “good” legislation in ancient codes such as the Code of Manu); Nonet, *Green v. Recht*, *supra* note 63, at 376.

¹⁴⁰ Nonet, *Green v. Recht*, *supra* note 63, at 376.

The good, noble laws are forever lost because “[j]ustice has fled our world”¹⁴¹ and because we are living in a unique time when law is divorced from justice and when art is in decline. By going back to the past, these scholars hope to recover notions of what neighborliness, punishment, promise, euthanasia, and other juridical concepts once meant.¹⁴² Unveiling their alternative meaning to modern laws demonstrates law’s falling while also giving us the invigorating power of nostalgia.

By now, I hope, it has become clear why I call this group of scholars reenchanters. Though not using this term explicitly, they reject almost each and every aspect of our modern and disenchanting law: its positivism, its instrumentality, its transformation into a set of rules and principles, its rationality, its reduction to policy, its becoming a technique of government,¹⁴³ and its detachment from justice¹⁴⁴—in short, its turning into a scientific-like endeavor. But law, they argue, is something entirely different and enchanted: “law requires that an individual sacrifice his rights, his pride, and even his self to something bigger and ultimately more meaningful.”¹⁴⁵ And the language of law is “the language of authority and respect. Our old Lawyers knew how and what to revere, honor, hallow. Noble souls, they peopled the world with the likes of themselves, persons in and through whose bodies the spirit of mankind showed a godlike splendor. . . .”¹⁴⁶ The search and yearning for charismatic and noble legal authorities (lawgivers and judges), for the reweaving of the transcendental and of justice into the fabric of law, and for the reappearance of art in our technical and bureaucratic existence all mark this unique and profound attempt to reenchant our law and, through it, our world.

D. The Reenchantment of Legal Authorities

One of the main crises of modernity and a major hallmark of our disenchanting world is the disappearance of traditional authorities (divine, prophetic, royal). In the legal field, I already argued, the extinction of traditional authorities manifests itself both in lawmaking and in its application by administrators and judges.¹⁴⁷ And while lawmaking is unmasked as “the technical means of a compromise between

¹⁴¹ BERKOWITZ, *supra* note 125, at ix.

¹⁴² Berkowitz, for instance, claims that “we know that there is more to being a neighbor than paying for the damage one does. Only one who understands that he is enmeshed in a moral world keeps his promise even when it is convenient, efficient, and legal to break it.” *Id.* at xii.

¹⁴³ LAVI, *supra* note 128, at 75–98, 126–71.

¹⁴⁴ Constable, *supra* note 124, at 572–80.

¹⁴⁵ BERKOWITZ, *supra* note 125, at xii.

¹⁴⁶ Nonet, *Green v. Recht*, *supra* note 63, at 376.

¹⁴⁷ See *supra* Part I.B.

conflicting interests,¹⁴⁸ adjudication turns into a rational and bureaucratic operation of fact finding and of technical rule application. Even in common-law systems, the image of the bureaucrat judge was never really convincing, as she was stripped of her charisma and traditional authority.¹⁴⁹ Indeed, most legal theories of the twentieth century were busily disenchanting the judiciary, even if for different reasons and based on different jurisprudential grounds. For some of the realists and their critically inclined followers (critical legal studies, critical race theory, feminists), it was because judges decided cases based on their psychology, ideology, or crude “hunch,” which exposed them as regular human beings, devoid of all charismatic or traditional authority.¹⁵⁰ But even for many postrealist reconstructivist scholars who tried to restore the faith in the judiciary and in the legal system, it was achieved by disenchanting the judiciary even further. This was so because judges’ legitimacy, these theoreticians argued, stemmed from their heavy reliance on processes and procedures (legal process),¹⁵¹ constitutional or legislative text (constitutionalists and textualists),¹⁵² judicial precedents, or extralegal knowledge (law and economics and other law and social studies).¹⁵³ Put differently, judges might have been relegitimated and regained the trust of some (since they are no mere ideologues or usurpers of power), but it was a Pyrrhic victory for judges’ authority since they obtained it through their acquired expertise and hard work—not through tradition or charisma—which made them further disenchanting (even if more legitimate).

¹⁴⁸ See Kennedy, *supra* note 7, at 1065 (quoting 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 875 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1921–1922)).

¹⁴⁹ See Langer, *supra* note 114 (describing a global movement towards managerial judging).

¹⁵⁰ See, e.g., ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (critique of law as ideology); Cohen, *supra* note 55, at 846 (the need to study the psychology of judges); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929) (on judicial “hunch” as the determining factor in judgment).

¹⁵¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (defending judicial review on the basis of political theory and legal process theory); HENRY M. HART, JR., & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994) (defining procedures and processes that would legitimate the legal process and adjudication).

¹⁵² JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (presenting constitutional theory legitimating the Supreme Court).

¹⁵³ The various law and social-science schools of thought are too many to name, yet most dominant are “law and economics” and “law and society” (usually meaning sociology and anthropology. For the purposes of this discussion, normative law and economics is the best example of a theory that legitimates the judge by subjecting her to the methodology of economics. See, e.g., Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

Over the past thirty years or so, however, some legal theorists are reenchanting the figure of the judge. They do so by glorifying judges, attributing to them traits that are almost godlike, thus restoring *faith*—not just trust or legitimacy—in them. This glorification of the judge is often accompanied by another reenchantment of the legislative process through the concept of deliberative (or discursive) democracy. Thus, law's authority is being reenchanting not through its substantive normativity, morality, political theory, or virtue but through the character of the judge and the merits of deliberative democracy. I now turn to briefly examine these reenchantments of law's authority.

1. *Reenchanting the Judge*

Hanoch Dagan and Roy Kreitner describe a set of legal theorists (among them Karl N. Llewellyn, Owen Fiss, Herman Oliphant, and Anthony T. Kronman) whose theory they label “law as craft.”¹⁵⁴ For these scholars, “law is neither art nor science, but craft,” meaning that at the heart of the law lie “shared professional norms,” which are based on “ways of doing,” “working knowhow,” and “operating techniques.”¹⁵⁵ While some of this scholarship draws attention to the complicated objectives and institutional arrangement of the judiciary, which render it neutral, independent, impartial, and required to reason and write elaborate decisions,¹⁵⁶ others focus on the personal traits of the judge: her virtues (which she either has or lacks), her character, her “common sense,” and other elements that are impossible to translate into rules of conduct, procedures, or institutional architecture.¹⁵⁷ Both Oliphant and Kronman come close to reinscribing the truly personal, perhaps even the charismatic, into the description of the work of the lawyer (and the judge): “the *illumination* which only immediacy affords and the *judiciousness* which reality alone can induce;”¹⁵⁸ and the unique combination of two thoroughly personal traits, sympathy and detachment—rather than theoretical

¹⁵⁴ See Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 CORNELL L. REV. 671 (2011); see also Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245, 2274–322 (2001) (exploring the similarities between the law and other craft traditions).

¹⁵⁵ Dagan & Kreitner, *supra* note 154.

¹⁵⁶ OWEN FISS, *THE LAW AS IT COULD BE* 160–67 (2003).

¹⁵⁷ See Solum, *supra* note 103, at 192–93.

¹⁵⁸ Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 73–75 (1928) (emphasis added). This characterization might seem somewhat unfair, given Oliphant's attempt to bind the judge through institutional arrangements much like Fiss. Yet, I think that there is enough in Oliphant to render him a reenchanter of the judges' charisma or traditional authority.

contemplation, intellectual excellence, or instrumental-scientific knowledge—is what gives the judge her authority.¹⁵⁹

This personalization and glorification of the judge (and the lawyer, who can also be a state administrator) that does not rest on objective, rationalizable, and bureaucratic rules and procedures brings the authority of the judge close to charismatic authority, and thus reenchants it.

Ronald Dworkin's Hercules is another example of reenchantment of the judge.¹⁶⁰ The rich and foundational theory of Dworkin goes well beyond of the scope of this Essay, despite the fact that it touches upon reenchantment themes that I discussed earlier (the role of morality in legal interpretation, the unity and integrity of the entire legal field, the imperative to read texts favorably, the discussion of the "grounds" of law rather than merely its consequences, and the requirements of "fairness and justice" within law's domain).¹⁶¹ Indeed, much of Dworkin's enterprise could be characterized as reenchanting the legal field, not so much because it reconstructs the field such to legitimate, justify, and stabilize it, but because Dworkin's law almost replaces religion in the modern world. The empire of law is truly everywhere, and the judges—along with the Constitution—are its rulers. And the judges receive the legitimacy not of positive legal authority but of the rule of integrity, fairness, and justice. The great "chain of interpreters" to which judges belong—stretching almost from ancient time until our present—and their fidelity to the entire normative cosmos renders them a truly Herculean glory and the aura of an enchanted legal universe.

2. *Reenchanting the Authority of Legislation*

Although judges are prone to be reenchanting (at least in common-law systems), the finding of morality, justice, coherence, and magic in contemporary legislators seems like an impossible task. Still, some legal (and political) theorists try to do just that through the concept of deliberative (or discursive) democracy.¹⁶² Here, too, I will be

¹⁵⁹ ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 325–28 (1993).

¹⁶⁰ See RONALD DWORIN, *LAW'S EMPIRE* 239–50 (1986) [hereinafter DWORIN, *LAW'S EMPIRE*]; RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 105–30 (1977).

¹⁶¹ See DWORIN, *LAW'S EMPIRE*, *supra* note 160, at 6–10, 96–98, 219–24, 254–70.

¹⁶² On the concept of deliberative democracy, see JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994); *DELIBERATIVE DEMOCRACY* (James Bohman & William Rehg eds., 1997); *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1998); Seyla Benhabib, *Introduction: The Democratic Moment and the Problem of Difference, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 1, 16 (Seyla Benhabib ed., 1996) (introducing a collection of essays aimed at convincing "intellectuals . . . that democracy can be defended with rigorous argument . . . not only with good faith and pious wishes"); Seyla Benhabib, *Toward a Deliberative*

concise and unable to delve into the entrails of democratic theory; I will only give some cursory remarks on some reenchanting themes that it entails. Over the past thirty years, and increasingly since the late 1980s, there has been a deluge of writing on deliberative democracy.¹⁶³ Indeed, as the crisis of representative (parliamentary) democracies deepens,¹⁶⁴ and as positive laws lose their legitimacy as a result thereof, democratic “deliberations” become operative concepts that not only legitimate the state but also reenchant the legal field.¹⁶⁵

Although it has many variants, the idea behind deliberative democracy is that for our legal system to enjoy real and sustained legitimacy our laws *should not* be produced by the traditional representative legislator, executed by regular administrators, or adjudicated in rule-applying courts. Rather, our laws should be the outcome of a complex, multilayered, and often decentralized deliberative process between “equal citizens,” which would infuse our laws with real democratic and moral legitimacy. Deliberative democracy is indeed an attempt to inject “authentic” legitimacy into what disenchanting law sees as a mere political and contingent compromise between competing interests and groups.¹⁶⁶ Indeed, the very idea that law is merely a compromise—often a result of power imbalances—is for deliberative democratic theorists an anathema, a crisis that needs to be solved. Thus the *ideal* of “deliberation”—often also associated with Jürgen Habermas’s ideal-speech situation and radical democracy as well as

Model of Democratic Legitimacy, in DEMOCRACY AND DIFFERENCE, *supra*, at 67 [hereinafter Benhabib, *Deliberative Model*]; Jürgen Habermas, *Three Normative Models for Democracy*, in DEMOCRACY AND DIFFERENCE, *supra*, at 21. For a discussion and critique of Habermas’s theory of discursive democracy, see Joshua Cohen, *Reflections on Habermas on Democracy*, 12 *RATIO JURIS* 385 (1999).

¹⁶³ See *supra* note 162 and accompanying text.

¹⁶⁴ For the classic work on the crisis of parliamentary democracy in the early twentieth century, see CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., 1985). For a more recent account of the severe deficiencies of contemporary parliamentary democracies, see Edward L. Rubin, *Getting Past Democracy*, 149 *U. PA. L. REV.* 711 (2001); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511 (1992).

¹⁶⁵ Although it would be impossible for me to discuss it in length, I would like to note that the surge of constitutional theory and of constitutionalization—in the United States and abroad—is another mark of the legitimacy crisis of the parliamentary administrative state and of positive law. Although a constitution is clearly a positive legal document, enacted (and amended) according to legal procedures, therefore obtaining its legitimacy from its being *posited*, it enjoys a unique status, either because it is often understood to be a direct articulation of moral principles or because it embodies a more authentic will of the population (due to requirements of supermajorities, plebiscites, and so forth). Once adopted, a constitution, especially if accompanied by judicial review of legislation—a practice adopted in more and more jurisdictions throughout the world—gives the entire legal field a moral and democratic legitimacy. Furthermore, it gives the legal system an image of a practice dedicated to the protection of an ancient, sacred, coherent, and authoritative text.

¹⁶⁶ See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 212 (1967).

Seyla Benhabib's discursive ideals¹⁶⁷—stands in stark contrast to the *realistic* and profoundly *political* disenchanting perspective on the law. And even though some of these scholars often posit the idea of deliberative democracy as a *critical* tool against the status quo—calling for a radical reform of existing democracies rather than enchanting them as already manifesting this desired ideal—a streak of reenchantment can still be found in their yearning for a legal system that will be legitimated through nonpositive legality.

In fact, the “reenchantment of legal authority” that I just described involves a different type of reenchantment than the preceding three types (formalism, virtue, and law as art). Although the previous three reenchantments were either explicit (overtly rejecting disenchanting themes) or implicit but central to the theory, the reenchantment that I identified in this section seems to exist *against* the intention and self-understanding of its authors. It is indeed a *marginal*—or *supplementary*—reenchantment that exists, even in a minimal way, in any effort to view the law as a system (even if not a coherent one), to find some morality in it (even if minimally in the form of values, for example), to insist that there is also some degree of meaningful agency for legal actors (even if in the form of practical wisdom), or to claim that *all law* is best understood as manifesting some basic idea, principle (e.g., wealth maximization),¹⁶⁸ value (such as “dignity”),¹⁶⁹ or ideology (liberalism and patriarchy, to name two prime examples).¹⁷⁰

¹⁶⁷ See Benhabib, *Deliberative Model*, *supra* note 162, at 67; Cohen, *supra* note 162, at 387–90; Habermas, *supra* note 162, at 21.

¹⁶⁸ Wealth maximization or efficiency can be seen as such a principle or idea because, at least for some law and economics scholars, it should serve as *the* principle according to which all norms and decisions should be shaped, interpreted, and received. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002); Posner, *supra* note 153; see also Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749 (2011) (defending a more eclectic law and economics perspective).

¹⁶⁹ This is the case of the rise of “dignity” as a foundational value or right in various jurisdictions throughout the world. In South Africa, Germany, Israel, Canada, and the United States, as well as in numerous international documents, dignity has become, over the past twenty years, an explicitly enshrined or implicit fundamental value or right. Submitting the entire legal system to one core value or right—even if understood as serving functional goals and as rational procedure—is a highly reenchanting maneuver since it gives the legal system coherence, unity, and moral legitimation. On the rise of dignity, see generally *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer & William A. Parent eds., 1992); EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (2002).

¹⁷⁰ Indeed, even those who see law as an effective expression or vehicle for the achievement of “ideology,” be it socialist, Marxist, free marketer, feminist, or nationalist, in fact reenchant law to a certain degree. For example, some feminist legal scholarship, highly committed to structuralist conceptions regarding the relationship between men and women (what Halley calls the “men over women” conception), belongs to this type of legal reenchantment. See HALLEY, *supra* note 60.

In these marginal/supplementary reenchantments, it matters greatly what the *degree* of this unintended reenchantment is. Although it is indeed unavoidable that some reenchantment will appear, the question is whether it consumes the entire disenchanting project, so to speak. I therefore think that even in theories that do not reject—explicitly or meaningfully—the disenchanting tenets, it is still important to observe the unintended elements of legal reenchantment (unity, coherence, functionality and instrumentality, morality, and charisma) and observe how dominant they are.

III

EVALUATING LEGAL REENCHANTMENT

What the various reenchanters share, despite their different intellectual origins and conflicting jurisprudential creeds, is an antagonism to the realist-inspired legal theories and an aspiration to find in the law an old-new meaning—a meaning that will transcend the disenchanted visions viewing law “merely” as a social instrument, a political compromise, a dominating structure, a historical contingency, or a cultural artifact. The reenchanters articulate an understanding of law that reasserts its inherent morality; commitment to transcendental wisdom, truth, and values; artful being; and nonpositivist authority. As against the disenchanted, realist, and fragmentary vision, they present an enchanted, idealist, antifunctional, and holistic countervision. And although some reenchanters are self-professed formalists and others vehement antiformalists, all are united in their opposition to the disenchanted, profane presentation by the various progenies of legal realism: critical legal scholars, legal empiricists, law and economics scholars, legal historians, legal feminists, and students of law and society.

One possible objection to my claim is that I have described marginal, perhaps even esoteric, legal theories that have had little influence on the main of legal academia in the United States and even less impact on the way legal practitioners—judges, lawyers, administrators—think about and practice law. I admit that some of the legal schools of thought that I analyzed have not changed the legal landscape, which by and large remains committed to the disenchanted view of law. However, I think that once the linkages between these supposedly isolated and marginal legal theories are exposed there emerges the growing tendency—or at least the theoretical foundation and possibility—of legal scholarship to turn the gaze from questions of indeterminacy, power, and consequences to debates about the grounds of law and to conceptual and even metaphysical deliberations.

A. “Law and . . . ” versus “Law as . . . ”

It might be helpful to reformulate my claim about the reenchantment of law in the following way: while disenchanted legal theoreticians attempt to investigate the *realities* of law by viewing it as a social instrument with *knowable* origins (historical, social, political, and technological) and *real* effects in the world and therefore turn to the social sciences through “law *and* . . . ” methodologies—law and economics, law and history, law and psychology, law and philosophy, law and literature, and so on—the reenchanters try to imagine the *ideality* of law¹⁷¹ through a turn to “law *as* . . . ” methodologies—law as morality, law as virtue, law as love, law as art.¹⁷² Although the move from “and” to “as” does not necessarily mean that we abandon realist, functionalist, or consequentialist analyses (after all, “law as culture” might mean that we analyze the functioning of law as a cultural, hence ideological, apparatus and further disenchant it),¹⁷³ it can still help us understand the radical jurisprudential shift that some reenchanters wish to make.

¹⁷¹ When I talk about “ideality” I do not mean “normativity.” Although normative endeavors might often include what I call “marginal” or “supplementary” reenchantment, ideality refers to an antirealist and antifunctionalist view of the law. See discussion *infra* Part III.B.

¹⁷² In April 2010, the conference “‘Law As . . .’: Theory and Method in Legal History” was held at the University of California, Irvine Law School. The public invitation to the conference reads as follows:

The “law and” problematic has been highly productive. The question nevertheless arises whether we have arrived at an intellectual moment in which, a century after its invention, “law and” has run its course. If so, what might be the implications for legal history?

“Law and” relies on empirical context to situate law as a determinate domain of activity. The result is a causally functional and empirical account of law. . . .

Suppose we dispense with the conjunctive metaphors of “law and,” and instead reach for different metaphors. What might they be? One possibility is optical metaphors—that is, metaphors of appearance, or image, or resemblance. Instead of parsing relations between distinct domains of activity, between law and what lies “outside” it, the objective of legal historical research might be to imagine them as the same domain: what do we get if we imagine law and economy as the same phenomenon—that is, law as economy (or economy as law)? What of law as art, as science, as war, as peace? What new method or theory might be the result?

Dan Ernst, “Law As . . . ” at UC Irvine, LEGAL HIST. BLOG (Feb. 3, 2010, 2:23 AM) <http://legalhistoryblog.blogspot.com/2010/02/law-as-at-uc-irvine.html> [hereinafter UC Irvine Invitation].

¹⁷³ Indeed, “law as culture” often entails some antirealist impetus. This is the case because cultural analysis of law often involves hermeneutic arguments about meaning and signification rather than empirical, consequentialist, or instrumentalist assertions. As Robert Cover asserts, “the capacity of law to imbue action with significance is not limited to resistance or disobedience. Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate or dignify.” See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983). Likewise, “law as art” might be a critical and disenchanting project focused on the power dimension in law—if we see art as a locus of power struggles (as in a Nietzschean “will to power”), contestation, and politics.

While the idea of “law and . . . ” contemplates distinct spheres—law, economics, literature, history, psychology—that are reaching out to each other to benefit from one another and fill in respective gaps, the “law as . . . ” idiom projects a different image. Indeed, the shift from *and* to the metaphorical *as* projects a world image in which the domains of human action are not really separate or distinct—they bear resemblance, if not identity.¹⁷⁴ Much like in the enchanted world that was lost where all domains were part of religion; part of God’s unified world; and equivalent in reflecting God’s glory, will, and cosmic order, “law as art” and “law as love” also mean that art is like law and love is like law, and all reflect transcendental and metaphysical truths. In this reenchanting world, the distinct domains regain their unity through their metaphorical relations.

But let me now leave the metaphor of “law as . . . ” to understand what more is at stake in the different reenchanting theoretical approaches.

B. The Stakes of Legal Reenchantment

As I have emphasized throughout this Essay, perhaps the most crucial effect of the rise of reenchanting theories is a waning of the tension between critical and reconstructionist legal theories and a loss of interest in the problems that these opponents understood themselves to address. Let me be clear: law’s indeterminacy and power have not been miraculously resolved by the reenchanters; they are simply not the most important or the most interesting questions in their mind. In fact, for some of them these “problems” demonstrate a profound misunderstanding of the law and of the task of those who inhabit the legal domain.

Again, this is not to say that questions of objectivity and determinacy become moot or unimportant in contemporary jurisprudence; these are still very much debated indeed. Yet, the reenchanters take explicit issue with other questions that have been neglected and supposedly made irrelevant by the apparent triumph of legal realism. The assertion that legal formalism is “not dead” should therefore not be read as a repetition of the debate between formalists and antiformalists of the early twentieth century but as a resurrection of metaphysics after its relative repression for at least half a century. Similarly, what might be seen as a renewed interest in natural law—questions of justice and morality—by the “law as art” followers is not a Finnis-like natural-law theory that was still in the grips of the realist indeterminacy debate; it is, on the contrary, a displacement of this debate and a rejection of a “secularized” and “rationalized” version of

¹⁷⁴ See UC Irvine Invitation, *supra* note 172.

natural law in favor of an almost mystical understanding of law as justice.

One could say, therefore, that the reenchanters present an idealist investigation into the law, as compared to the realist query that focused on law's functionality and instrumentality. There is something to this suggestion, but I want to clarify that the idealism of the reenchanters has two distinct meanings. First, it is a truly ideal, unreal world; it is a forever-hidden moral world that never existed on this earth, yet it guides—indeed it *must* guide—our actions.¹⁷⁵ Contemporary formalists and virtuists belong in this idealist camp. The second group of idealists consists of the “law as art” theorists. For them, the ideal world is not other-worldly at all. On the contrary, it was very real, but it disappeared. The ideality of the law, therefore, cannot be a guiding or a regulating principle. All it can do is to make us think about the present and hope that a new dawn will shine upon us.

Once reenchanting theories shift the jurisprudential debates, a new set of questions arises: If not assessing and evaluating consequences and effects through different methodologies, what should legal theory be about? And what should the task of the legal academic be if not to provide an estimation of the effects of legal rules and doctrines, critique them, and provide normative proposals? And is the dismissal of all these realist and postrealist questions inherently reactionary since it ignores distribution, domination, and power? In this Essay I have not made a serious attempt to answer these difficult questions but merely raise them and, perhaps, offer some cursory remarks regarding them.

First, if reenchantment is to succeed, legal theory should be about the grounds of law rather than its consequences, about its meaning and not its effects, about its transcendental virtues rather than its power, and about its metaphysical underpinning rather than its function. Such reenchanting theories, as I elaborated earlier, do not possess one answer or have one position regarding which grounds, what meaning, and which virtues the law has; however, they seek to *argue* about these matters rather than focus on what function law should serve, what its real effects in the world are, and what power relations it manifests (and brings about).

Second, a possible and interesting implication might be a methodological shift from examining law with the aid of the social sciences to looking at it through the prism of the humanities, of philosophy. While the humanities, too, might offer consequentialist evaluations of legal doctrines (Marxist historical analysis and philosophical pragma-

¹⁷⁵ This ideal world (of Kant and Hegel) is the object of Marx's critique. See KARL MARX & FREDERICK ENGELS, *THE GERMAN IDEOLOGY* 39–41, 68–72 (C.J. Arthur ed., 1970).

tism are prime examples), a prevalent tendency of the humanities is a focus on finding grounds and meaning, rather than analyzing possible, let alone actual, consequences. Hence, the investigation of the legal materials is redirected from outcomes to meaning: not what law does, but what it says, how it tells, what it means, and what it is.¹⁷⁶ Thus, the way to discover—perhaps “uncover” is a more accurate term—these hidden meanings, grounds, and underpinnings of the law is often through historical analysis, cultural critique, or philosophical contemplation. Indeed, this shift to the humanities is apparent also in reenchanting theories which were not discussed in this Essay; already in earlier works of the cultural study of the law (such as Robert M. Cover’s groundbreaking *Nomos and Narrative*), one could trace the strong antirealist and anticonsequentialist attitude of legal reenchantment.¹⁷⁷ Such works turn away from social-science positivism toward humanities’ hermeneutical approach, from consequence to meaning.¹⁷⁸

I would like to clarify that discussions of the meaning of a legal rule, as opposed to its effects, are not necessarily reenchanting. Indeed, at times a meaning of a rule might include its effects and consequences, and sometimes such analyses expose power relations and social structures hidden in and perpetuated through the law. Yet, often such cultural analyses oppose, explicitly or implicitly, the disenchanted instrumentalist view of the law by rejecting the idea that legal rules and doctrines can—or even should—be rationally and intentionally designed in order to advance desired social goals. This rejection might stem from a global suspicion of the ability to calculate social consequences in advance (suspicion of “social engineering”) or from an aversion to thinking about societies and cultures as rationally manipulable objects due to their complex and even mysterious nature.

Third, it would be tempting to view reenchanting theories as politically reactionary, yet I think it is not a necessary trait. On the face of it, reenchanting theories, since they refuse to deal with—or at least set aside—the consequence, the real impact, or the actual effect of legal rules and doctrines might seem politically regressive. This is so especially in light of many realist and postrealist studies that have demonstrated the pro-status quo bias that legal rules, structures, and institutions have. On the other hand, as a factual matter, substantively, the reenchanting theories that I have discussed are no more

¹⁷⁶ As Lavi argues, the ontological investigation aims at discovering what the law really is and not what we can know about it from one perspective or another. Lavi, *supra* note 123.

¹⁷⁷ See Cover, *supra* note 173, at 8.

¹⁷⁸ See, e.g., MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* (2011).

progressive or conservative than the main of contemporary legal theories.¹⁷⁹ Furthermore, if we adopt a broader view of reenchantment—one which includes theories with a significant “supplementary” and unintended reenchantment component in the form of a strong regulating ideality—it becomes clear that there is nothing inherently conservative about reenchantment. What would determine the political valance of such theories is, rather, the “values” or regulatory principles which underlie the theory’s normativity.

A fourth, interlinked implication of law’s reenchantment is a possible realignment between critical and noncritical legal theories, due to the complicated relationship that some strands of critical legal studies have with the concepts of disenchantment and reenchantment. Although critical legal scholars are not nostalgic for charisma, authority, unity, or transcendence, some of them (Duncan Kennedy is the prime example) have a clear streak of irrationalism, which is a hallmark of reenchantment.¹⁸⁰ Indeed, the irrationalist and decisionist element in critical legal studies’ (CLS) rendition of law and of adjudication—emphasizing the fact that legal decisions are forever filled with contradictions, inconsistencies, gaps, and inexplicable decisions—sets it apart from many other postrealist legal theories that explicitly reject the irrationalist moment in law or simply ignore it. In this sense, CLS—at least in its irrationalist mode—bears the paradoxical affinity to the noncritical legal theories, some of which were discussed in this Essay: suspicion of instrumental rationality, refusal to believe in purely rational adjudication and deliberation, and an insistence that law cannot be reduced to policy, science or artful balancing of competing principles and values. The focus and insistence on the irrational, on that which cannot be articulated through rules and procedures, and on the moment of “magical” decision—all these become common grounds for critical and other reenchanting (although noncritical) legal theories, as against the fully rational, instrumentalist, and highly functionalist approaches to the law. It is therefore possible to categorize CLS as including an important ingredient of reenchantment.

Yet on other issues, CLS’s reenchantment directly opposes the reenchanting theories that I earlier described. Metaphysics, conceptual philosophy, virtue, or revered past are all excluded and denied as ways out of the irrationalist moment of decision by critical legal scholars. Thus, the skepticism that CLS demonstrates toward various stabilizing and unifying solutions characterizes it, indeed, as both

¹⁷⁹ Indeed, while the legal realists were predominantly progressive, their contemporary progenies and legal instrumentalists are not. The realist cry that law should reflect current social reality was the basis for politically progressive reforms a hundred years ago, but it is no longer the case now.

¹⁸⁰ See Peter Gabel & Duncan Kennedy, *Roll over Beethoven*, 36 STAN. L. REV. 1 (1984) (discussing the irrationalist position within critical legal studies).

disenchanting and reenchancing; on the one hand, it continues the realist trajectory of fragmentation and demystification of the legal field; on the other hand, it refuses to see law merely as a site of solvable problems or as the “technical means of a compromise between conflicting interests,”¹⁸¹ reducible to rational policy making and balancing of values. For CLS, law always involves the irrational, the singular, and the “leap of faith” of the deciding actor; hence law is reenchanted at the same moment of its most profound disenchantment. Thus rechantment both unifies and divides opposing jurisprudential movements, making it even more obvious that the grounds of jurisprudence are indeed shifting.

CONCLUSION: THE POSSIBLE FUTURE OF LAW’S REENCHANTMENT

As Kennedy explains, Weber saw the possibility of irrationality, of disintegration into sects, and of growing enchantment (in the form of mysticism, for example) in almost every domain but never gave it much thought in the legal field.¹⁸² It is our task, therefore, to ask whether contemporary legal reenchancers are the legal “flight into the irrational,” the legal parallels of “the irrationalization of religion.”¹⁸³ One possible answer is that indeed they are. Even so, they might not pose a real danger to our disenchanted legal world. After all, Weber was extremely pessimistic about the option to turn the tide and escape the “iron cage of modernity” and therefore thought that irrationalist tendencies would end up losing.¹⁸⁴

But the question whether humans can ever regain true faith in that which was lost centuries ago—in divine laws, in oracles and prophets, in charismatic judges and kings, in the ability to deduce particular rules from highly abstract concepts, and so on—is an open one. While I tend to share Weber’s view that disenchantment is a one-way street, I also sympathize with the Nietzschean and Heideggerian hope that where there is danger, there lies hope (and vice versa).¹⁸⁵ It might be scary, but a faith that was lost can possibly be regained. And if people once thought that texts possessed one sole meaning, and if they once experienced trials by fire as the manifestation of justice, perhaps one day we will wake up and humanity will have this faith

¹⁸¹ 2 WEBER, *supra* note 29, at 875. See *supra* text accompanying note 38.

¹⁸² See 2 WEBER, *supra* note 29, at 874–75, 1031–32.

¹⁸³ *Id.* at 889.

¹⁸⁴ See Kennedy, *supra* note 7, at 1030–52.

¹⁸⁵ I am aware of the great difference that can be made between Nietzschean and Heideggerian hope. For Heideggerian reenchancers, there is an obvious mourning for a lost world, and we must try to find our way back into it; Nietzschean rechantment, however, basically—and perhaps desperately—calls upon us to reenchance the world not by finding our way back to the lost world, but by creating a new world through our will and joy. I thank Pierre Schlag for this point.

again. The religious revival around us might point to the fact that this is indeed the case.

What should be thought about the various grand theories that try to reenchant law? Is it not good, after all, that at least some degree of faith is being restored in our laws? More importantly, is it not a good development that the technical, crude, instrumentalist vision of law-making and adjudication is replaced by a vision that reimagines a law that has “metaphysical dignity?”¹⁸⁶ Perhaps so, but if it comes with a complete dismissal of questions of domination and power, of distribution and politics, I am inclined to say that it would be better for us to stick to a more disenchanting, fragmented, and eclectic view of the law. We should therefore all worry about Weber’s prophecy:

The fate of our times is characterized by rationalization and intellectualization and, above all, by the ‘disenchantment of the world.’ Precisely the ultimate and most sublime values have retreated from public life either into the transcendental realm of mystic life or into the brotherliness of direct and personal human relations. It is not accidental that our greatest art is intimate and not monumental, nor is it accidental that today only within the smallest and most intimate circles, in personal human situations, in *pianissimo*, that something is pulsating that corresponds to the prophetic *pneuma*, which in former times swept through the great communities like a firebrand, welding them together. If we attempt to force and to ‘invent’ a monumental style in art, such miserable monstrosities are produced as the many monuments of the last twenty years. If one tries intellectually to construe new religions without a new and genuine prophecy, then, in an inner sense, something similar will result, but with still worse effects. And academic prophecy, finally, will create only fanatical sects but never a genuine community.¹⁸⁷

Let us hope that the reenchanting theories will master the art of the “*pianissimo*” rather than the monstrosities of the monumental and that their “academic prophecy” will not join the fanatical sects that are already part of our academic life.

¹⁸⁶ See Kennedy, *supra* note 7, at 875.

¹⁸⁷ WEBER, ESSAYS, *supra* note 26, at 155.