## Articles

# Texts, Contexts and Interpretative Communities: A Comment on Regina Ogorek

*By David Sugarman*[*]

A major entry point into the cosmology of the law is the history of the recurrent and long-standing struggle to construct (or undermine) a science of law. This addresses an issue neglected by most historians and sociologists of the professions: namely, the constitution of the knowledge base of professions. Here the history of legal science and legal education parallels and illuminates that of other disciplines: that is, the recurrent effort for more precise denotation, the striving to create a universal language and objective knowledge; and the simultaneous recognition that such a thing cannot be had.[1] As I have tried to show elsewhere, it is a story of continual sliding between gradations of the one or the other, of a hybrid enterprise and the dilemmas and internal contradictions this reflected and generated.[2] Although Regina Ogorek's fascinating paper does not address its subject matter in quite these terms, it is nonetheless an admirable illustration of this phenomenon.

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[*] Professor of Law and Director of the Centre of Law and Society at the University of Lancaster, England. He is also a Visiting Senior Research Fellow, Institute of Advanced Legal Studies, London University and a Fellow of the Royal Historical Society. LL.B., Hull, 1970; LL.M., Diploma in Comparative Legal Studies, Cambridge, 1972; LL.M., Harvard Law School, 1976; S.J.D., Harvard Law School, 1985. Author: Legality, Ideology and the State, 1983 (ed.); Law, Economy and Society 1750-1914: Essays in the History of English Law 1984 (ed. with G.R. Rubin); Regulating Corporate Groups in Europe 1990 (ed. with Gunther Teubner); Law and Social Change in England, 1780-1900, 1993; Professional Competition and Professional Power, 1995, ed. with Yves Dezalay; Law in History: Histories of Law and Society, 2 vols, 1996 (ed.); Property Law, Personhood and Citizenship. A Comparative Social and Cultural History of Property Law and Property Rights, 1999, ed. with Hannes Siegrist; Lawyers and Vampires: Cultural Histories of Lawyers, 2003, ed. with Wes Pue; "Images of Law. Legal Buildings, 'Englishness' and the Reproduction of Power", In Rechtssymbolik und Wertevermittlung, ed. R. Schulze, 2004, 194; "Courts, Human Rights and Transitional Justice. Lessons from Chile" 36 Journal of Law and Society (2009) 272. He is also the author of articles on human rights struggles in Chile during and after the Pinochet dictatorship in The Times, The Guardian, the Santiago Times (Chile), Open Democracy, and El Mostrador (Chile). Email: d.sugarman@lancaster.ac.uk

[1] Some of the most interesting work in the history of political thought during the last ten years has shared this common theme: that is, the contrast between a science of human conduct, a deductive system of universally applicable propositions; and a non-scientific account of it. See QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978); WEALTH AND VIRTUE (Istvan Hont and Michael Ignatieff eds., 1983); STEFAN COLLINI, DONALD WINCH AND JOHN BURROW, THAT NOBLE SCIENCE OF POLITICS (1983). For an attempt to apply this notion to the history of legal science and legal education in England see David Sugarman, *Legal Theory, the Common Law, Mind and the Making of the Textbook Tradition* in LEGAL THEORY AND COMMON LAW, 26 (William Twining ed., 1986); "*Impelled by a Hatred of Disorder": English Legal Science, Liberalism and Empire, 1850-1914* (Paper to the seminar of the Shelby Cullum Davis Center for Historical Studies, Princeton University, January 1988); *The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science*, 46 MODERN LAW REVIEW 102 (1983).

[2] See Sugarman, *id*.

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Ogorek's paper is concerned with the conceptualization and theorization of the judicial role in nineteenth and early twentieth century Germany. Its novelty stems from its convincing challenge to a basic orthodoxy in German legal history: namely, that the theory and practice surrounding the judicial role in nineteenth century Germany treated judges as highly formalistic and mechanical, thereby de-emphasizing the legislative character of the judicial process. According to the traditional view, it was only at the beginning of the twentieth century that it became obvious that statute law contained gaps; and that the art of the judge involved more than implementing the law as laid down in legislation.

Ogorek's paper constitutes a healthy dose of revisionism. She sets out to demystify the discourse which has informed accounts of the image of the judge in nineteenth century Germany. Such histories were traditionally cast in a progressive, teleological, emancipatory framework, presupposing stark dualisms such as formalism/instrumentalism, creativity/neutrality and judicial/legislative. Ogorek counterargues that the image of the judicial role was acknowledged to be much more complex and contradictory. There were many discourses addressing the judicial role; and jurists and others recognized that judges were more creative than was assumed by the traditional accounts. Thus, her approach is not to reiterate the case for judicial restraint any more than to champion instrumentalism over formalism. It is rather to expose these instrumentalism/formalism, restraint/creativity scenarios as false consciousness, at once self-congratulatory, self-serving and shallow.

Ogorek's strategy – dear to the heart of many a Critical Legal Historian – is to summarize the orthodox approach so that its Whiggish, evolutionary and functionalistic assumptions are drawn to the surface.[3] Giving her essay a Critical tilt, it reads like this. The traditional histories are present-minded: they assume that the natural evolution of society and its laws is towards the type of law and society that exists in present-day West Germany. The story they tell is one of how legal theories and conceptualizations were constructed to satisfy the functional requirements of society during each stage of its development.[4] For example, in the earlier period of absolutism, the landed gentry established a legal regime which benefitted them and was staffed by their judges. Judicial discourse was instrumentalist; law and politics were largely at one. However, during the nineteenth century, with the rise of the middle classes, there was increasing pressure from the middle classes to take law out of the arena of politics, in part, to protect and enhance their rights *vis-à-vis* the landed. The position of the judge evolved from servant of the landed gentry to the servant of the law. The role of the judiciary became that of ensuring strict compliance with the law as laid down by statute. In the language of Horwitz, we have a shift from instrumentalism to formalism.[5] This formal rationality echoed the needs of the bourgeois for certainty and predictability.

[3] See, for example, Robert. W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

[4] See, generally, Gordon, *id*.

[5] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977)

So much then for the orthodox account. In its place is substituted a much richer history. The story told by Ogorek is one of "countless differences of opinion among lawyers, considerable variation in case-law and scholarship ... In sum, there are numerous phenomena which contradict any assumption of a complete and scientifically precise closed legal system."[6] There was no uniform answer to the proper ambit of the law and the judge. "[Opinions] as to the function of the law and the description of judicial activity varied (often within the works of the same author) from that of an unproductive application of norms to creative development of the law, and the other way around".[7] Thus, she argues that the mechanistic view of the function of the law was a relatively marginal strand in a corpus of legal thought which "... offered a whole series of theoretical 'repositories' for judicial creation of the law".[8]

In the closing pages of her essay, Ogorek argues that German legal science was often double-edged: on the one hand, it provided an array of intellectual resources which facilitated and legitimated judicial creativity; and on the other hand, it constituted a variety of ideological constructs which sought to reassure others, including lawyers, that judges were not politically dangerous or mere servants of the state. This had the pre-eminent virtue of protecting liberal notions of property and freedom of contract. Like most revisionists, Ogorek's message is that the juristic revolution of the late nineteenth century produced far less change in what jurists and judges did than historians have previously supposed.

Ogorek's emphasis on the multiple discourses employed in the conceptualization and policing of the judicial role is most welcome. It does much more justice to the richness and complexity of the intellectual life of the past than the restrictedly linear model allowed for. Despite the occasional lump of undigested information, it certainly provides a more convincing picture of the turmoil within juristic thought.

All this is not only of value for historians of German legal thought. The construction of liberal legal science in Germany, America and England was a cosmopolitan, two-directional enterprise.[9] German legal thought, as well as its conceptions of the university, history,

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[6] See Ogorek, this issue, section C II, text accompanying note 20.

[7] *Id*., section G.

[8] *Id*.

[9] See Sugarman, *supra* note 1. See also Michael.H. Hoeflich, *Transatlantic Friendship and the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AMERICAN JOURNAL OF COMPARATIVE LAW 599 (1987); *John Austin and Joseph Story*, *Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AMERICAN JOURNAL OF LEGAL HISTORY 36 (1985); *Savigny and his Anglo-American Disciples*, 37 AMERICAN JOURNAL OF COMPARATIVE LAW 17 (1989); ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY (1997); David S. Clark*, Tracing the Roots of American Legal Education – A Nineteenth Century Germany Connection*, 51 RABELS ZEITSCHRIFT 313 (1987)

science and so on, were tremendously influential within and beyond legal circles in the United States and England.[10] Not surprisingly, therefore, there are striking parallels between the debates surrounding the image of the judge in all three countries. At stake was not only the legitimacy of the jurist, judge and legal profession but the very claims of the Rule of Law itself, with the attendant power, legitimacy and privilege that it confers upon the legal community. The question of how to delineate a legitimate place for judicial review and creativity that did not traverse the sovereignty of the state and the neutrality of the legal order became even more important towards the end of the nineteenth century with the rise of the modern regulatory state in all three countries. Maintaining the boundaries that supposedly separated law from politics, law from the state, the public sphere from the private sphere undoubtedly intensified from the 1870s onwards. Ogorek's paper provides some much welcome data on the German side of the story, as well as being suggestive at the comparative level.

But if we return to the issues briefly touched upon in the opening of this paper, how might we generate from Ogorek's paper new suggestions and new questions concerning the writing of histories of legal science? It should be observed that Ogorek's paper is solely concerned with putting the record straight. Nineteenth century legal thought was no monolith; in fact it was all over the place. Thus, many jurists in this period did not imbibe the simplistic approaches usually attributed to them.

Whilst this revisionism is most welcome, both the type of argument used and the method grounding it are strikingly similar to the historiography under attack. For instance, Ogorek's story, like that of the account she critiques, is one of the growing acknowledgement of judicial and juristic creativity and their reclassification from a largely marginal and improper intervention "into the realm of necessity and rightness". And like the traditional historiography, Ogorek vacillates between an approach whereby ideas breed other ideas, that is, ideas somehow having a life of their own; and an account whereby law evolves to meet certain functional needs, albeit, ones that are largely asserted or implied from exclusively legal materials.[11] The jurist's quest for meaning, self-identity and purpose is noticeably absent. There is little here to illuminate the ways in which juristic science was employed to mystify and control. From these perspectives, the story told by Ogorek is less a story of shifting values than of shifting *strategies* to deal with the problems posed by the efforts to separate law from politics and provide a legitimate province for jurists, judges, the legal profession and the state. Whilst it is important to recognize that the legal

[10] See *id*.

[11] See, further, Gordon *supra* note 3. Also, David Sugarman and G. Rubin, *Towards a New History of Law and Material Society in England, 1750-1914* in LAW, ECONOMY AND SOCIETY, 1750-1914: ESSAYS IN THE HISTORY OF ENGLISH LAW, chapter 1 (G. Rubin and David Sugarman eds., 1984); David Sugarman, *Theory and Practice in Law and History*, in LAW, STATE AND SOCIETY, 70 (Bob Fryer *et. al.* eds., 1981).

community swam in multiple codes, the next step is to disentangle one from the other and explain why one rather than another was chosen in specific situations.[12]

Who used what discourse to whom and when? In part this would involve an analysis of the programmes (conscious and unconscious) and situations involved in moving from one discourse to another. It would also involve identifying the ways of talking they represent; and the messages (verbal and non-verbal) transmitted by legal discourse. All this is to begin to harness Ogorek's account of the plurality of legal discourse to the methods and concerns of much of the new intellectual and social history of science and language – especially its diverse efforts to explore interpretative communities, the linguistic dimensions of meaning and the structural significance of text.[13] The notion that jurists, judges and lawyers operated within the context of a collective enterprise and that, at least within their elite factions, they shared many conceptual categories, is elucidated by reference to Kuhn's work on the pre-suppositions of scientific communities encapsulated in the notion of the "paradigm".[14] It arose from a genuine attempt to describe and analyse what scientists did. And it has spawned several valuable histories of "interpretative communities" – that is, "... networks of practitioners bound together by dense webs of technical communication, and by 'traditions' 'paradigms', or 'research programs' that define reality within the field and supply practitioners with the indispensable basis of their practice",[15] which are obviously relevant to Ogorek's work. Respect for the authors' intentions and the specificity of their texts need not preclude us from also conceiving the

[12] See David Sugarman, *In the Spirit of Weber: Law, Modernity and the Peculiarities of the English*, 48 (Institute of Legal Studies, Wisconsin University, Madison, Working Paper 2: 9, 1987).

[13] The literature is enormous and what follows is a small sample of the methods and controversies that characterize this field: THE SOCIAL HISTORY OF LANGUAGE (Peter Burke and Roy Porter eds., 1987); Robert Darnton, *Intellectual and Cultural History* in THE PAST BEFORE US (Michael Kammen ed., 1980); John Dunn, *The Identity of the History of Ideas*, PHILOSOPHY, POLITICS AND SOCIETY, 4TH SERIES (Peter Laslett, W.G. Runciman and Quentin Skinner eds., 1972); Felix Gilbert, *Intellectual History: Its Aims and Methods*, 100 DAEDELUS 80 (1971); ERIC D. HIRSCH, THE AIMS OF INTERPRETATION (1976); Martin Jay, *Should Intellectual History Take a Linguistic Turn?* in MODERN EUROPEAN INTELLECTUAL HISTORY (Dominick L. LaCapra and Steven Kaplan eds., 1982); Martin Jay, *Two Cheers for Paraphrase*, 3 STANFORD LITERATURE REVIEW 47 (1986); R. Jones, *On Understanding a Sociological Classic*, 83 AMERICAN JOURNAL OF SOCIOLOGY 279 (1977); Donald Kelley, *Horizons of Intellectual History: Retrospect, Circumspect, Prospect*, JOURNAL OF THE HISTORY OF IDEAS 143 (1987); Leonard Krieger, *The Autonomy of the History of Ideas*, 24 JOURNAL OF THE HISTORY OF IDEAS 499 (1973); Dominick LaCapra, *Rethinking Intellectual History and Reading Texts*, in MODERN EUROPEAN INTELLECTUAL HISTORY (Dominick LaCapra and Steven L. Kaplan eds., 1982); MAURICE MANDELBAUM, THE HISTORY OF IDEAS, INTELLECTUAL HISTORY THE HISTORY OF PHILOSOPHY, HISTORY AND THEORY, BEIHEFT 5 (1965); Anthony Pagden, THE LANGUAGE OF POLITICAL THEORY IN EARLY MODERN EUROPE (1987); Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, 3 NEW LITERARY HISTORY 90 (1972); John Toews, *Intellectual History After the Linguistic Turn*, 60 AMERICAN HISTORICAL REVIEW 878 (1987); HAYDEN WHITE, THE CONTENT OF THE FORM (1987).

[14] THOMAS KUHN, STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970); THE ESSENTIAL TENSION (1977); see B. BARNES, T.S. KUHN AND SOCIAL SCIENCE (1981)

[15] T.L. Haskell, *Introduction* in THE AUTHORITY OF EXPERTS, xxiv (T.L. Haskell ed., 1984). See, generally, T.L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE (1977); DANIEL J. KEVLES, THE PHYSICISTS (1971)

history of ideas as a "collective activity".[16] Within the history of legal thought, what this means is that the authors of legal thought (principally judges, jurists and lawyers) should be perceived as singular and social individuals within the contexts of collective enterprises. In part, this acknowledges that comprehension, verbalisation and the articulation of expression are, to some extent, dependent upon specific social frameworks, arrangements and relationships. Thus, Ogorek's jurists shared a culture which at least in part was constituted by the common understandings and shared discourses imbibed by individual members of the juristic community.

Now, if used in a static, one-dimensional fashion, this stress upon interpretative communities, of jurists sharing a common culture or *mentalité*, can appear overly-reductive, vague and imprecise.[17] For each community is characterized by many *mentalities*; it shares a plethora of discourses. Thus, a crucial issue is that of the diverse ways in which individuals or groups utilize, appropriate and interpret the culture they share with others. Comprehension and usage will vary from individual to individual. Even within an interpretative community, what is shared is problematic, malleable and unstable.[18]

Pocock's work on the history of political thought represents a highly influential attempt to historicize Kuhn's ideas, affording greater recognition to the plurality of the discourses created and assimilated by interpretative communities.[19] For example, Pocock's celebrated notion of rival "languages" or "paradigms", when harnessed to Ogorek's pluralistic discourses, might advance a clearer picture of what the "mental furniture"[20] of German legal thought actually was. Also suggestive is Stedman Jones' analysis of the language of Chartism.[21] During the first half of the nineteenth century, Chartism was the major

[16] See Richard Ashcraft, *Political Theory and Political Action in Karl Mannhein's Thought*, 23 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 23 (1981); *On the Problem of Methodology and the Nature of Political Theory*, 3 POLITICAL THEORY 5 (1975). See, further, his splendid magnum opus, REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES OF GOVERNMENT (1986).

[17] See Robert Darnton's critique of histories of mentalites in *The History of Mentalites*, in STRUCTURE, CONSCIOUSNESS AND HISTORY, 106 (Richard .H. Brown and Stanford M. Lyman eds., 1978); Darnton, *supra* note 13. See also Dominick LaCapra, HISTORY AND CRITICISM, chapter 3 (1985).

[18] See David Sugarman, *Legal Theory and Common Law*, *supra* note 1 for an attempt to combine an interpretative communities approach with one sensitive to this process; see, especially, section V, Languages of Reciprocity and Conflict, 44-48.

[19] J.G.A. POCOCK, POLITICS, LANGUAGES AND TIME (1971); THE MACHIAVELLIAN MOVEMENT (1975); and VIRTUE, COMMERCE AND HISTORY (1985).

[20] For an excellent example of how to survey the intellectual contexts of a subject, see WILLIAM STAFFORD, SOCIALISM, RADICALISM AND NOSTALGIA: SOCIAL CRITICISM IN BRITAIN, 1775-1830, chapter 3, "Mental Furniture" (1987).

[21] G. STEDMAN JONES, LANGUAGES OF CLASS, chapter 3 (G. Stedman Jones ed., 1983); see Joan W. Scott, *On Language, Gender and Working Class History*, 31 INTERNATIONAL LABOUR AND WORKING CLASS HISTORY 1 (1987).

movement of working class protest in Britain. Now Chartism has traditionally been conflated with the rise of a new class-conscious proletariat fuelled by essentially economic grievances. Stedman Jones' study of what Chartists said has turned this conventional wisdom on its head. Chartism emerges as a broadly based *political* movement drawn from a variety of social groups. Its language was not the new language of the factory worker, but a continuation of a long established discourse through which grievances were addressed. This work, and work like it,[22] provides a valuable affirmation of the ways language itself may affect outcomes. In the context of Ogorek's paper, it sensitizes us to the ways the language of judge and jurist may have been shaped and limited by an antecedent tradition of legal science and "talking" about the theory of the judiciary as well as by the pressure of new forms of class alignment or the evolving needs of capitalism. It also illustrates the way changes in language (either retaining its old form but acquiring new meanings, or the displacement of languages) becomes an important indicator of economic, political and cultural transformations. Such an approach might help us to analyse the mental and material mechanisms by which legal culture was connected to socio-economic change.

Building on Ogorek's work, we might explore the relationship between the image of the judge and the codification movement, the rise of German nationalism and a unified state (and, therefore, a unified legal system, with a growing body of legal bureaucrats). To this one might add the peculiarities of the legal profession and university legal education in Germany. For instance, the legal profession and legal education in nineteenth century Germany were much more strictly regulated by the state than was the case in Britain and the United States. Legal education was highly regarded (though not intellectually demanding) as it was essential for the judiciary, the bar, and senior levels of the civil service.[23] The law faculties were major conduits for state servants. This close proximity to the state enhanced the prestige of the law. It also accentuated the problem of how to characterize the judiciary: could they be conceived as independent of the state and an aristocracy, who significantly administered that state?

Relevant here is the recent debate among historians of modern Germany about the peculiarities of the German path to modernity.[24] This debate has begun to consider the extent to which it is possible to attribute legal change in Wihelmine Germany to the growing power of factions within the middle classes, business interest, the legal profession or German bureaucracy. In short, historians have begun to take seriously the relationship between law and society in the imperial era. Michael John's work on the codification of

[22] See, for example, LYNN HUNT, POLITICS, CULTURE AND CLASS IN THE FRENCH REVOLUTION (1984) and WILLIAM M. REEDY, THE RISE OF MARKET CULTURE (1984).

[23] See KONRAD H. JARAUSCH, STUDENTS, SOCIETY AND POLITICS IN IMPERIAL GERMANY (1982); THE TRANSFORMATION OF HIGHER LEARNING 1860-1930 (Konrad H. Jarausch ed., 1983).

[24] See, for example, DAVID BLACKBOURN AND GEOFF ELEY, THE PECULIARITIES OF GERMAN HISTORY (1984). This work is discussed in: David Sugarman, *In the Spirit of Weber*, *supra* note 12, 52-55.

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German civil law is a case in point.[25] This work has sought to problematize the notion of a "bourgeois identity" with the desirability of a unified legal system, codification and Weberian calculability and certainly. Whilst he acknowledges that some evidence exists to sustain such an identification:

> "The major developments in nineteenth-century German private-law jurisprudence occurred in most cases as a result of the desire to produce technical advances in that jurisprudence. Whatever the consequences of those advances, they were not conceived as responses to specific social problems or needs – for example, the desire to promote a capitalist economy.
>
> This does not of course mean that ... [the 'bourgeois identity' thesis] is necessarily flawed, for what really matter are the social and economic consequences of legal developments rather than the intentions of those responsible for those developments ... [However,] it is remarkably difficult to find sustained pressure from bourgeois groups for ... [codification, a unified legal system, systematization and Weberian predictability]. That may well be largely because bourgeois interests in Germany took it for granted that the civil code would be founded on the well- established principles of the nation's jurisprudence and that pressure to secure these ends was therefore unnecessary ...
>
> By comparison with England ... it was not the strength or weakness of bourgeois interests, nor the power of capitalist social relations, but the place of the bureaucracy in relation to modern state formation which determined what type of legal system developed. Of central importance here were the German bureaucracy's claims to stand above the divisions of civil society and embody the general interest; equally significant was the monopoly enjoyed by academic jurisprudence in the training of the nineteenth-century German civil servant".[26]

Like Weber, John's work seeks to reinstate the specific nature of jurisprudential traditions and the relationship between bureaucracy and civil society alongside the dynamics of modern capitalism in any explanation of the character and development of private law in Imperial Germany.

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[25] M.F. JOHN, THE FINAL UNIFICATION OF GERMANY: POLITICS AND THE CODIFICATION OF GERMAN CIVIL LAW IN THE BÜRGERLICHES GESETZBUCH OF 1896, (Oxford University, D. Phil. thesis, 1983); *The Politics of Legal Unity in Germany, 1870-1896*, 28 HISTORICAL JOURNAL 341 (1985); *The Peculiarities of the German State: Bourgeois Law and Society in the Imperial Era*, 119 PAST AND PRESENT 105 (1988).

[26] M.F. JOHN, THE PECULIARITIES OF THE GERMAN STATE, *id.*, 121 and 127.

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The problem of judicial and juristic creativity was not a natural inevitability to be denied or liberated, but a social and cultural construct, a discourse. The history of this creativity might be enhanced, therefore, if it were written, in part, as the history of its discourses. From this perspective, the efforts of later jurists to recast the judicial role can be seen less as a break with, and more as a revamping of, the law-centered imperialism of a legal culture from which it sometimes promised rescue.

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