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REVIEW ESSAY

Conflicting Orders: How Peace Is Waged

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William Rasch, *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political*, London, Birkbeck University Press (Cavendish Publishing), 2004, ISBN 1859419844, 208 pp., £23.95 (pb).

> 'War is for men, for honour and glory.'
> 'And death,' she pointed out.
> 'Of course death. That is why women must be protected. Many babies must be born to replace the dead warriors.'
> 'It might be better just to stop the wars.'
> 'Pah! It is always useless to talk to women. They have no understanding.'[1]

1. Introduction

This argument is instantly, and strikingly, anachronistic. This is not simply because of its overt sexism, but rather because it challenges the belief in pacifism, in mankind's progress from the dark ages of conflict to the light of reason. Rasch also has doubts about this process of enlightenment, of evolution; about the movement of the Zeitgeist towards the 'End of History'.

Rasch – following Schmitt – questions the credibility of the dichotomy between law and force, order and violence, pacifism and war. Law is not the opposite of force, but a particular embodiment of force. Order is maintained through violence, not just against it. Pacifism is, itself, a form of warfare.[2] The dichotomy is illusory, as Schmitt notes: 'War is condemned but executions, sanctions, punitive expeditions, pacifications, protection of treaties, international police, and measures to assure peace remain.'[3]

Violence and force secure the 'order' of 'pacifism'. Progress does not move away from violence, but rather towards a centralization of violence. The means of destruction remain, as does the possibility, even the likelihood, of their deployment.

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1. D. Gemmel, *Waylander II: In the Realm of the Wolf* (1992), 119. It is worth noting that neither Rasch nor Schmitt defend war on the grounds of 'honour and glory', and indeed Rasch specifically refutes Habermas's attempts to ascribe such a view to Schmitt. See W. Rasch, *Sovereignty and Its Discontents* (2004), 11.
2. M. Foucault, 'Truth and Power', in Foucault, *Essential Works of Foucault, 1954–1984*, trans. R. Hurley et al., Vol. 3, *Power*, ed. J. D. Faubion (2000), 111 at 124. It may be worth noting the absences of Foucault and Derrida from Rasch's analysis of the 'post-Marxist Left'. Berlin's absence from the pantheon of liberals is equally striking.
3. C. Schmitt, *The Concept of the Political* (1996), 79.

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Only the honesty about this has withered, 'a new and essentially pacifist vocabulary has been created'.[4] As Foucault observed, 'justice no longer takes public responsibility for the violence bound up with its practice'.[5] But the violence remains, only its visibility has receded: force is met with greater force. In short, 'legality, Schmitt [says], is . . . deceptive, camouflaging its violent uses of force under the fig leaves of rule and norm' (p. 22). This entails that wars fought for juridical purposes – wars of law enforcement, or 'police actions' – are wars fought on false pretences. Such wars simply disguise and deny the national or supra-national (but never universal) interests which they promote or realize.[6]

Thus there are two, quite distinct, problems. The first is that law and pacifism are *not* the opposite of war and force; the second is that the international order which claims to legitimate the violence of law (enforcement) is not, in fact, universal. Moreover, in its (false) claims towards universality, the international order simply excludes – denies the legitimacy, rationality, or even existence of – competing claims:

> Is a world that outlaws war, Schmitt asks, also a world that outlaws opposition in general, consigning the political to the illegal realm of the terrorist? If so, can we afford the pacification that we have been promised? (p. 62)

Rasch's book engages these questions directly, and – although it is perhaps a little disjointed, created as it is from a collection of previously published essays – makes a consistent, and insistent, point: universality is a fraud. In the words which Rasch's principal protagonist, Carl Schmitt, borrowed from Proudhon, 'He who claims humanity cheats'. This is the crux of the book, and manifests itself as an extreme disquiet regarding liberal projects of universal rights, the rule of law, and pacification:

> Thus, Schmitt would argue, the distinction between 'decision', 'force', and 'sovereignty', on the one hand, and the 'rule of law', on the other, is based on a blithe and simple illusion. What agitates Schmitt is not the force, but the deception. (p. 30)

This, for Rasch, is the problematic:

> Originally constructed as a subversive counter to the tyrannies of positive law, the universal structure of cosmopolitan law, once completed, would neither embody opposition nor even allow it. (p. 62)

2. The problem elucidated

Rasch starts from the position that there are, and can be, no true universals. There is no Hegelian 'end of history', and so there can be no movement towards such an end. We cannot accommodate all interests in a rational scheme, and so we cannot accommodate such a scheme within a universal order of law or ethics.

4. Ibid.
5. M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (1977), 16.
6. Schmitt, *supra* note 3, at 79.

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> Rather than dream those dreams, we should return to more sober insights about the ineluctability of conflict that not only calls the political into being but also structures it as a contingent, resilient, and necessary form of perpetual disagreement. (p. 17)

Political problems are necessarily intractable, political solutions necessarily inadequate, but there is no general willingness to acknowledge or engage that fact. 'Weary of political debate . . . of being asked to help determine solutions to problems they do not understand, a majority . . . willingly . . . leave decision-making up to "experts" or "business leaders".' (p. 1)

Although Rasch perceives this as a negative, others may not. Liberalism, just as much as the Platonic theories of the 'Philosopher-King', tends to assume the abstract possibility of harmony, or at least harmonization. Albeit rejecting the 'classical unity of the True, the Good, and the Beautiful' (p. 7, paraphrasing Strauss), liberalism nonetheless predicates its self-understanding on pacification, on the elimination of conflict, and the possibility of a 'neutral' proceduralist solution:

> It is not the 'liberal' structure of modernity that [Schmitt] fears as much as the liberal self-description of that structure, a description . . . that threatens the very structure it claims to represent and defend. (p. 5)

Liberalism is born out of conflict, out of the absence of truth. Yet liberal theories claim to be able to manage, perhaps even eliminate, conflict through reason, through persuasion, through 'non-coerced agreement' reached under 'ideal discourse conditions'. Liberalism, paradoxically, posits itself to the production of the very neutral truths whose absence brought it into being. Liberalism, as Rasch understands it, promises the 'correct', the 'neutral', 'expert', 'scientific'; the *unarguable or undisputable* solutions to the 'problem' of human coexistence. 'What Schmitt fears most of all, one might say, is the loss of our ability to make political decisions once their contingency is masked by a façade of necessity' (p. 61).

According to Berlin, liberalism, and political thought generally, presuppose the absence of agreement, especially over 'ends'.[7] It is precisely *that* absence which creates and perpetuates contingency:

> Where ends are agreed, the only questions left are those of means, and these are not political but technical, that is to say, capable of being settled by experts or machines.[8]

Consequently, Rasch identifies his first task:

> In opposition to the near universal pressure to abolish the pesky complexity of the political, the aim of this volume is to reject every resurrection of eschatological desire, and to affirm conflict as the necessary and salutary basis of political life. (p. 3)

7. This means that the idea of formal equality is itself problematic. Where ends remain disputed, neutral evaluation is impossible. This cannot be escaped procedurally, or even by recognizing a multiplicity of competing evaluative perspectives, as any attempt to co-ordinate or structure these would simply reiterate the impossibility of formal equality. The meta-system would have to allocate non-transgressable conceptual spaces to the subordinate systems.
8. I. Berlin, 'Two Concepts of Liberty' in Berlin, *Four Essays On Liberty* (1969), 119.

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Rasch chooses two quite specific groups as his 'enemies': liberals, most especially in the form of Habermas and Rawls, and 'the post-Marxist left' (p. 2), as he terms certain branches of optimistic postmodernism (personified in the figures of Agamben, Deleuze, and Hardt and Negri). Against these Rasch lines up with his (co-opted?) 'friends' Schmitt, Lyotard, and Luhmann, theorists he reads as accepting the inevitability of conflict and plasticity (p. 45).

This gives the book two distinct movements, while an engagement with Brecht signifies either a third movement or a hinge between the two primary movements. First, the universalist claims of liberal millenarianism are problematized and exposed as nothing more than the solipsistic moral imperialism of the West, a quest for hegemony through homogeneity.[9] The second movement is more radical, rejecting not only the reality, but the very possibility, of a universal consensus, or harmonious order.

The engagement with Brecht is of a different nature. Rasch characterizes Brecht's aims as being a politics in search of self-transcendence, captured in a move 'from politics to pedagogy'. In his 'political' mode, Brecht accepts the necessity of conflict as the basis of social order. However, this conflict has a particular purpose, the socialist revolution, and thus the creation of a non-conflictual order, communism. For Rasch, this solution is pathological; consensus can never be real, and homogeneity must always be imposed; whether this is by force, education, or 'persuasion' is irrelevant. The imposition is a basic wrong in itself.

Rasch identifies this structural tension in Brecht with a schism in Marxist thought itself. He highlights the fracture in Marxist thought. This is caused by 'Marxism's' incommensurable, but simultaneous, commitments to a 'sociology of ineluctable dissonance and conflict' versus a messianic philosophy of history 'which promotes the vision of future harmony, free from all strife' (p. 69). Conflict, in other words, is endemic and inexorable, *until it is not.* Such a critique may strike many Marxists as unfair, as Marx himself had explained the coexistence of these allegedly incommensurable impulses: conflict, like all thought, is a product of 'social relations'. This is Marx's famous inversion of the Hegelian dialectic: if social conditions cause self-understanding, then eliminating conflict in social relations would eliminate conflict. Therefore, if we alter the social relations, we may eradicate the basis of conflict.

However, matters may not be quite so simple:

> The question of who would clean the lavatories or hew the coal was neither asked nor answered. When a German smart aleck tried to catch him out by wondering aloud who should polish the shoes under communism, Marx replied crossly, 'You should.'[10]

The schism itself is worth highlighting, because, despite his best efforts, Rasch fails to escape an analogous schism within liberalism itself.[11] Moreover, it is in

9. Deleuze has made a very similar point. See G. Deleuze and F. Guattari, *A Thousand Plateaus* (1998), 178.
10. F. Wheen, *Karl Marx* (2000), 97.
11. Despite acknowledging the ineradicability of conflict, Rasch remains to some extent committed to the value of order. Consequently, he must draw a line between those conflicts (*litage*) which may be referred to a meta-system for resolution; and those (*différend*) which may not.

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this 'failure' that a conceptual space may be made in the Raschian architectonic, within which the law may reside.[12] All interests cannot be accommodated, but the exclusion – at least in 'normalcy' – of some interests, by sovereign decision, is the necessary price to pay for order. This would allow for a non-universal law, sanctioned not by legitimacy, but rather by utility: a necessarily partial, but nonetheless necessary, legal order – law without the rule of law.

3. The delusion of universality

3.1. Habermas and Rawls as imperialist apologists

> No politician, ever, by act, word, or deed either expressly or by implication, should give any support to the notion that violence might be justified.
>
> (Sir Menzies Campbell)

Thus spake the Liberal. Yet law is not the opposite of violence, but the embodiment of overwhelming violence. To maintain a functioning legal order, this must be accepted. Thus Rasch's first thesis – that the absolute dichotomy between law and force is false – may be taken as given. However, this merely raises the question of whether the dichotomy retains a practical utility: can law and force be distinguished by reference to their 'legitimacy'?

> As long as death and pain are part of our political world, it is essential that they be at the centre of the law. The alternative is truly unacceptable – that they be within our polity but outside the discipline of the collective decision rules and the individual efforts to achieve outcomes through those rules.[13]

Is the force of law a justified force, which may be counterpoised to the particularist, partial, selfish deployment of force outside the law? Rasch's second thesis relies on disproving this distinction.

Certainly, in order to unleash this violence, the law – or rather the legal actor, the judge – must convince itself of the legitimacy of that violence.[14] Force is used to secure the value of order. However, the value of order is, itself, secured by the epistemic exclusion of competing claims – by 'invisibilizing' the 'constitutively excluded', that is, by sanctioning only 'opposition within' and not 'opposition to' that order (pp. 9–10). 'Just as liberal society marginalizes politics and conditions us to be suspicious of it, the modern international order . . . outlaws war and makes opposition to its rule something immoral' (p. 2).

This is manifested in the drive towards the rule of law in international affairs:

> The rule of law brings all the comforts of an uncontroversial, rule-based, normative security, as if legality proceeded by way of simple logical derivation, abolishing, above all, the necessity of decisions. (p. 29)

12. Law would be one of the systems by reference to which *litage* could be resolved.
13. R. Cover, 'Violence and the Word', (1986) 95 *Yale Law Journal* 1601, at 1628. A 'slippage' analogous to Rasch's is apparent also here. Cover acknowledges that law and legal interpretation can never be unitary (all-encompassing or universal). He nonetheless presents the decision-making rules as embodying the collective interest, an interest which, by his own definition, cannot exist to be embodied.
14. Ibid. See also J. Beckett, 'The Violence of Wording', *Issues in Legal Scholarship* (forthcoming).

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As a result, 'Political action finds itself today trapped in a pincer movement between the state managerial police and the world police of humanitarianism' (J. Rancière, quoted on p. 18, n. 1). Law and especially the human rights discourse postulate the primacy of pacification, which, along with the postulated consensus of humanity (which can never be demonstrated as even a hypothetical possibility, but only as a utopian dream) are posited as inherent goods and thus transcendentally shielded from critique: who could argue against pacification and consensus?[15]

But that is not Rasch's question. Instead he focuses on the costs inherent in realizing this pacified consensus. Put differently, in the absence of legitimate recourse to conflict – be that civil disobedience or violence, or any other actions outwith the boundaries of lawful protest – how are unorthodox demands to be recognized? Rasch's basic thesis is that, *contra* Habermas, there can be no universal normative order against which the 'acceptability' of competing claims can be impartially observed.

This is so for two distinct reasons. First, law is necessarily partial, ideologically biased; it cannot be neutral. Second, the process of subsumption under rules is not a logical one.[16] These 'facts' combine to render law a mere legitimatory shield for the actions of the powerful, the First World (p. 57).

What then happens to those opposed to that particular ordering?

> Apathy can easily tip over into frustrated action when normalcy is experienced by those who are constitutively excluded by the liberal order . . . not as welcomed neutralization, but as acute and absolute paralysis of the political . . . neutralization by way of invisibilization. (p. 10)

Schmitt makes the same point yet more forcefully: 'A domination of men based upon pure economics must appear a terrible deception if, by remaining non-political, it thereby evades political responsibility and visibility'.[17]

And, lest we start to consider this a reactionary outburst – classifying Rasch alongside Schmitt in what Habermas sees as 'a grand century-long "counter-revolutionary" and counter-enlightenment conspiracy' (p. 11) – Chomsky's views should also be heard:

> From the doubly privileged position of the [Western] scholar, the transcendent importance of order, stability, and non-violence (*by the oppressed*) seems entirely obvious; to others the matter is not so simple.
>
> If we listen, we hear such voices as this, from an economist in India:
>
> It is disingenuous to invoke 'democracy,' 'due process of law,' 'non-violence,' to rationalise the absence of action. For meaningful concepts under such conditions become meaningless since, in reality, they justify the relentless pervasive exploitation of the masses; at once a denial of democracy and a more sinister form of violence perpetrated on the overwhelming majority through contractual forms.

15. Consequently, the presupposition of order delimits the possibilities of opposition. It also grants a legitimacy to that order, and legitimacy itself the status of an organizing principle. See also text at notes 75–92, *infra*.
16. Moreover, the laws themselves may be indeterminate, thus leading not to the rule of law but to the rule of lawyers, with judges and 'authoritative decision-makers' in fact playing a political role, merely disguised by the façade of legal neutrality.
17. Schmitt, *supra* note 3, at 77–8.

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> Moderate [Western] scholarship does not seem capable of comprehending these simple truths.[18]

Instead, 'moderate' or 'liberal' scholarship presupposes the primacy of peace and reason, the move to structured dialogue and neutral solutions, these solutions being determined by an over-arching normative structure, like human rights or minimum standards. Drawing on Schmitt's critique, Rasch notes that 'There is no resultant difference of unities, no true pluralism, according to Schmitt, because liberal unity is represented by the ultimate "monism" of "humanity"' (p. 32).

Human rights embody a particular understanding of 'humanity' – humanity as an ideal, against which the 'inhuman' can be identified, judged, and eradicated (be that by exclusion, invisibilization, or even extermination). 'When . . . the term is itself manipulated as one side of a distinction . . . then 'humanity' needs a counterpart – it needs the dehumanized and inhuman enemy, the subhuman' (ibid.). Human rights and minimum international standards do not provide a neutral perspective, but a situated one. 'Used politically . . . the term "humanity" takes the form of a particularly brutal weapon' (ibid.). As Koskenniemi puts it,

> International law is burdened by kitsch. What kind of kitsch? Well, for example, *jus cogens* and obligations *erga omnes*, two notions expressed in a dead European language that have no clear reference in this world but which invoke a longing for such reference and create a community out of such longing. Instead of a meaning, they invoke a nostalgia for having such a meaning, or for a tradition which, we believe, still possessed such meaning. They are the second tear we shed for the warmth of our feelings.[19]

Koskenniemi's notion of *Kitsch*, developed from Milan Kundera, revolves around the idea of using structures (like law, humanity, consensus, universality, etc.) to convince *ourselves* that what we want is what everyone wants.[20] We should all be treated and evaluated equally, but equally in terms of *our* standards. *Kitsch* is the manifestation of the necessary partiality of universal judgement: the ideology embodied in the law.

This illustrates the distinction between liberalism – which recognizes the ineluctability of conflict – and the 'liberal self-description' which advocates the primacy of peace, and thus the *possibility* of consensus and neutrality: decisions can be structured as a process of subsumption under determinate and neutral norms. This is liberalism's ideological legitimation of neutrality through law, the escape from 'decision', as manifested in the rule of law.

Law functions as exculpation from the agonies of decision-making; only, of course, it does not. Conflict disguised is *not* conflict resolved! The *possibility* of determinacy and universality is *not* realized,[21] and *may* not be realizable. This gives force to Rasch's attack on universalist theories; an attack based on the impossibility of translatability or ranking of values/cultures. From ideal discourse conditions to

18. N. Chomsky, *American Power and the New Mandarins* (2002), 37.
19. M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', (2005) 16 EJIL 113, at 122.
20. Cover makes an analogous point when he notes the function of ideology in justifying an order to its beneficiaries, *supra* note 13, at 1608.
21. See M. Koskenniemi, *From Apology to Utopia* (2005); S. Harris-Short, 'Listening to "the Other"? The United Nations Convention on the Rights of the Child', (2001) 2 *Melbourne Journal of International Law*, at 304.

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uncoerced agreement to overlapping consensus: a narrative of liberal failure and denial. 'One can then say that the articulation of a concrete norm is not the result of a derivation, but the effect of a performative.' (p. 24)

But this is disguised and denied. The law is presented as neutral, and its distinctions (its decisions) are portrayed as neutral, inevitable, necessary. This creates a need for standards against which the law can evaluate conduct; and *that* – at the international level – involves, for Habermas and Rawls, the division of the world into three 'spheres'. The 'Third World' of failed states, the Second World 'largely comprising the decolonized regions of an older Third World' which '"obstinately insist on sovereignty and non-intervention from the outside"' (p. 57, quoting Habermas). Finally, there is the First World, us, the developed West/North:[22]

> It is not only that the Second and Third Worlds are to be measured against the achievements of the First, they are fated or destined to join their more temporally advantaged cousins, even if they need some coaxing, or, as Habermas puts it, even if they need the 'gentle compulsion' that is required by the 'undistorted perception of current global dangers'. (p. 57)[23]

In short, Habermas 'subsumes the pluralism of states under the hegemony of the singular but exemplary nature of the First World' (p. 59).

Habermas' vision is integration, a worldwide, rationally justified ordering of human society:

> Such integration, in Habermas's view, necessitates a transfer of loyalties from the particular traditions and histories of the nation-state to the rational and universally valid truths of natural law and morality. (p. 49)

This will manifest itself in a (single, singular) World State which 'does not represent moral or political despotism' (p. 52).[24] This state is already visible on our horizon. 'The creation of the League of Nations laid the foundations for the new world order envisioned by Habermas', and this was developed by the Kellogg-Briand Pact and the post-Second World War international military tribunals (ibid.). Through these events, cumulatively, 'governmental subjects of international law lost their general presumption of innocence' (ibid.), that is, the legitimacy of recourse to conflict was removed, overlaid by a new, universal, legitimacy of centralized force.[25]

Habermas does not appear to engage the question of whose interests were served in these 'advances', nor is he greatly concerned by the structural inequalities of the

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22. Rasch only directly engages Habermas on this point; for Rawls's almost identical position see J. Rawls, *The Law of Peoples* (1999). For a much earlier, tellingly colonial, but nonetheless almost identical tripartite division between 'civilized', 'semi-barbarous', and 'barbarous' nations, see J. Lorimer, *Institutes of the Law of Nations* (1883).
23. This quotation also provides an excellent illustration of the ontological differences between Rasch and Habermas. For Rasch no perception is 'undistorted', because there is no (intelligible) 'real reality' to perceive, there are only constructions, abstractions, and exclusions; only 'bundling[s] of difference'. Consequently, what might be classified as a 'global danger' depends entirely on the observer's frame of reference. Perhaps the global dangers are terrorism and/or war; perhaps they are ecological in nature; perhaps they are religious; perhaps they concern world poverty and the economic system. It all depends on what is recognized as relevant and what as valuable, and how these are interpreted. See ibid., p. 67.
24. This is perhaps best understood as an institutionalization of Kant's understanding of freedom as subjection to reason and the moral law.
25. See section 1, *supra*.

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current international organizations, but simply assumes these to be manifestations of the 'World Spirit . . . jerk[ing] unsteadily forward' (p. 52). Ultimately, this should (must?) lead to the 'sovereignty of a code of law based on rationality and universally valid human rights' (ibid.). This, according to Habermas, leaves us with a stark choice '[b]etween pacific cosmopolitanism and regressive, belligerent loyalty to one's tribe' (p. 53).

This, had Habermas been accurate in his descriptive thesis, would not be a hard choice to make. 'The United Nations of the World . . . ought to be cast in the Image of the United States of America' (p. 55). All states should become part of one 'all-encompassing federation' which

> requires the global establishment of liberal constitutions, guaranteeing (as yet unspecified) human rights and the dismantling of regimes that are deemed illiberal, traditionally authoritarian, or theocratic. Not only will there be one world government, there will be one world religion, a secular religion of the rights of man. (ibid.)

The critical question, for Rasch, is why such a process of homogenization does not represent a despotism; why is that instance of the particular *truly* universal? Habermas's response is that 'the conception of human rights does not have its origins in morality [but] is distinctly juridical in character' (ibid.). Human rights are not particular, because they are not derived from moral claims. Instead, human rights are 'rationally justifiable' (p. 56), and this forms the 'fundamental discourse principle': 'Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse' (ibid.).

But this justification is based on (at least) two problematic assumptions: it assumes a coherent concept of rationality, and it assumes the commensurability of different value systems under a rational ordering. On the first point, Rasch is sceptical:

> What is rational discourse? What are its rules and whom and what does it exclude? And if such discourse does exclude things and people, in what way can it be the basis for universally valid legal norms? (ibid.)

In short, Habermas's 'intersubjectivity operates with a monologic vigor' (p. 57). He assumes certain values to be rational, and judges everything else from this perspective. That which is not rational may be excluded without violence; moreover, in fact, it is highly unlikely that such exclusions will even be noticed.[26]

In short, the First World, because of its (unsurprising) congruence with international organizations it created to reflect its own interests,[27] becomes '"the temporal meridian of the present" against which the rest is to be measured'. The Second and Third Worlds cannot be legitimate sources of alternative ideologies (p. 57). In sanctioning opposition within the order, that is, immanent critique, Habermas has denied the legitimacy of opposition to that order; he has reinscribed the minimalization of (acceptable) difference. This is a patently circular justification, and one actually undermined by the actions of the First World itself:

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26. This is precisely the process of 'invisibilization' of which Rasch complains. It is also the process I have elsewhere analysed as 'epistemic violence', see note 14, *supra*. It is a necessary effect of Habermas's parochial embeddedness, on which see Rasch, pp. 62–3.
27. See P. Sands, *Lawless World* (2005), 13.

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> Habermas's matter-of-fact equation of the First World with the universal spirit, his unreflected belief that the particular instance of the West can be the unproblematic carrier of the universal principle, cries out for some form of critical scrutiny – especially now that the United States, in a fit of uncharacteristic honesty, has torn off the veil of legality once provided by the United Nations. (pp. 57–8)

In other words, Habermas's legal/moral distinction,[28] even if it is accepted, cannot carry the burden his thesis places upon it. The legal is not a reflection of consensus, justice, rationality, or natural right; it is a product of politics. The conditions for ideal discourse are themselves subject to dispute, likewise the presuppositions of reason. This could be disguised and denied to the extent that international law reflected the desires of its most powerful, and hence 'exemplary', states. Then the actions of those states, being in accord with the 'universal' law, could re-enforce, and be legitimated by, that law. In this circle, the exclusion of alternative world-views would be hidden.

However, the contingency of that world comes clearly into relief at the point where not even the West wants to play by the rules that it has created. At this point, when the rules no longer even reflect *their* interests, it becomes impossible to argue that they reflect the universal interest. Moreover, the possibility that there is no 'universal interest' finally comes into relief (albeit not for Habermas).

As Schmitt puts it, 'the political world is a pluriverse' (p. 59). We cannot reduce all decision-making to the legal, because the legal cannot be impartial. In other words, the presupposed value of order, and the corollary absence of neutrality about neutrality, the commitment to the truth that there is no truth, necessarily preclude a genuine understanding (or inclusion) of the other. That, at least, is the claim made by Schmitt and adopted by Rasch:

> A total or global 'inclusion of the other' to use Habermas's threatening phrase, could only occur if the *otherness* of the other, that which makes him what he is, is excluded from the world community. (p. 138, emphasis in original)

The legal *always* reflects someone's interests. However, this is invisible for two reasons: first, it is *our* image that is being set as a universal standard; and second, our solipsism (or capture within an operationally closed system (ch. 1))[29] prevents us from readily perceiving the exclusions mandated by this solipsism:

> By virtue of such an asymmetrical distinction between self and other, the qualities of the self are simply assumed, unstated, and silently equated with the norm, while the sub-standard properties of the other can be endlessly enumerated. (p. 139)

This is an age-old process of imperialism. Habermas, Rawls, and human rights are merely the modern manifestation of an unchanging reality:

> When [Saint] Paul proclaimed that there was no difference between Jew and Greek, he in effect erased the Jew from a world dominated by Greeks. (p. 129)

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28. Which appears analogous to Cover's imperial/*paideic* (*supra* note 13), Rawls's modus vivendi/community (*Political Liberalism* (1993)), and Simmonds's minimalist/maximalist distinctions (N. E. Simmonds, 'Bringing the Outside In', (1993) 13 *Oxford Journal of Legal Studies* 147).
29. And see W. Rasch, 'Introduction', in N. Luhmann (ed.), *Theories of Distinction: Redescribing the Descriptions of Modernity* (2002).

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> Vitoria is careful to specify that the barbarians of the Americas had nearly all the same rights as the Spaniards . . . But, for all of Vitoria's concern with reciprocity . . . he cannot grant them equal rights when it comes to religion. Here . . . one finds Vitoria's, and Christendom's, central and inescapable asymmetry. (p. 141)

Thus, and for all time,

> 'The prejudice of equality is [the great threat to knowledge] for it consists in identifying the other purely and simply with one's own "ego ideal" (or with oneself)' [quoting T. Todorov]. Such identification is not only the essence of Christianity, but also of the doctrine of human rights preached by enthusiasts like Habermas and Rawls. And such identification means that the other is stripped of his otherness and made to conform to the universal ideal of what it means to be human. (p. 145)

Consider, for example, the 'rational man' operating under a 'veil of ignorance' in Rawls's 'original position'. This allegedly neutral position is reached by a process of abstraction, 'an imagined . . . setting in which rational persons, freed from their idiosyncratic preferences, seek to pick social rules to govern their communal life'.[30] But who forms the basis for this rational man? Who decides what counts as rational? How are 'idiosyncratic preferences' to be isolated from (particular) societal values, from 'our considered convictions about justice'?[31] Why should societal values be maintained? Can reason be separated from value, from 'the passions'?

> Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.[32]

Reason is the evaluation of potential courses of conduct in terms of the consequences they will (or are likely to) produce. This means that we also deploy reason to decide between options based on the desirability of the outcomes they will produce. However, what makes those outcomes desirable is not, itself, a matter of reason, but of value. Reason cannot engage the question of why we should (or do) value certain states of affairs over others. At best, reason might be able to evaluate these values, but only in terms of yet other values. Reason presupposes values and cannot be separated from them.

In short, the 'rational man' is the man who would act as John Rawls would (or would like to think that he would) act. Although the rational man is not unemotional, 'We might regard an emotion as irrational if it lacks any point or purpose that we can understand or with which we sympathize.'[33] In other words, the irrational man is the man who is not like us. 'What is claimed to be a systematic theory is really an incoherent bundle of personal intuitions and bygone social conventions'.[34]

We cannot escape our own embeddedness, and thus reason is not impartial, but situated and invested. However, reason remains a powerful rhetorical device, legitimating the 'correction' of the irrational, the different. Thus, because it is 'man's

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30. J. Murphy, *Retribution Reconsidered* (1992), 55.
31. The phrase, of course, is Rawls's; see J. Rawls, *A Theory of Justice* (1973).
32. D. Hume, *A Treatise of Human Nature*, Book II, s. iii, 3 (1978), 415.
33. Murphy, *supra* note 30, at 70.
34. Ibid., at 145.

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rational will that is to be respected', this idiosyncratic model may serve as the basis for an imposed homogeneity:

> Surely we want to avoid cramming indignities down the throats of people with the offhand observation that, no matter how much they scream, they are really rationally willing every bit of it.[35]

The critical issue, then, concerns who determines the substance of this abstract 'rational man', and for Schmitt the answer is clear:

> His specific definitions of sovereignty and politics are aimed not just at liberalism in general, but at the particular 20th-century carriers of liberal values, specifically the Anglo-American world led by the United States. (p. 33)

Consequently, human rights are, and can be, nothing more than tools of imperialist expansion:

> Whereas . . . Spain in the 16th century . . . justified [its] imperial conquests by asserting religious superiority, America simply denied that its conquests were conquests . . . Because law ruled the United States, the rule of the United States was first and foremost the rule of law. For Schmitt, this widely accepted self-representation was neither merely 'ideological' nor simply propagandistic. It was in truth an intellectual achievement, deserving respect, precisely because it was so difficult to oppose. . . . the equation of particular economic and political interests with universally binding norms, *this* is the intellectual achievement Schmitt could not help but admire. (pp. 132–3, emphasis in original)

In contrast to this, Koskenniemi, while sceptical about the contents of contemporary public international law (PIL), is more optimistic about its possibilities:

> We should take much more seriously those critiques of international law that point to its role as a hegemonic technique. Once that critique has been internalised however, I want to point to its limits. If the universal has no representative of its own, then particularity itself is no scandal. The question would then be: Under what conditions . . . might we have good reason to imagine . . . a politics of universal law?[36]

In other words, even though Rasch has demonstrated the partiality of Habermas's supposedly neutral discourse and its products (human rights and the cosmopolitan law), he has not thereby demonstrated the impossibility of universal consensus *per se*. 'The fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal.'[37]

3.2. The failure of subsumption

The first problem with law, pacification, or any other 'neutral' evaluative perspective, then, is the impossibility of neutrality and the consequent inevitability of exclusion, denial, and partiality. This can, of course, be overcome by having a non-impartial, but nonetheless extant body of rules, against which conduct can be consistently evaluated.

35. J. Murphy, 'Marxism and Retribution', in A. Duff and R. Garland (eds.), *A Reader on Punishment* (1994), 44 at 56.
36. Koskenniemi, *supra* note 19, at 115.
37. Ibid.

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This would lead to the possibility of a determinate law – law as a body of determinate norms[38] – pursuing a specific, and thus in some sense partial, purpose. However, this partiality would, almost certainly, once more be denied and thus politically, and most probably procedurally, legitimated.[39] But the decision would remain. In other words, this decision, although extant, is hidden behind the façade of consensus; and seeking out such a consensus, even assuming that the 'advanced' West would be willing to negotiate away its own exceptionalism, and accept the contingency of its most cherished dogmas, would require operating at a high level of generality. 'This may require lowering the expectations of technical certainty and increasing sensitivity to the ways in which law gets spoken.'[40]

But for Rasch that raises another set of problems entirely:

> The great superiority, the amazing political achievement of the US reveals itself in the fact that it uses general, flexible concepts . . . With regard to these decisive political concepts, it depends on who interprets, defines, and uses them; who concretely decides what peace is, what disarmament, what intervention, what public order and security are. One of the most important manifestations of humanity's legal and spiritual life is the fact that whoever has true power is able to determine the content of concepts and words. (pp. 146–7, quoting Schmitt)

The apparently determinate law would be forced, by its own procedures of legitimation, into indeterminacy. That, however, forms the crux of the second aspect of Rasch's second critique of the legalist project. On his analysis, no body of rules can be self-applying or auto-interpretative:

> No norm . . . interprets and administers, protects and guards itself; no normative validity validates itself; and there is . . . no hierarchy of norms, only a hierarchy of concrete people and instances. (p. 27, quoting Schmitt, ellipses in Rasch's text)

This is so for two reasons. First, the law will contain ambiguous terminology, which must be given concrete meaning in a concrete situation. Quoting Schmitt again, Rasch observes that 'a judicial decision can said to be correct today if another judge would have reached the same conclusion'. Second, even beyond this, that is even assuming that concrete meaning can be given to the words of the norm, the rule cannot determine the subsumption of facts under it:

> The exception makes itself known as the failure of subsumption – as the impossibility, one might say, of determinate judgement. . . . The exception presents itself as the ineluctable necessity of choice precisely at the moment when none of the normal criteria is available to guide selection. (p. 27)

Law merely disguises, and thus in a sense perpetuates, political disagreement:

> But from the fact that there is no authentically universal position, it does not follow that all positions are the same. Indeed, were this the case, we would have no reason

38. On which possibility, see J. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments', (2005) 16 EJIL, at 213.
39. I make precisely such an attempt (ibid.). However, as Rasch notes – absent the impossible dreams of the end of history – such a proceduralist escape is manifestly pointless. 'More important than the question of where the chain is cut, is the question of who cuts' (p. 92).
40. Koskenniemi, *supra* note 19, at 119.

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> to take the realist critique seriously, no basis to distinguish between honesty and cheating.[41]

In other words, at least for Koskenniemi, we can distinguish between licit and abusive 'interpretations' of the law. But that does not solve the factual problem. Even assuming that we know what, for example, 'aggression' means, we must still establish whether or not the facts in question amount to an act of aggression, and, of course, whether or not those 'facts' are even 'true':

> 'Consultation' with the Allies is a gleefully open and public form of threat, extortion, bribery, and, when these do not work, punishment. And support for the United States is displayed with all the calculating opportunism of a masochistic, tail-wagging and hand-licking lapdog. (p. 2)

Put differently, while law has always been simply a moral shield for the expansionist opportunism of hegemonic powers, that process has now become more open, and, paradoxically, more open to abuse. Nonetheless, the partiality of international law, and especially of human rights, stands open for all to see. 'Attempts to determine just causes become ever more arbitrary' (p. 36).

This demonstrates Rasch's second thesis: international law does not form a neutral perspective from which actions can be evaluated.

4. From the failure of universalism to the impossibility of universality: Rasch on pedagogy and postmodernism

> the consciousness of isolation is none other than the private
> consciousness, that potential of individualism which respectable people
> drag around like their most sacred birthright, unprofitable but cherished
>
> Raoul Vaneigem

These are, to my mind, the least convincing sections of Rasch's book, but that is probably because they concern fundamental ontological disagreement, and, as Rasch notes,

> One cannot argue for one ontological view of the world over another, because one's ontology, even if it is uttered as the rejection of ontology, is the basis for, not the result of, one's arguments. (p. 103)

Thus where Rasch argues – perhaps paradoxically – for the single truth that there is no truth, and moves from there to the ineluctability of conflict, his postmodern 'enemies' each hold a variant of a commitment to truth: Agamben's 'new day', 'beautiful life', or 'coming community'; Benjamin's 'divine violence'; Deleuze's 'plane of immanence'; and Hardt and Negri's 'multitude'.

What unites Rasch's opponents here is the belief that we can think beyond sovereignty, and that, until we do so, all thought remains trapped in nihilism (p. 97).

41. Ibid.

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For Rasch, this perspective is problematic on two levels. First, it requires the leap of faith involved in the move from politics to pedagogy, the loss of 'critical distance' and the reduction of judgement to 'sympathy'. Second, as we await the occurrence of this leap, as we 'hibernate' and await the discovery of the new ontology, the present system – the managed, disciplined, system criticized above – is given time and space to entrench itself yet further, politically and epistemically. 'Ironically, if inevitably, such a retreat leaves the field clear for the managers' (p. 2).

The problem, to repeat, is that this dispute is ontological in nature. If the current system is based on a false ontology, then it cannot be overcome from within, and, moreover, should not be perpetuated indefinitely; and every amelioration is *always* a perpetuation. The risks of divine violence are outweighed by the endemic evil of 'mythical violence', but of course those risks cannot be calculated:

> That 'completely new politics' cannot be planned or anticipated, it can *only* occur as the result of the absolute destruction of the present order by a purely immediate and bloodless divine violence. (p. 87)

What is clear, however, is that this new politics must 'call into question the very structure of sovereignty', because 'Agamben translates what we have treated as a logical inevitability [the sovereign self-exemption] into a metaphysical mistake, into the mistake of metaphysics itself' (pp. 94–5). This dispute cannot be solved logically or rationally.

Where Rasch, following Schmitt, adopts Hobbes's claim that the sovereign rescues us from the state of nature, 'as a necessarily imperfect but nevertheless still *necessary* solution to a perpetual problem', Agamben sees the structure of sovereignty as the *cause* of guilt and evil and exception. 'The state from which Hobbes's sovereign rescues us is the state into which Agamben's sovereign plunges us' (p. 96, emphasis in original). The critical issue, then, is the sovereign self-exemption 'which makes a necessary asymmetry out of an impossible symmetry'. This is the moment which closes a system, by 'excluding itself from its own workings'. Law offers protection under the law, 'but the law itself is not subject to the law'. Consequently, 'the sovereign is law's shadow, its included and excluded double'. The sovereign cannot precede law, because it 'is simply the name given to a logical effect' (p. 90).

This remains so even if the sovereign is 'personified as an individual, an institution, or a general will', for that must then be justified, and that can be done only by a hierarchical ordering – which 'must eventually arrive at God' or at the (impossible) hypothesis of a direct democracy realizing 'neutral images', the realization of the General Will[42] – or 'by a classically bad infinity of provisional sovereigns whose sovereignty is forever relative to the next higher, but equally provisional, equally relative sovereign' (p. 90). For example, the law could be subject to morality, but, if morality does not come from God, then it too must embody the sovereign self-exemption: the demand to be moral cannot itself be subject to the demands of morality.

42. Beckett, *supra* note 14.

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That is what creates the self-referentiality of all truth, the situatedness of all perspectives. It is also, for Agamben, the denial of our truths, it is *nihilism*, and must be escaped. Truth *is* possible. The question of course, even assuming the possibility that Agamben is correct, is how to move from our present, fallen, state, how to escape nihilism:

> Any step out of our fallen state must be a step initiated by divine violence – this time a truly bloodless violence, because it is to take place in the non-corporeal world of thought. (p. 99)

But Rasch does not analyse the details of Agamben's thesis. Instead, he contents himself with attacking the desirability of the move itself:

> Because we do not fear the arrival of the Antichrist as much as we fear Christ Himself . . . to long for the divine destruction of the imperfect world of the political – perhaps this is the greater nihilism. (p. 101)

But why should this be so? Again, the conflict is ontological in nature. For Rasch humans are truly incorrigible, conflict truly ineluctable. Thus, even if we were to escape our fallen state, at whatever cost, we would inexorably return to it:

> How long would it take for the sin of the political to make its presence felt again? . . . what would the members of this community do if . . . a messenger arrived, an apostle with an apple . . . who spoke of God and Satan, of good and evil, of salvation and damnation, of friend and enemy? . . . Could they *avoid* listening . . . would it be possible to close the mouth of this political emissary in a non-political way? (ibid., emphasis in original)

Perhaps it would not, but perhaps, also, that is not relevant. The questions Rasch does not ask are: where does this emissary come from? and why would he prove persuasive, or even interesting, let alone 'tempting'? One, obvious, answer is because he is tempting to Rasch, another because he would reflect the deep commitments of Rasch's world-view.

That, it seems to me, is the central problem with the engagements with the postmodernists. When push comes to shove, Rasch is unwilling to accept change. They are not wrong for any greater reason than that they dispute, undermine, challenge Rasch's constitutive commitments. This is best summed up in two of his key refutations. First, the quotation above: for Agamben, working within a Foucaldian paradigm, the idea of legitimacy is itself illegitimate. Consequently, only the illegitimate (domination or differentiation) need be legitimated. Thus conflict would first have to return before it could be excused through legitimacy or morality or politics. For Agamben, there is no reason to assume that this will happen; for Rasch, there is no reason to assume that conflict could ever go away in the first place.

The same problem surfaces in the engagement with Brecht. In the move from politics to pedagogy we lose not only politics (as defined by Rasch and Schmitt) but also 'critical spirit'; we encounter 'the cancellation of all critical and political distance' (p. 71). However, this loss, symbolized by the Control Chorus, was inevitable:

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> We should recognize that the Chorus had no choice but to agree with the reasoning of the agitators, for it conforms to the relativisation of morality laid out by the Control Chorus itself. (p. 73)

Put differently, what is lost is the 'liberal morality' of neutrality, objectivity, critical distance, and the absence of truth. To lament this loss, Rasch must remain trapped in the liberal order to which he is committed, and by its self-description, to which he claims to be opposed.

However, Rasch is suggesting a political, rather than a philosophical, resolution here. The key issue is the potential paradox of the single truth that there is no truth. This can be restated in a non-paradoxical form: according to currently established criteria of truth, no currently established criterion of truth is true.[43] However, that does not dispute the possibility of truth, and *that* leads to Rasch's political argument: whether or not absolute truth is possible, it is politically unwise to pursue that truth.

Moreover, current 'truth regimes'[44] possess value, even if they cannot be demonstrated to be absolutely true. Consequently, such regimes, such truths or systems, should not be abandoned lightly. Finally, even the conflicts between these systems have value, and should be recognized (without a view to their being eradicated). Truth is contested, and there is value in recognizing that contest as conflict, as war.[45] If nothing else, such recognition precludes 'leav[ing] the field clear for the managers' (p. 2), the experts, those who would deny the contingency of truth.

4.1. Rasch's solution to the 'truth' of the absence of truth

The possibility of the absence of truth and the argument about the political folly of pursuing truth leave open two questions: is the law worth preserving at all? and, what should replace or complement that law? Rasch does not provide an explicit answer to the first question, but it may be assumed – since Agamben is criticised (p. 97) for urging us to think beyond 'the form of law' – that the law must play some role, though what this is is undisclosed. Rasch does desire regulative, institutional, controls of some form; even conflict is accepted, ultimately because it leads to 'more benign human *institutions*' (p. 17, emphasis in original).

The second question is even more difficult to answer. Rasch is clear that the solution is political, but is unclear – at least to me – as to what exactly this means, or how it might operate:

> The political does not exist to usher in the good life by eliminating social antagonism; rather, it exists to serve as the medium for an acceptably limited and therefore productive conflict in the inevitable absence of any final, universally accepted vision of the good life. (Ibid.)

Social antagonisms cannot be resolved, certainly not through reason, discussion, or 'un-coerced consensus'. Hence Rasch adopts, and extends, Mouffe's opposition to deliberative democracy. We must recognize the relationship between reason and

43. See Rasch, p. 2.
44. Foucault, *supra* note 2, at 111.
45. M. Foucault, *Society Must Be Defended* (2003).

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'passions', and thus 'the prime task of democratic politics is not to eliminate passions nor to relegate them to the private sphere'.[46] Any such attempt to desiccate the public sphere must, inevitably, channel conflict towards a single 'version of the good life'.

The deliberative routes to resolution always presuppose an objectively correct answer, vouchsafed by reason, but:

> Forced to acknowledge its impotence when confronted with questions regarding ends . . . modern rationality is restricted to offering advice on the use of the best, the most proper and the most efficient means in the pursuit of goals which themselves cannot be rationally justified. (p. 26)

There is no rationally correct solution, and thus we have two options: we can endorse a leap of faith (irrationality) and choose a particular solution, or we can (endorse the opposite leap of faith and) accept the impossibility of a solution and resolution, and instead pursue a structure of 'channelled antagonism' which accepts the self-referential contingency of all systems.[47]

As we can never be in the position to recognize a true universal, to differentiate between the true and the false, Rasch advocates the latter option. 'How can one tell, afterward, whether the wars conducted by the singular instance in the name of the universal instance are wars of liberation or wars of conquest?' (p. 34)

The answer, of course, is that one cannot tell, not definitively or with certainty. Instead, as one might have assumed Schmitt would realize, one must *decide*. However, in order to do so, one must also recognize and accept the limits of rationality. The question then is not how to make the decision, but rather how to institutionalize the answer. The key is to envisage institutions which do not institutionalize (restrict, channel, straitjacket, or compel) any one particular choice. The aim, in other words, is to maximize the institutional capacity to recognize competing choices, and thus to maximize individual capacity to make the choice:

> The ultimately possible attitudes toward life are irreconcilable, and hence their struggle can never be brought to a final conclusion. Thus it is necessary to make a decisive choice. (p. 26, quoting Weber)

Schmitt and Rasch are attempting to realize a distinctly Weberian project here. In order to accept or commit to rationality, one must also accept the limits of rationality, or rather one must accept that there are (not one but) many rationalities. Moreover, there is no 'rationality', no 'reason', which can provide a hierarchy, a meta-system, or a coherence between these competing rationalities. There is not even a 'master rationality' which could provide for co-ordination, nor even the (formally fair) allocation of disputes between the rationalities, or 'closed social systems'.

That is why there can be no 'good reason to imagine . . . a politics of universal law'. The universal, to be universal, can accommodate only difference. These differences can be legitimately homogenized only within states, not between states. Indeed, even within states, the contingency of this homogenization, and the order it underwrites, must be acknowledged.

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46. C. Mouffe, 'Deliberative Democracy or Agonistic Pluralism?', (1999) 66 *Social Research*, 745 at 755.
47. See Rasch, p. 2, and notes 64–78, *infra*.

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This is why Rasch interprets the Schmittian project as an attempt to institutionalize that peculiar form of decision which is the non-decision: the liberal commitment to undecidability and the absence of truth, a commitment which must, itself, be raised to the standard of indisputable truth, the truth of the necessary ineluctability of conflict (p. 17). Consequently, Rasch elaborates 'Schmitt's critique of the liberal foregrounding of law, norm, and procedure'.[48] And in doing so he 'stresses the necessity of determining a workable order where no single order bears the mantle of necessity, in fact, where all order is contingent' (p. 30).

5. The challenge clarified

Rasch endorses sovereignty – be it that of states, rationalities, social systems, or even individuals – as a manifestation of the denial of truth and the truth of contingency. Sovereignty thus secures a 'true pluralism':

> Sovereignty produces internal hierarchy (sovereignty is always over something) and external anarchy (by definition there can be nothing governing a sovereign entity, so if there is more than one sovereign entity in the universe, there is necessarily anarchy among them).[49]

However, Rasch believes that true (international) pluralism is not incompatible with (some degree of) internal plurality. Consequently he seeks to cut the Gordian knot joining sovereignty and homogenization.

Rasch is opposed, and with good reason, to the homogenizing influences of universalist doctrines of any form. This includes, as a substantive normative commitment, an opposition to internal homogenization as much as to universalist homogenization; indeed, the 'homogenization and pacification of the state is the great flaw in Schmitt's grand design' (p. 39). That is, he believes that liberalism can secure a genuine pluralism at the international level, without being (completely) suspended at the municipal level. The obverse is entailed: liberalism can operate at the domestic level without acting illiberally at international level. Neutrality is an idea which must be cherished and defended, but not exported, nor imposed. Consequently Rasch must accept that

> Within the space that is its jurisdiction, sovereignty signifies supremacy of power or authority . . . Yet turned outward . . . sovereignty conveys autonomy or self-rule, and the capacity for independence in action. Inside, sovereignty expresses power beyond accountability; outside, sovereignty expresses the capacity for autonomous agency[50]

while also disputing the claim that

> The two are related, of course, insofar as it is the supremacy within that enables the autonomy without; the autonomy derives from convening and mobilizing by a master power an otherwise diffuse body.[51]

48. W. Brown, 'The Return of the Repressed: Sovereignty, Capital, Theology', in D. Campbell and M. Schoolman (eds.), *The New Pluralism: William Connolly and the Contemporary Global Condition* (forthcoming 2007).
49. Ibid.
50. Ibid.
51. Ibid.

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Alternatively, it could be that Rasch seeks a different form of unity within the state, but a unity nonetheless. In this way Rasch's project becomes clearly distinguishable from the 'agonistic pluralism' pursued by Mouffe or Connolly. Where the last two attempt to stake out an intellectual position – a 'third way' – *between* deliberative democracy and Carl Schmitt (a project Mouffe clearly labels as *not* pursuing a left Schmittianism[52]), Rasch adopts Schmitt's analysis completely:

> The question on both levels, then, is the same: Who decides? The answer in both instances also remains the same: The sovereign. But the consequences differ. Within the state as between states, the sovereign (i.e. the decision-making individual or governing body) serves as exclusive and authoritative agent, but in international relations, where a plurality of sovereigns represents a plurality of interests, there is no highest and last instance that stands over two contending parties. Here the fundamental principle of equality among sovereigns rules. (p. 36)

It is only by securing an internal unity that sufficient strength can be generated to allow for an external pluralism. The key, however, is to discover a 'unity' which is not also a homogenization. For present purposes, however, the critical question must be: can this form of politics be realized at all? Or, what would it mean for this form of politics to be realized? Just what is Rasch advocating? We must 'extend his "logic" of conflict to "re-enter" his friend/enemy distinction within the state, *without* thereby collapsing the grander structure he outlines' (p. 39, emphasis in original).

In other words we must allow for a pluralism within the state, while simultaneously maintaining the structure of conflict (true pluralism) at international level. We must resist the urge to homogenization at international level, and in particular we must resist the pull of the 'ultimate monism' of humanity:

> Now, as far as I am concerned, it would certainly be no tragedy were illiberal and theocratic states to disappear and be replaced by constitutional republics – but then I am an atheist who lives in a liberal, constitutional republic. What would be tragic, however, would be to watch that which presents itself as the most liberal of all possible worlds actualize itself precisely as the most *il*liberal of all possible liberalisms. (p. 58, emphasis in original)

So far, this at least makes sense; the commitment to the truth of the absence of truth may be maintained at the domestic level, but not at the international. Theocratic states precisely embody a commitment to truth, but this must be accepted because the untruth of their truth cannot be determined. The liberal politics of human rights precisely denies theocratic truth and consequently, and contradictorily, accepts the truth of untruth:

> Liberal human rights, from which Habermas and Rawls wish to derive popular will formation and the Law of Peoples, are precisely what they say they are – liberal – because they are the manifestation of a liberal political order and *not* because the liberal ideology vibrates at the same frequency as the dynamo at the heart of the universe. (p. 92, emphasis in original)

At international level Rasch emphasizes the illegitimacy of any one situated observer evaluating or judging any other. This would appear to mean that we ought

52. C. Mouffe, 'Introduction', in C. Mouffe (ed.), *The Challenge of Carl Schmitt* (1999).

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to tolerate all kinds of states, from liberal, through fascist, to theocratic. There should be no hidden monism, no minimum standards, no ideal image of man against which 'neutral' evaluative judgements can be made. The possibility of conflict as 'arbiter' nonetheless remains. However, the meaning of the friend/enemy distinction, and its postulated 're-entry' into domestic affairs, is quite unclear.

5.1. Rasch's vision: a Schmittian commitment to diversity?

> Schmitt could not see a structure of differentiation carried by a unity that itself was structured by differentiation. This then becomes our challenge. (p. 39)

For Schmitt, only a commitment to a substantive vision of the good could unify a community to a sufficient degree to guarantee the mobilization of its strength. Only in this way could its external sovereignty be retained; and only through that retention could true pluralism be maintained at the international level. Consequently, only at the international level was (true) pluralism possible. Moreover, even limited pluralism at the domestic level was dangerous, leading to either dissolution or capture. Such pluralism either functioned to allow the takeover of the state by sectional interests (thus resulting in the imposition of a substantive vision) or it confused itself with truth and thus led to the 'monism' of a universal humanity.

Given his opposition to substantive homogenization, Rasch is forced to disagree with Schmitt here. In the absence of any possibility of – or, at least, given the political preferabilty of not pursuing – objective (or absolute) truth, Rasch advocates a system in which pluralism is accepted and structured, but in which also the perpetuation of that pluralism is itself taken as a normative goal. Consequently Rasch posits the commitment to diversity as itself a form of unifying vision:

> The modern neutral state . . . could not be neutral to its own continued existence. Therefore, the issue of sovereignty, which the liberal rule of law thought to have settled once and for all, was as relevant as ever. (p. 29)

The neutral state must fight to maintain its own neutrality, to create and maintain conditions under which that neutrality – and the options among which neutrality is to be maintained – can be perpetuated. This is not an original observation; Rasch attributes it to Schmitt and, as Mullender has noted, 'there is a lack of neutrality about neutrality in the United States. . . . neutrality is widely regarded in the USA as an ideal worthy of pursuit'.[53]

Consequently, anti-liberal, or anti-democratic, opposition must be excluded from the constitutional order. We must accept pluralism as a desirable structure for the status quo, as the normal situation. However, the parameters of 'acceptable' debate must also be established and guarded. It must be accepted that the system does not, and cannot, accommodate all interests. Conflict cannot always be internalized. Consequently, although pluralism must be cherished (and thus protected), it cannot be a true pluralism:

53. R. Mullender, 'Human Rights: Universalism and Cultural Relativism', (2003) 6 *Critical Review of International Social and Political Thought* 70, at 78–9.

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> Luhmann's basic schema describes normalcy . . . By taking opposition out of the streets and placing it in the parliament, one sanctions opposition within the liberal-democratic order, but not *to* it. (pp. 9–10, emphasis in original)

And it gets worse, for the normalcy of the normal situation – the content of the order and its legitimate opposition, and the modes of legitimate protest – must be established and maintained. That is the task of a sovereign: to decide on normalcy by deciding on the exception.

This brings into relief Schmitt's major concern, and Rasch's 'productive paradox': the contradiction between liberalism as such and liberalism's self-understanding or 'self-description'. Liberalism as such is predicated on the absence of truth, yet liberalism's 'self description' is its claim to be able to manage conflicts and disputes neutrally, to create a rational structure within which all competing commitments can be reconciled. This is also the falsehood we maintain as individuals when we tell ourselves that we are capable of rational evaluation.

This 'paradox' can be productive, because, as Rasch notes, 'the liberal vision of justice is a "misconception" to which we have (quite rightly) become attached' (p. 31). Internal liberalism is a good thing for those (societies) which desire it. However, that does not make liberalism good, let alone 'true', as such.

Normalcy is maintained by the identification and exclusion of the 'non-normal'. Thus 'the same liberal regime that enunciates the self-evident validity of universal norms strives to enact a universal consensus that is, indeed, far from uncoerced'. Consequently, 'In its claim to a universal, normative, rule-bound validity, the liberal sleight-of-hand reveals itself to be not the opposite of force, but a force that outlaws opposition' (p. 30). In short, the normal situation can be governed by norms, and therefore presented as a neutral operation. However, this operation, the system, cannot actually be neutral, because norms cannot bring the normal situation into being: 'Every norm presupposes a normal situation' (p. 24).

The order of norms – the legal, ethical, or other normative system – presupposes the existence of a normality which it can neither create nor protect, but which it can only embody and regulate. This normalcy must be created and guaranteed outside the legal order. It must embody a specific claim to truth and thus exclude competing claims to truth. 'Thus states neither arise nor are legitimized by way of a logical deduction from universal norms; rather, norms presuppose the legitimacy of states' (p. 24).

This applies as much to 'states of affairs' as it does to territorial entities, and that is why '[e]stablishing norms does not precede politics and evade sovereignty; it *is* politics, sovereign politics' (p. 92, emphasis in original). Moreover, the norm – the legitimacy of the norm – then operates as an organizing principle, excluding the 'non-normal' and then denying that exclusion. As Lyotard has noted, 'We are obligated, before the law, in debt.'[54] But that obligation is forgotten, and that 'forgetting is, in turn, forgotten'.[55]

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54. J. Lyotard, *The Différend: Phrases in Disputes* (1989).
55. J. Lyotard, *Heidegger and the Jews* (1990).

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5.2. The nature of conflict and pluralism

Only the existence of multiple sovereignties can secure true pluralism: to pursue pluralism we must abandon the pursuit of hierarchy and fixed or rational order. Instead we must embrace 'conflict':

> Political antagonism, in the final analysis, is a discrete and fragile structure that limits conflict by legitimizing it. Such bounded discretion, according to Carl Schmitt, is the apogee of civilisation. (p. 17)

However, it should be emphasized that Rasch's reading of Schmitt tends to de-emphasize physical violence; indeed, he even goes so far as to attack Habermas for emphasizing the 'aesthetics of violence' in the Schmittian world-view. Consequently, for Rasch, what distinguishes 'friend/enemy' conflict is not its ferocity, but its 'existential' nature, its undecidability. Friend/enemy conflicts cannot be resolved neutrally; they defy the possibility of impartial mediation by a meta-system. Such conflicts are *différend*, and not *litage*; they cannot be subjected to adjudication:

> Thus, since no third-party or meta-sovereign exists to settle the disputes, conflict becomes the *functional equivalent* of sovereignty, the mechanism by which decisions are made in the extreme or exceptional case. (p. 37, emphasis in original)

This conflicts with the pacifying movement of the liberal project. More importantly, it brings into relief the fact that (ideally compulsory) adjudication is merely the manifestation of this liberal commitment to peace: the priority of peace over war. However, this brings adjudication into an uneasy tension with liberalism's competing commitment to the absence of truth. Once more, this is a manifestation of the conflict between liberalism and its own self-image.

From a Schmittian perspective, conflict cannot be escaped or eradicated. Consequently, political debate is simply displaced to the adjudicative act, but remains unchanged as political decision-making:

> The realist critique usefully reminds us that, in law, political struggle is waged on what legal words such as 'aggression', 'self-determination', 'self-defence', 'terrorist' or '*jus cogens*' mean, whose policy they will include, and whose they will exclude.[56]

This subverts the process of adjudication. Conflict is neither avoided nor even suppressed; it is simply moved from the battlefield to the courtroom. 'This should not be thought of as a scandal or (even less) a structural "deficiency" . . . indeterminacy is an absolutely central aspect of international law's acceptability.'[57] This procedure does not bring with it neutrality, or a decision to which both parties must rationally agree. The decision manifests epistemic conflict and violence (victory and defeat); but it does not avoid physical violence, because the 'peaceful' resolution takes place under (and is vouchsafed by) the threat of overwhelming, and legitimated, violence.[58]

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56. Koskenniemi, *supra* note 19, at 119.
57. Koskenniemi, *supra* note 21, at 591.
58. It is worth noting the near identity between Schmitt's understanding of the political (the friend/enemy distinction as the sphere of physical violence which can be reached from any other point), and Weber and Kelsen's understanding of the rule of law (the conditions under which legitimate violence can be accessed). If we take Schmitt's concerns over, and critique of, legitimacy seriously, then the two concepts become functionally identical.

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Consequently the liberal commitment to adjudication must be complemented by a commitment to truth, to neutrality, impartiality, and inclusiveness. Only in this way can adjudication be reconciled with liberalism's self-description. However, this once more clashes with the foundational commitment to the absence of truth. The conflict cannot be avoided; either a truth must be chosen or conflict must be recognized as insoluble and continuous. Rasch advocates committing politically to the latter option. This entails acknowledging both the contingency of this commitment, and the contingency of the 'impartiality' we construct to constrain adjudication.

This would function to reduce, or even exclude, political conflict within adjudication, to 'purify' law as a system. Law would function by recognizing that not all interests merit or receive equal respect. However, this also exposes law and adjudication, as such, to political conflict. As a result, it must be recognized that law's decisions are not always authoritative, and/or that law does not have jurisdiction (even in principle) over all subject matters. Law must be categorically separated from the rule of law if it is to be insulated from internal political struggle.[59]

In this way the legal system is shielded from internal capture; moreover, Schmitt's 'grander structure' of true pluralism is protected. This is because a legal system alive to its own contingency cannot confuse itself with truth. Legal systems committed to the pursuit of truth necessarily become imperialistic, because truth is either true or it is not (truth): it cannot be true in some places or systems but not in others. However, those systems which recognize their own contingency can also recognize their own temporal and spatial limitations.

Contingent order remains a goal worth pursuing, but only within parameters. What Rasch is opposed to is the idea of a universal law as such. The absence of truth can be posited as a truth, but this is an act of decision and thus remains contingent. Consequently, it should have no universal pretensions, but is instead limited within the state:

> The battle is . . . between a pluralism in the service of a universal morality (accompanied, not so coincidentally, by a universal economy) and a pluralism in which no contestant can claim the moral high ground. (p. 35)

The latter is Schmitt's goal and is also endorsed by Rasch, while the former is political orthodoxy. This orthodoxy has historical roots,[60] and so does the preferred heresy:

> The European civil war of the 16th and 17th centuries signalled, in Schmitt's view, a transfer of power from one universalist doctrine to another. . . . What eventually emerges from this battle is a form of Anglo-American economic imperialism that is conducted under the banner of civilisation, humanity, progress, and pacifism. (p. 37)

This is the new universalist doctrine which has assumed power, and hence orthodoxy. But it is a doctrine based on falsehood:

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59. See, e.g. L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 352, at 353; Beckett, *supra* note 38.
60. See, e.g., M. Koskenniemi, *The Gentle Civiliser of Nations* (2004).

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> Schmitt's quarrel with America's post-1917 role as 'arbiter of the world' centers on the presumptuous and deceptive nature inherent in any particular instance that designates itself to be the carrier of universal principles. (pp. 33–4)

However, Schmitt does not want to revive the former doctrine (imperialist Roman Catholicism), but rather the conditions of transfer themselves – the period of open conflict, when neither doctrine held undisputed authority, the 'hiatus or transition period' (p. 37), the crisis which brings the structure of the exception into relief:

> In Schmitt's reconstructed history . . . there is no last instance in the international sphere of action because no sovereign has authority over any other sovereign and no Pope, no international tribunal or organisation, is charged with adjudicating disputes. Thus, since no third-party or meta-sovereign exists to settle the disputes, conflict becomes the *functional equivalent* of sovereignty, the mechanism by which decisions are made in the extreme or exceptional case. (Ibid., emphasis in original)

This is good, because, absent a false universalism, 'neutrality does not bring with it the power to ascend to a higher "objective" or "non-partisan" level' (p. 36). Judgement is always partial.

6. Sovereignty and 'closed social systems'

This leaves two outstanding issues: the location of sovereignty and the role of physical violence. Rasch, it would appear, is not simply attempting to resuscitate the sovereignty of the nation-state. From the Raschian perspective, such sovereignty is already permeable and, indeed, breached. The world is divided into 'operationally closed social systems', which transcend spatial borders:

> We no longer deal with the historical reality (or fantasy) of nation-states . . . Thus, the structure we face is parallel to, but not the same as, the structure of state and international relations as described by Schmitt. Indeed, what we are looking at is the structure of modernity as the differentiation of social systems, and so we ask how these systems are to be ordered. . . . To order them by reason would . . . betray a naïve belief that reason orders rather than divides. To order them by norms would be to assume that morality or law or perhaps religion rules. (p. 39)

In the absence of truth, functional differentiation between social systems cannot be controlled by a meta-system:

> The reality it purports to describe aggressively displays the limits of self-observation, and any attempt to view society normatively, as if from the outside, is greeted with bewilderment. Norms . . . are socially embedded, not transcendentally given.[61]

This is why 'the value of Schmitt today lies . . . with the structure of conflict' which he 'outlined' (p. 38). Consequently, 'what is to be avoided is the hegemony of a single system', despite the fact that 'the types of quasi-legal, collective, international organizations Schmitt railed against have become the norm'. These institutions claim to embody a neutrality which cannot exist, and consequently their legitimacy is based on an untruth and should be challenged.

61. Rasch, *supra* note 29.

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The institutions, and even the laws or other normative codes they apply, must be accepted as extant, and the (contingent) order they maintain as prima facie 'good'. However, their claims to hegemony should be denied. The maintenance of order is not an absolute good, and thus should not be allowed to operate (even through law) as moral exculpation from political decision-making. To 'delegate' political decision-making to a system (e.g. law) is always already to make a political decision, a decision to privilege that system. Political decisions can be disguised, but not avoided.

Instead, the liberal order, and the system of its law, must acknowledge both its contingency and its non-universality/non-neutrality. It must recognize its capacity to exclude and the necessity of exercising this capacity. The order, and those who wish to maintain and protect that order, must then take political – and not (merely) legal – responsibility for those exclusions. Granted that not all interests can be accommodated, we must realize that not all interests are equally valuable and that that justifies the existence of constitutive exclusion, but it does not negate the existence of that exclusion:

> Politics does not avoid, in the name of law or consensus, the forcible exclusions that come with all choice, but rather recognizes the necessity as well as the necessarily violent nature of decision. (p. 41)

This is why we must assume political and not legal responsibility for exclusion: the law masks ('invisibilizes') exclusion behind its claims of neutrality, impartiality, and inclusion.

Systems, and the actors they authorize, should be exposed as political agents; their claims to absolute truth and universal accommodation must be challenged. No system is absolute and, more importantly, no system can determine the conditions of its own application; the norm cannot contain the exception.[62] But that does not mean that the norm cannot exist, that the exception *must* become the norm.

Instead, Rasch postulates an order – a multiplicity of systems – in which both resoluble and irresoluble conflicts exist. In such a system, the norm can only be preserved in the recognition of the exception. The key is to separate the two 'types' of conflict: norm from exception, *litage* from *différend*. The first pole in each dichotomy may be referred to a system for resolution, but the second may not. In short, there may be a space for law, but Rasch's opposition to the rule of law remains implacable at both the municipal and the international level.

This would appear to suggest the possibility that law's utility could outweigh its illegitimacy, that although law can neither recognize nor embody difference, it can nonetheless function to maintain a degree of sameness such that difference could regulate itself. However, because the legal order is not, in fact, internally open to difference, it must remain open to, and vigilant against, extra-systemic challenges to its established order.

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62. C. Schmitt, *Political Theology* (1985).

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6.1. Channelling conflict

What this means is that at neither international nor municipal level can a social order be given precedence. The rule of law as such must be abandoned. Law cannot justify a claim to superiority. Instead,

> We must envision political and social structures that freely acknowledge the ordering and civilising power of antagonism. It remains an intriguing task to think of society's channelled political and cultural battles not as disturbances to be excluded, but as an organisational achievement of the highest order. (p. 40)

Normalcy – the normal situation within which norms can 'operate' – must be protected. However, it must also be accepted as flawed, as imperfect – 'The *katechon*, as a figure for the political, rejects the promise of the *parousia* and protects the community from the dangerous illusions of both ultimate perfection and absolute evil' (p. 100). Consequently, the perpetuation of normalcy must also be recognized as imperfect, and hence as violent. Politics and peace must themselves be recognized as 'forms of warfare'.[63]

Therefore the maintenance and 'channelling' of disputes must not be reduced to the application of technical, ethical, legal, moral, scientific, etc. expertise. Antagonism must not be considered as in principle soluble or eradicable; it must not be delegated to experts. In other words, we must join Lyotard and ask, *contra* Habermas, 'how to proceed politically in the face of the impossibility, even undesirability, of any re-established harmony' (p. 40). But first we must consider the mechanisms by which battles are to be 'channelled':

> To the extent that [MacIntyre and Berlin] see conflict and disagreement being channelled by the techniques they identify, they equally see a loss occurring. Berlin's expression of this was found in the way that conflict was always in danger of being treated like a disease in need of a cure. [For] MacIntyre . . . [it] tended to be concealed within liberal debate because of the rhetorical and institutional channelling it received.[64]

But Rasch, I think, has something quite different in mind, a channelling which is not a concealment or a treatment, neither reduction nor loss. The channelling cannot be structured by a meta-discourse, but by the functional differentiation of the social systems themselves. They are 'structured' or 'channelled' precisely by *not* subjecting to a meta-system, by *not* seeking formal equality in the allocation (let alone the resolution) of disputes not being sought. To comprehend this, we must take seriously the 'fact' of the *différend*:

> A case of differend between two parties takes place when the 'regulation' of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom. (p. 40)

This is an exceptionally difficult challenge. What Rasch brings into relief, through both Schmitt and Lyotard, is another deep-rooted schism in the liberal project: the 'holy trinity' of liberalism[65] – freedom, equality, and the rule of law – stand in tension

63. Foucault, *supra* note 2, at 124.
64. S. Veitch, *Moral Conflict and Legal Reasoning* (1999), 123.
65. See M. Koskenniemi, 'The Politics of International Law' (1990) 1 EJIL, 1 at 2.

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with one another. They *conflict*, and any apparent harmony between them can only be the result of an ideological illusion:

> To place notions of equality at the centre of politics is inevitably to privilege one aspect over another. . . . [N]atural privilege, the object of the egalitarian's venom, is in fact itself the obverse and consequence of the egalitarian's fundamental project.[66]

Instead, we must recognize the conflicts caused by difference as intractable, and therefore within the purview of politics (conflict), and imperfection, the suspension of politics (conflict). Formal equality is not, and cannot be, equal. Consequently, whichever rules, norms, images, or standards are embodied in the law, the rule of law must conflict with equality, and some of those 'equally' subject to that law must have their freedom 'unfairly' restricted as a consequence.

This is true at both international and domestic level. There are no commonalities; that is the basic claim of both the *différend* and of politics in Rasch's sense. It must be emphasized that it is not in the interpretation and application, but rather in the creation of law that the foundational and primary violence takes place. The violences, mutilations, and corpses of interpretation are derivate effects, unrecognized battles echoing on from wars presumed long ended; 'all adjudications of disputes are simultaneously declarations of a new war' (p. 40).

The very articulation of the common standards – the images – on which formal equality depends, as well as the articulation of the corollary standards of similarity and difference on which its deployment is conditional, are themselves the original acts of violence. The operation of the system – the judicial application of law – merely (re)iterates these original decisions. Rasch is also careful to eliminate the proceduralist escape, the 'liberal' rationalizing impulse which tells us that, with a little bit of common sense and compromise, we could negotiate neutral images.[67] 'More important than the question of where the chain is cut, is the question of who cuts' (p. 92). Neutrality is not an option, values are not universal, and decisions – although they can be invisibilized – cannot be avoided.

6.2. The war of the social systems

Différend appear to be caused by 'operational closure', which is Rasch's necessary response to his own ontological commitment to the overwhelming complexity of 'particularity'.[68]

> How is difference possible? As Zeno's paradox shows, difference is infinite and, as such, invisible. Further distinctions can always be made, making the task of perceiving difference paradoxical, because difference is all we have. If a structure of difference is to be made visible, difference must be suspended and bundled into unities . . . if politics is conflict, at what level is politics (conflict) suspended in order to make politics (conflict) possible? (p. 21)

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66. Simmonds, *supra* note 28, at 164.
67. See Beckett, *supra* note 14; Sub-Commandante Marcos's solution – to negotiate the conditions of negotiations, to 'construct a new table' around which the negotiators might sit – which I adopted in that analysis, seems from the present perspective unrealizable, a pure sentimentality.
68. See J. Beckett, 'Mercy, Particularity, and the Map from the Void', 2007 *Archiv für Rechts- und Sozialphilosophie* (forthcoming).

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Unmediated perception is as impossible as absolute truth; indeed, these twin impossibilities are the two sides of the same coin. In order to make sense of the world, we must exclude the majority of its particular content from our perceptions. As Borges has noted, 'To think is to forget differences, generalize, make abstractions'.[69]

In response to this overwhelming complexity, to aid us in de-differentiating, in generalizing, we turn to categories:

> We order the World according to categories that we take for granted just because they are given. They occupy an epistemological space that is prior to thought, and so they have extraordinary staying power.[70]

The mediation of categories is simply inevitable; notions of likeness and difference are necessary to social sanity.[71] MacIntyre argues that 'to share a culture' is 'to share schemata which are at one and the same time constitutive of and normative for intelligible action by myself and are also means for my interpretations of the actions of others'.[72] Without such schemata, the world would simply be an overwhelming array of unrelated sensations. Thus radical scepticism, even empiricism, if followed through, would be unintelligible; 'empiricism would lead not to sophistication but to regression'; it would 'lack any means to order experience'.[73]

However, for Rasch the categories themselves are either products, or manifestations, of those social systems which Luhmann postulates as the 'true' epistemic entities of reality.[74]

Difference, to be recognized, must be 'bundled into unities'. However, there are different ways of forming these unities; no similarity and no difference is absolute or real – all are social constructs. That is the 'reality' of the existence of 'operationally closed social systems'. Moreover, this inevitably leads to a plethora of such systems. Rasch concerns himself, initially, with the question of whether any system should be raised to the level of meta-system, and concludes that this ought not to happen (p. 39).

> By way of operational closure they develop such high levels of internal complexity that they sensitize themselves to 'perturbations' and 'irritations' coming from . . . the other systems of society. But despite these mutual irritations – or perhaps because of them – they do not stand in any sort of dominant or subordinate relationship to each other. (ibid.)

From a strictly Luhmannian (or Teubnerian) perspective, functional differentiation gives way to autopoeisis and systems become entirely self-sustaining. In this sense, Luhmann's thesis is empirical and not normative in nature; it concerns the

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69. J. L. Borges, 'Funes the Memorious', in Borges, *Labyrinths* (1979), 87 at 94.
70. R. Darnton, 'Pruning the Tree of Knowledge: The Epistemological Strategy of the *Encyclopédie*', in Darnton, *The Great Cat Massacre, and Other Episodes in French Cultural History* (1986), 191 at 192.
71. A. MacIntyre, 'Epistemological Crises, Dramatic Narrative and the Philosophy of Science', (1977) 60 *The Monist* 453, at 453–4, 462–3.
72. Ibid., at 453.
73. Ibid., at 462–3.
74. I am not convinced that Rasch, nor anyone else operating within the radical constructivism of the Luhmannian model, can escape the need for a confrontation with truth. Truth is denied by this model, yet the model itself claims empirical truth. Moreover and more pertinently, it would only be from a perspective of truth that the dichotomy between *différend* and *litage* could be maintained.

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impossibility, not the inadvisability, of sovereignty or authority. The same proves true should law be grounded in rationality, economics, or any other discourse.

'The law does not derive its power from an external source . . . it is sovereign simply because it is sovereign' (p. 90). And even that sovereignty is a relative sovereignty. 'For law to be absolute, it must be limited, it must be immanent to the set in which it rules and stand in no hierarchical relationship to the outside' (ibid.). No system – other than 'absolute truth' or God – can escape this paradox of self-reference, this sovereign self-exemption, 'which makes a necessary asymmetry out of an impossible symmetry'. That is why no one system can be more 'true' or more authoritative than another. All systems can operate only by refusing to apply their own operations to themselves.[75] Thus all systems are equally provisional and equally sovereign.

In the terms used above, all systems 'bundle difference' into different 'unities', all systems 'suspend politics' differently. Consequently politics remains between systems, exactly as it did between states in Schmitt's ideal order. The law is but one system among many; its decisions are therefore but one set among many. It is pathological to pretend otherwise.[76]

As Rasch has noted, the defining mark of a system is operational closure, or what Teubner terms 'normative closure'.[77] This closure is offset by, but also conditions, a 'cognitive openness'. In brief, systems can perceive the world outside themselves – which, importantly, includes the other systems – but can understand this world only in terms of their own closure, their coding. Thus, for law, the world can *only* be perceived in terms of legal/illegal; for economics in terms of profit/loss; science, true/false; morality, good/bad; and so on. This entails, *inter alia*, that no system can understand any other system; there is neither communicability nor even translatability.

Instead, each system must strive to make sense of the actions – and especially the communications – of the 'others', in terms of its own operational closure. This leads to the radical constructivism of the Luhmannian method and on to an idea which Black, developing Teubner, has termed the 'internal environment'.[78] This is an epistemic space within which each system constructs its own 'world'; the constructions of the other systems are also located here, and it is here (alone) that systems can act intelligibly.

However, their actions are intelligible only to themselves; to the other systems, including that being 'regulated', the actions are mere 'noise', 'perturbations' which must be constructed in terms of that system's own code, (re)constructed within its internal environment. 'The "binding decisions" that are the outcomes of the political system [are] the perturbations that irritate other systems' (p. 44). Operational closure is an absolute bar on inter-systemic understanding or communication. Each system, by identifying unity (i.e. bundling differences) differently, effectively constructs and then observes (regulates) a different world from any other system.

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75. N. Luhmann, 'The Third Question: The Creative Use of Paradoxes in Law and Legal History', (1998) 15 *Journal of Law and Society* 153.
76. J. Black, 'Constitutionalising Self-Regulation', (1996) 59 *Modern Law Review* 24, at 47.
77. G. Teubner, 'How Law Thinks', (1989) 23 *Law and Society Review* 727.
78. Black, *supra* note 76.

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7. THE INEVITABILITY OF CONFLICT AND DECISION

Rasch's hybrid of Schmitt and Luhmann is recursively stabilized: having identified ineluctable conflict and the impossibility of order it normatively endorses the recognition of conflict by reference to its own inevitability. As such, the thesis is true only if its underlying world-view is also true. Neither point is verifiable or falsifiable. As Rasch has noted in an analogous context,

> The teachings of the Marxist-Leninist classics and the ABCs of communism may indeed be derived from the conditions of reality, but our knowledge of those conditions hinges on our acceptance of the teachings of the classics. (p. 67)

Everything can always be reinterpreted, reconstructed, but then that is precisely Rasch's (Luhmannian) point!

The war of the social systems then becomes inevitable, because no system has any reality for any other system, and each system is sovereign over itself and hegemonic in regard to others. The war can be denied or disguised, most especially if one (or more) system(s) is raised to the level of meta-system (p. 39). However, even then, the war is not ended, but displaced, internalized.

This can occur – and can appear not to occur – because systems are paradoxically more sovereign over their constructions of each other than they are over themselves. 'Real' systems are heterogeneous, but can be externally constructed as homogeneous precisely because of systems' sovereignty over their own internal environment. Internally, law, ethics, economics, politics, and so on are indeterminate, but externally they can be made to appear determinate and clear.

This is important because hegemonic systems – such as law – base their claims to hegemony on their capacity to learn from, or incorporate, other systems. Thus, a 'sovereign' law will be economically efficient, ethical, prudent, pragmatic, and so on. However, this is possible only on the condition that law claims the 'epistemic authority' to determine the wise, the ethical, the efficient, and that is possible only within the internal environment of law.

This displacement is doubly pathological, the legal answer becoming subject both to critique – from, for example, pragmatists, ethicists, economists – and to misinterpretation because law can be nothing but a 'perturbation' in the internal reality of any other system.[79] However, one pathology can be overcome, and the other recognized as, in fact, non-pathological.

The first, and genuine, pathology is that in the hegemonic attempt to raise any system to a meta-level (the search for adjudicative neutrality/legitimacy/authority, or even the 'co-ordinating' attempt at dispute allocation between competing systems[80])

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79. For example, law, acting 'ethically', 'authoritatively' prohibits industrial pollution; however, 'industry', coding economically (and internally sovereign), perceives only an additional 'cost' to certain forms of waste disposal. The legal system is 'authoritative' only to the extent that it can impose its sanction. It is not authoritative either over behaviour in the economic system or even over the understanding (the interpretation or construction) of its own 'sanction'.

80. In a sense, these two 'pathologies' form the core of one orthodox response to the NAIL critique of international law. In fact, I have precisely attempted to purify law, and to maintain the possibility of a neutral and universal customary international law. See Beckett, *supra* note 38. The key difference in Rasch's arguments and my own earlier arguments is his implicit belief that the biases of PIL are not caused by bad faith and therefore

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the endemic conflict between other systems is internalized into that system.[81] The second (apparent) pathology concerns the reception of the authoritative commands of the meta-system: these are met with 'bewilderment' and reflex violence.

The first pathology precludes the possibility of a productive tension between the reality and the ideal of law, because the ideal relies on the impossible dream of neutrality. Politics remains war, and cannot be transformed into peace.[82] In effect, this 'tension' (between an unredeemable reality and an impossible ideal) serves only to disguise the partiality and illegitimacy of the current order, by focusing on its potential future legitimacy. In positing legitimacy we assume legitimacy through the pursuit of that legitimacy.

The recognition that order comes at a cost raises the question of the value to be placed on order, and indeed the question of why we value order at all. In part, of course, order is valued by its beneficiaries because they do not – and, indeed, refuse to – see the costs of that order.[83] This gives weight to the desire to conceal the maintenance of that order behind the comforting illusion of the rule of law. But there is a further complication here, an example of what Foucault might consider enthralment to 'the lustre of power'.[84]

Given our desire for order, we perceive law as our tool. Law is the means by which that order can be maintained, but also the epistemic principle by which order is defined, and thus identified, as the resolution of disputes by reference to rules or adjudication. Consequently we seek the conditions under which that law might be considered legitimate.[85] However, it may be that the concept of legitimacy is, itself, a poor or dangerous ordering principle, that it is a focus on legitimacy that underwrites the progress narrative of pacifism, and therefore causes blindness to exclusion.

Thus Rasch also wants the 'bloodless violence' of change in the non-corporeal world of thought. Although he does not seek a new ontology or even, really, a new epistemology, he does seek a new (ethical) interpretation of reality. In that regard, his challenge is very similar to Unger's idea of *kenosis*: an 'emptying out', a rejection of current organizing principles or interpretative axioms.[86] The idea of formal equality – and the 'logocentric' ethics it mandates – constructs and delimits (the possibilities within) our conception of 'order'. Order is equated with formal equality, but this is a 'false necessity'.[87]

This leaves open the possibility that it is the existence of an idea like (legitimate) law which causes us to value order in the first place, to accept the definition of

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cannot be rectified by good faith. Moreover, the same impossibility of a formal neutrality which undermines PIL's claims to sovereignty (the rule of law) also precludes the possibility of locating law as one social system among many, with a legitimate role and jurisdiction.

81. Beckett, *supra* note 38, at 219–21.
82. I have relied on, and attempted to demonstrate, precisely antithithetical assumptions in ibid. and *supra* note 14.
83. Cover, *supra* note 13, at 1608; Chomsky, *supra* note 18.
84. Foucault, *supra* note 45.
85. That is, the conditions under which law could be 'made to' live up to its *own*, unquestioned and uncritiqued, ideal. This is precisely what I have attempted in *supra* note 38.
86. R. Unger, *What Should Legal Analysis Become?* (1996), 128–9.
87. R. Unger, *False Necessity* (1987).

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order, the value of order, and then law's role in maintaining that order. The law – functioning as legitimacy, or the 'lustre of power' – then functions as an ordering principle, overlaying, and negating the legitimacy of, alternative organizing principles, notably that of the legitimate recourse to conflict. If law allows 'orderly' protest, dissent, and transition (and the limitations on these can be overlooked), then how can 'disorderly', criminal, or violent protest or dissent possibly be legitimated?

From one perspective, then, it is not law that is our tool, but the reverse: we are law's tools. It is law which conditions us to perceive and desire an ordered world. In assuming the value of (that) order, we must also assume the potential legitimacy of law. As a direct consequence, we implicitly legitimate, and thus 'invisibilize', law's exclusions, its epistemic and physical violences. We hold law only to its own ideal, and assume the 'legitimacy' of that ideal (outweighs the 'unfortunate but necessary' violence). In this way law is shielded against all but immanent critique: we may seek to perfect the model, but we may not question the definition against which that perfection is to be measured.

Logocentric order is, by its very nature, violent, both epistemically and physically; it is inherently, and extensively, violent. Perhaps, then, this form of order should not be posited as the ideal. This involves abandoning a familiar, and cherished, argumentative structure: the current structures are necessary, even if the current rules (the content of those structures) are less than ideal. We must preserve the structures (and the ideal of order they embody), as they will be necessary given the advent of ideal rules. And anyway, the current structures offer some semblance of order, some hope for future order, and that is infinitely better than disorder. This argument is false!

Order is better only for its beneficiaries, and those do not even form the majority of the Earth's inhabitants. It is the search for, the belief in, order itself which legitimates order – the current, or any other, order. But the ideal order is impossible: the structures, as much as their content, are the *cause* of injustice, exclusion, and violence. This is what leads to the need for *kenosis*, for an 'emptying out' of our thought; we must think anew.[88] We must recognize – re-cognize – channelled antagonism as the apogee of human organization. The key is not to recognize in the sense of repeating, replaying, a cognition, but rather to re-cognize, to renew, not to repeat. Conflict must be reinterpreted, reunderstood, reclassified, recategorized.

We must move away from a 'logocentric' understanding of order, and the demands of legitimacy that this brings. Freeing ourselves from this will allow us a fresh perspective on 'reality'. It will allow us to see the violence and warfare at its heart. In this way, any violence could be legitimated, but 'lawful' violence has its automatic legitimacy removed (or at least reduced to the purely *prima facie*). That is what should cause the reduction in violence which Rasch postulates, the 'fragile structure which limits violence by legitimating it'.

The first pathology can – I believe – be overcome, but only at the expense of 'closing' and thus purifying the system. This is especially important in regard to law,

88. On a similar note, but for diametrically opposed reasons, see P. Allot, *Eunomia* (2001), xxvii.

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which – in its 'positive' modernity – prides itself on its openness. Just as no system can claim a divine mandate for authority, so too no system can be comprehensively inclusive. It is impossible to take everything in, or even to differentiate 'correctly' (absolutely) between the relevant and the irrelevant. Consequently, no claim to meta-system status can be substantiated. All systems can be closed and purified, but then none can claim authority. This is a good thing as it highlights the pathology of the desire for meta-systems, the inadequacy of legitimacy as an organizing principle.[89]

Consequently, we can see that the second 'pathology' was not in fact pathological. Rather, what is pathological is the desire, and attempt, to impose order, legitimacy, hierarchy – to establish the norm over the exception. What is even more pathological is to pretend to have done so, while refusing to analyse the effects of failure.

The reflex 'violence' simply manifests the omnipresence of the exception – the non-subsumable decision – because the decision as to which social system to apply is, necessarily, an example of *différend*.[90] Consequently, abandoning the assumption of order allows for a 'clearer' view of reality.[91] Coherence, compatibility, order, and hierarchy can only be achieved by denying conflict, by (deliberately?) turning a blind eye to its omnipresence. But denial and repression are themselves pathological states. Better then to confront the necessity of conflict, to channel and limit conflict, without distorting, reducing, or suppressing it.

This would appear to lead to a desire for co-ordination in some form or other. However, within Rasch's system, no meta-system *means no* meta-system! As such, there could be no legitimate, or 'formally fair', allocation of disputes between the warring social systems:

> [W]here a plurality of sovereigns represents a plurality of interests, there is no highest and last instance that stands over two contending parties. Here the fundamental principle of equality among sovereigns rules. (p. 36)

Thus any potential co-ordination, or allocation, could only be achieved on the basis of conflict, 'the functional equivalent of sovereignty'. However, Rasch does seem committed to the possibility of co-ordination (presumably by appropriation rather than allocation) as even conflict is, ultimately, accepted because it leads to 'more benign human institutions'.

Rasch thus appears committed to 'order' as a political and physical – rather than an epistemic – good. Recognizing epistemic disorder ameliorates, and thus 'legitimates', physical order: the twinned nature of the scourges of war and of peace is brought into relief. This is manifested in his maintaining the distinction between *différend* and *litage*. This defence does create a conceptual space for law, as one social system among many.[92] However, it may, also, serve to fracture his epistemic architectonic. This is because it is extremely unclear why that particular dichotomy can – unlike

89. Foucault, *supra* note 45.
90. Or, rather, the question will be answered differently, and simultaneously, by different systems. Any system which recognizes a conflict automatically assumes its capacity to resolve that conflict.
91. Although, of course, that is impossible within such a radically constructivist epistemology.
92. The position of 'sovereign' states in Rasch's analysis is exceedingly unclear, but they also seem most likely to manifest single social systems in competition with others.

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all the others – be made to withstand the weight of the thesis, why it, alone, should prove 'true' or 'objectively determinable'.

7.1. Recognising conflict: violence as signifier of *différend* or exception

The preceding fracture, or rather a desire not to acknowledge it, may explain the lack of detail as to how exactly Rasch's preferred system would operate in reality, or even in the ideal. In particular, the meaning of, and signifier for, 'conflict' are unclear. How is conflict among social systems to be recognized? Given the absence of mediation or 'umpiring', how are victory and defeat signalled? And, indeed, who decides what constitutes victory, or defeat?

Second, given that Rasch's concept of the political as conflictual order is, explicitly, contrasted to Agamben and Benjamin's 'divine violence' – 'a truly bloodless violence, because it is to take place in the non-corporeal world of thought' (p. 99) – what role does physical violence play within his preferred political order?

Despite his relativization of violence – his demonstration of equivalence between so-called 'legitimate' and 'illegitimate' violence – and his desire to de-emphasize violence in the Schmittian model, Rasch offers no alternative signifier for the existence of conflict, for the identification of the exception, friend or enemy. That is, even though violence is relegated from cause to symptom of the exception, it is not replaced as the empirical identifier of existential (epistemological) dispute, that is, of the political.[93]

Moreover, the role of violence in the municipal context is left, disturbingly, unclear. In this regard, the divergence between Rasch's project and that pursued by Mouffe gains import. Where Mouffe argues that 'the aim of democratic politics is to transform an "antagonism" into an "agonism"',[94] Rasch focuses on the 'civilising power of antagonism', which he considers 'the apogee of civilisation'. Consequently, his claim that the key is to 're-enter the friend/enemy distinction' must be taken at face value.

Rasch is consistent in neither seeking nor assuming a 'third way', an intellectual hybrid of Schmitt, reason, and democracy. This appears to be a wise decision, since such a hybrid is simply another unstable manifestation of the desire for order, for coherence and compatibility. However, this rejection has some potentially chilling implications. In the same way that all claims cannot be reduced to legal claims, the law cannot establish a monopoly over the definition of legitimate forms of – or subject matter for – protest. Extra-legal protest must be recognized as potentially 'legitimate', and as a valid technique for bringing the epistemic violences (the constitutive exclusions) of the (legally regulated) order into relief.

For example, we could see a link here between international and municipal law and politics, first, by considering the potential legitimacy of the resort to violent force in the face of oppression, as perhaps in the occupied Palestinian territories,

93. It is possible that 'success' could be the signifier of victory. The actions of individuals (themselves understood as sites of multiple systemic attribution) could be understood as driven by conflict between the attributing systems. Thus conflict/violence may be less signifier than ordering principle – epistemic grid – with 'victory' signified by ascertaining which system was 'in fact' 'followed'.

94. Mouffe, *supra* note 46, at 755.

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where the legal avenues of protest seem designed to disallow the claims which motivate that protest.[95] Where, moreover, the 'illegality' of the protest itself is used to perpetuate the oppression which initiated that protest. Similarly, we should not be too cavalier in our repudiation of Iraqi violence, which may simply illustrate the impossibility of securing a rational order which accommodates all interests in that country. From this perspective, that violence could be understood as an exercise in honesty which can be favourably compared with the internal dishonesty of Western democracy.

Second, then, the reduction of protest to the legal can – and should – be challenged within the Western democracies themselves. Here the right to protest is widely granted, but the exercise of that right strictly regulated. Protest may be noisy and distracting, but should not cause any real measure of inconvenience, let alone intimidation. Violence and conflict are not sanctioned. This protects and perpetuates order, but also protects and perpetuates the epistemic violences, the exclusions on which that order relies.

For example, those protesting about the invasion of Iraq could march through the streets – with prior agreement or authorization from the police – but not block the crossroads or motorways. They had a right to make their point, and others had a right to listen to, or ignore, that point. Those others, 'going about their everyday business', should not be inconvenienced. The inconvenience of Iraqi civilians – who may have had better things to do than be blown up or occupied – was not registered, not relevant. Nor was the possibility that the 'convenience' enjoyed by Western citizens is in fact paid for by the violent appropriation of the Earth's resources.

Similar arguments can be made from the perspective of world trade and human suffering,[96] from the perspective that Western conveniences – the luxuries taken for granted, as normal, as constitutive of normalcy – are themselves available, and affordable, only as the products of exploitation.[97] Those who suffer and die for these luxuries have no point of access, no avenue for 'legitimate protest', while those in the West who would protest on their behalf are reduced to ineffectual bleating or undignified begging. Each of these, in fact, entrenches and perpetuates the epistemic violences which allow this system of suffering to continue.[98]

As well as what we might term these ethically ambiguous flirtations with violence, the re-entry of the friend/enemy distinction would also serve to free governments from the shackles of legality. If Rasch is true to his Schmittian project, then he

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95. See G. Baars, 'Corrie et al. v. Caterpillar: Mobilising the Machinery of the United States Legal System for the Wretched of the Palestinian Earth', *Yearbook of Islamic and Middle Eastern Law* (forthcoming 2006).
96. On which see T. Pogge, *World Poverty and Human Rights* (2002).
97. This is so on two levels, first the viciously unfair and exploitative world trade system, on which see ibid. The second is the concept of 'ecological debt'. Put simply, for everyone on the planet to enjoy an average British lifestyle, we would require the resources of 3.1 Planet Earths. Consequently this lifestyle can only be maintained by expropriating resources, and actively denying them to those in the developing world. See, e.g., http://news.bbc.co.uk/1/hi/sci/tech/4897252.stm and http://news.bbc.co.uk/1/hi/sci/tech/4696924.stm.
98. See Pogge, *supra* note 96. Charity causes us to perceive Third World poverty as nothing to do with us, as not caused or exacerbated by our actions, and consequently as falling within the positive duty of benevolence, the discretionary jurisdiction of distributive justice. What Pogge's analysis demonstrates is the applicability of the corrective justice paradigm: our duty is not, as such, to help others, but rather to cease harming (exploiting) them.

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is driven inexorably towards the claim that the sovereign (the political system) is – at least at times of crisis, times which only it can identify – beyond legal limitation: sovereignty is absolute.

This is, potentially, exacerbated by the attack on human rights and the underlying theme of the non-intelligibility of 'the other'. If social systems are closed and sovereign, and so are ways of life, then it stands to reason that we can neither understand nor intellectually engage with our enemies. Moreover, there is no legal constraint on how 'we' deal with those enemies. At international level, this would sanction resort to conflict at sovereign discretion. However, at municipal level, it would also appear to sanction resort to detention, torture, and so on. Once the enemy is recognized as enemy, the gloves are off.

Given the necessary contingency and violence of the liberal legal order, that order cannot be universalized, and should not be imposed on others. Thus its 'enemies' ought only to be repelled, not exterminated. Enemies must be recognized as *justus hostis*, as 'actual', and not as 'absolute', enemies. The enemy must be met in 'conflict', but only to the extent, to borrow Schmitt's quote from Joan of Arc, that 'they must be driven out of France' (p. 69). There are *no restrictions* as to how this may be achieved.

7.2. Normalcy: the regulation of conduct through observation and the possibility of violence

However, matters are not always quite so drastic. Within 'normalcy' the concept of formal equality continues to function:

> Not all conflicts result in a *différend*, but conflicts between incommensurable idioms – between competing values, between operationally closed or autonomous social systems – necessarily exclude the conciliatory third term, the reconciliation of opposites magnanimously offered by the superior neutrality of a universal discourse. (p. 40)

Consequently, especially to the extent that order is a value worth pursuing, law does have a valid role: it can regulate the normal situation. What must be opposed, however, is the rule of law, for that is necessarily blind to the distinction between norm and exception.

However, this leaves open the question of how the norm and the exception are to be distinguished, how *différends* are to be identified. Moreover, the operation of the 'discreet and fragile structure' of the conflict of social systems is not elucidated. Rasch appears to rely on Schmitt's assumption that conflict will somehow regulate itself, and lead to a co-ordination between competing sovereigns. This is relatively easy to imagine (though difficult to envisage) on a spatial level, where sovereigns are manifested as nation-states, with finite powers, defined territories, and desired spheres of influence. Here the mutual antagonisms – and the fear of violent conflict which they engender – could cancel one another out.

Matters appear altogether less simple at the epistemic level of competing closed social systems. Even granting Rasch's claim that such conflict – the war of the social systems – is inevitable, it is difficult to imagine how this war is to be conducted – or, perhaps more importantly, observed – and how victory and defeat are to be distinguished. Assuming that physical violence is discounted – (a) on the

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non-corporeal level and (b) on the corporeal level, since social systems do not inspire the type of 'political' loyalty which results in justifying physical slaughter – what, other than success itself, could replace it as a signifier of either conflict or victory?[99]

The pursuit of order, of a managed and limited accommodation of difference, does justify law – though not the rule of law. Law can be justified by locating it within or in regard to politics. Law then becomes a tool, with a legitimate and valued (although limited) function.[100] Thus we can justify law to the extent that it perpetuates the liberal order, and our 'comfortable misconception' of its value. Law provides order, and order is good, consequently we can pay the price of illegitimacy. As Cover has emphasized,

> If I have exhibited some sense of sympathy for the victims of [law's] violence it is misleading. Very often the balance of terror in this regard is just as I would want it.[101]

In other words, although law is not the antithesis of violence, and although it cannot be justified by reference to its universality or justice, it nonetheless serves the 'legitimate' function of securing order. This order can be recognized as violent, without also being posited as a 'transcendent value'; that order is beneficial does not entail that it is beyond critique. Consequently the desire for order can found an immanent critique of the legal system, while the contingency, and costs, of that order form the foundation of external critiques.

But where does all this leave us? How are we to imagine the re-entry of the friend/enemy distinction? Certainly we must begin to imagine a world without formal equality. Thus the first option, that we could have a law, a legal system, which applied sometimes, but was legitimately suspended on other occasions, must be forsaken. This is because that 'solution' merely defers the quest for formal equality. Instead of, or as well as, looking at the construction of equality within the system, we must also search for similarity and difference – and criteria of judgement, formal equality – between those occasions when the system must be applied, and those when it may be suspended.

No, to re-enter the friend/enemy distinction, the idea of formal equality must be abandoned. And, more, the idea of legitimacy must be abandoned too. Only the inexorable fact of conflict remains. 'Conflict is grounded in conflict – all the way down and all the way up' (p. 44). Yet violence and conflict function as 'conditions of possibility', and are omnipresent only as threat, not as reality; within normalcy, the rule does govern. Consequently, disputes are resolved, are somehow allocated between systems. Although Rasch does not explain how this occurs, he does at least open a new space and technique for observing the occurrence, perhaps with a view to an 'undistorted' explanation arising.

99. But this may not be a problem; see note 93, *supra*.
100. On this view of law, and the immanent critique to which it can give rise, see Beckett, *supra* note 38.
101. See Cover, *supra* note 13, at 1608.

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8. A 'TIMELY' TEXT: SOVEREIGNTY AS ZEITGEIST AND THE FRAGMENTATION OF PUBLIC INTERNATIONAL LAW

Rasch's book is timely in Nietzsche's sense; it captures the spirit of our current anxieties, and our favoured solutions. Sovereignty is, perhaps, *the* topic of contemporary thought.[102] Whether we discuss its death, its revival, its meaning, implications, function, or location, we discuss sovereignty. Few texts, however, engage the substance of sovereignty or follow through their own arguments to their logical conclusions, with either the thoroughness or the consistency displayed by Rasch.

Like Luhmann and Teubner before him,[103] Rasch does not shy away from any unpleasant implications that his work may have. He offers his premises up for inspection, seeks to explain and defend them, and then applies them: consistent to the bitter end. This gives his text force and coherence; moreover, it also gives that force to arguments we may not wish to entertain. 'As tainted as Schmitt's arguments may be, tainted by interest and tainted by affiliation, neither their structure nor their continued relevance can be so easily dismissed' (p. 33).

Perhaps conflict is endemic, and human rights and the rule of law dangerous myths. Perhaps, more deeply, order itself is an inadequate epistemic grid, our desires distorting our perceptions, making us unwitting accomplices in the perpetuation of systems and situations to which we claim to be opposed.

Rasch gives us good grounds for, at least, questioning some of our most cherished dogmas – notably the priority of pacifism over violence and law over politics – and he does so without resort to what could be termed postmodernist mystification. His text is clear and engaging. It covers many interrelated concerns, at many different levels: the political, the juridical, the normative, the empirical, the strategic, and the epistemic.

Of more direct interest to international lawyers perhaps, this book also offers a fresh perspective on our own manifestation of the contemporary crisis of sovereignty: the question of constitutionalization or fragmentation of international law. In particular, it may be possible that the system of functional differentiation (the fragmentation of PIL) is analogous to Rasch's thesis on closed social systems. There is no reason not to understand the sub-systems of the international legal order as operationally closed, as autopoietic systems.

If this is so, then our familiar clichés regarding hierarchy, or the 'logical connections' between the sub-systems and general international law, must be opened to challenge. Moreover, behind the familiar responses of hierarchy, coherence, dispute allocation, or co-ordination of the sub-systems – that is, behind the questions of how to (re-)establish order in PIL – the real question comes into relief: why do we desire this order at all?

102. Brown, *supra* note 48.
103. See, e.g. note 77, *supra.*

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