In January of 2017, the International Consortium of Critical Theory Programs began formally with two Mellon grants: one to Northwestern University and another to the University of California at Berkeley. Both among the Mellon officers and other scholars who were canvassed about the Consortium, there were a number of skeptical responses, some more predictable than others. Some were interested in the Consortium but did not want to work with the term “critical theory” because it has been over-institutionalized as a European mid-twentieth-century project, one bound by the intellectual response to European fascism and emergence of technologies that amplified possibilities of domination and destruction. They suggested that critical theory is hopelessly bound up with that European legacy, that it cannot be transported easily or well. So the questions we had to answer were: what is critical theory now, and what global forms does it take?

The first impulse was to identify all the places in the world where Adorno was read or appropriated for local purposes, but it quickly became obvious that such a move keeps the Frankfurt School as the locus of critical theory and identifies those foreign sites only as instances of its appropriation. Theory is only appropriated or instantiated in those global sites, but not generated, and certainly not generated in a novel relation to established critical theory. Without emerging from the Frankfurt School, critical theory nevertheless takes form in non-European intellectual legacies, through different languages and vocabularies. Even “The Frankfurt School” proves to be no steady referent; internally complex, the School harbored ongoing debates about how best to define conditions of belonging. Some of the most exemplary critical theorists have rejected the term. Jürgen Habermas argued that a form of transcendental reflection on norms and a focus on communicative practice had to replace critical theory’s reliance on the reflexive operation of a historical subject and its form of immanent critique (Habermas, 1985: 119–121). Of course, most people continue to regard Habermas as the most important living representative of the Frankfurt School, contextualizing the transcendental fresh start in the context of an evolving history of that school. That fact alone underscores that critical theory can, and does, change, and that as much as its contemporary forms differ from its previous ones, they also extend the historical life and cultural range of critical theoretical activity in the present.

As important as it is to reflect upon the Frankfurt School as the central form of critical theory in Europe and in many other regions of the world, it is equally important to allow critical theory to enter into history, as it were, and to assume a number of global forms. Otherwise, we are left with a predictable form of cultural imperialism: Mahmood Mamdani has maintained that it cannot be the case that theory is manufactured in the North and
simply applied to the South, or that the South offers nothing but illustrative examples for theoretical points articulated in the North. If we ask what form theory now takes and what makes it critical, another set of geographical and historical coordinates become necessary for situating critical theory for the present. Perhaps there is, in fact, a more important point, namely, that our understanding of space and time changes once the global framework is invoked. What is meant by “the Global South,” for instance, and what geopolitical realities does it include, marginalize, and efface? This is one question posed by the problem of the subaltern (Spivak, 1988). Locations are not the unambiguous and given spatial coordinates for theory. They emerge only on the condition that there is a map of knowledge and discourse that establishes them as such (Spivak, 1995).

So the task is neither simply to document how the term “critical” operates in various locations nor to discover the new vocabularies that do critical work at a distance from recognized forms of critical theory. Our ability to identify such vocabularies is possible not because we know in advance what is “critical” and then apply that criterion to the instance. In order to remain open to new senses of the critical, we have to allow for dissonance, even contradiction, to exist between older and newer versions of critical thought. Indeed, the term “critical” may have to be relinquished as new vocabularies emerge as a result of translation practices. The idea that critical theory can be found in other vocabularies presumes the success of a translation practice within a multilingual field to find a one-to-one correspondence between terms. But why should we presume that all critical practices are translatable into the language of “critical theory” when the global terrain of critical knowledge is one in which the limits of translatability are constantly exposed, including the translatability of “critique” itself?

This raises a crucial question: when the term “critical” or “critique” proves simply not to be translatable into another language, does that mark the limit – or the end – of critical theory itself? Or does that difficulty imply that we can no longer undertake critical theory without engaging the task of translation, working with linguistic impasse and resistance, those who are resistant to a language that is foreign and hegemonic and for whom, the possibility of new translations whose so-called inadequacy is the source of their fecundity, even their unexpected promise? There can be no global effort to connect critical theory projects without letting the term “critical theory” dissolve and transform in the course of translation itself. The project which simply asks how the Frankfurt School has been appropriated and transformed in different locations and languages keeps in place the European referent for critical theory. We had to let critical theory leave Frankfurt or perhaps to resituate and decenter Frankfurt within a global framework.

We could have sought to give a forum for critical theory from the south, accepting that “the South” is a unity of some sort with a distinct epistemological standpoint or perspective more or less purified of extra-hemispheric contaminations. There seem to be, however, too many important quarrels about the geographical presumptions made by such theories, whether they apply rightly or evenly across South America, whether they apply to Africa, to the legacy of Apartheid in Africa, to South Asia, and to the geopolitical tensions between the south and north of South America, or Africa, whether something called the South is in the process of creeping North and now includes Greece, and whether colleagues who are marginalized in the Middle East, the Balkans, Russia, and East and Southeast Asia are left out of the hemispheric metaphors that seek to correct one very dominant form of exclusion only by producing another. How do we think, for instance, about the Critical East? It will not suffice, for instance, to say that the Global South includes the Middle East or the Balkans, for instance, since those geopolitical specificities become effaced in the making of a fictional monolith called the South. Further, the history of colonization and present forms of exploitation and intervention by the United States in Latin America make it necessary to know how the north enters the south, and how the south (its labor, natural resources, and goods) enters the north or, in the case of migrants, often stopped at the border.
The hemispheres are defined as much by passages and blockages, imperial interventions, and the migratory paths of refugees and exiles. The Global South is shorthand for a wide range of efforts to challenge the Eurocentrism of critical thought in this time. Sometimes that term occults the very knowledge efforts for which it stands, especially those that emerge from indigenous populations. At the same time, hemispheric domination can hardly be doubted, given the North’s economic exploitation of the South. It remains important to track how hemispheric discourse operates, and what it foregrounds and occults in order for it to have a useful place in critical theory. One operation of contemporary critical theory is to track and evaluate those maps of knowledge that help us rethink the global forms of critical thought.

I have suggested that no single conceptual understanding of what critical theory is can serve as the criterion for identifying its various instances, since the global forms of critical theory are still in the making. But if there is no core set of presuppositions for calling something critical theory, then does an unruly nominalism then follow? Will anything that anyone claims to be critical theory qualify (or conversely, nothing anyone claims as critical theory will qualify)? We might respond to this challenge by asking, at what point and for what purpose do knowledge projects take up the mantle of critical theory? A certain commitment seems to run through the various instances, namely, that theoretical activity that seeks to respond to the historical conditions of its emergence, interdisciplinary in form, must seek both to reflect and intervene upon those conditions in the service of realizing a normative aspiration. Even this brief formulation is, of course, controversial. Can a reflection upon a historical condition intervene upon that condition, changing the condition itself? Is an interdisciplinary approach required to grasp the multidimensional aspects of the phenomenon? How do we develop a way of thinking, for instance, about domination and subjugation that does not replicate or ratify those forms of power? Further, is critical theoretical activity undertaken by a subject? Or does critique name a particular relationship between the historical conditions of thought and the forms of judgment that seek to intervene upon, and transform, historical life for the purposes of realizing political ideals such as equality, freedom, and solidarity, to whatever degree that proves possible?

These important questions cannot be adequately addressed in this chapter. I propose instead to focus on two dimensions of critique that remain actively contested during the present time: the first is that the Latourian position that claims that critique is invariably subjective and negative (and that this accounts for the “exhaustion” of critical theory in the present); the second is that critique maintains a vexed relation to both law and judgment in light of the absence or failure of legal institutions that embody ideals of justice in times of crisis. This has relevance for us during a time in which the refugee crisis raises questions about where judgment and justice are to be found—in or outside the law?

Is Critique Over?

Some contemporary critics doubt that critical theory in whatever form has the vocabulary and power to accomplish any of the aims named above. Bruno Latour, for instance, imagines that when we speak about what is “critical,” we have in mind a fully negative project, a practice of debunking and dismantling hegemonic presumptions about the world, and that critical theory intensifies skepticism and lacks transformative power and commitment to emancipatory ideals (Latour, 2004). The validity of his claim depends on a careful consideration of what “negative” means, and querying whether the negative deserves such a negative reputation. Perhaps, it is possible to agree that a “critical” approach is not content to reproduce those forms of thought that belong to modes of social life that reiterate modes of domination or subjugation. In this sense, a naturalized form of knowledge is negated in order
to open up a critical perspective on that form, and this serves as a condition of possibility of precisely those forms of intervention that Latour denies to the critical project – the history of an error inaugurated by Kant.

Latour writes:

The mistake we made, the mistake I made, was to believe that there was no efficient way to criticize matters of fact except by moving away from them and directing one’s attention toward the conditions that made them possible. But this meant accepting much too uncritically what matters of fact were. This was remaining too faithful to the unfortunate solution inherited from the philosophy of Immanuel Kant.

(Latour, 231–232)

Latour seems to understand positivism as the object of critique, and he goes on to claim that matters of fact have to be reapproached in a way that affirms their potential and agentic powers. That may well be the case. But what version of critique has he identified with Kant, and is Latour right to imagine that critical theorists have all been ensnared by a view that fails to attend to matters of fact (and recast them as matters of concern) to discern their own critical potential?

For Latour, critique is undertaken by a subject whose main aim is to distance itself from, and so to negate, the realm of what is (considered as what simply is). Negation, for Latour, cannot account for the shared agency at work between subjective and objective fields. This misunderstanding, in his view, follows from a Kantian epistemology. Moreover, it fails to understand properly that the realm of “facts” and “matters of concern” offer critical possibilities themselves. Latour’s criticism could be easily refuted by a more nuanced consideration of the relation between subject and object, and between nature and life, in German Idealism that might prove to be not so very antithetical to his own views (Hegel, 2007). Another criticism could show that Latour misunderstands negation, especially the Hegelian notion of determinate negation, as part of a philosophy of immanence. Critical theory has offered an array of positions against skepticism, and these are overlooked when Latour understands skepticism to be the signature characteristic of critical theory. Finally, the Kantian position he associates with a hyper-subjectivism that abandons the realm of objective reality is neither a fair and grounded characterization of Kant nor of critical theory’s concerns.

Yet, Latour’s errant critique provides an opportunity to approach the “critical” aspect of critical theory in contemporary terms where we can see critique emerge from situations of crisis. Of course, critical theory has drawn extensively from the work of Kant, whose critical philosophy arguably furnished the very term “critical” for modern and contemporary philosophy and theory. For Kant asked about the conditions and limits of what could be thought, and counseled that we stay within those limits in order not to become speculative or dogmatic. Kant thought less about the historical conditions and limits of thought, although that very issue became more important for those who sought to bring Kant forward into a critical theory for the present. Indeed, there are always strong historical limits to what any of us can think when we are thinking critically about our times. We can see right away an important problem: how do we come to identify the limits of what can be thought within any particular historical horizon?

To ask this last question is not to take distance from historical conditions or the phenomena that appear to us within a specific historical horizon. The demand to translate among different historical schemes is a disorienting form of engagement with no guarantee that various horizons will come together in the end. Confronting the untranslatability of key terms constitutes a contemporary crisis for theory. The task of critical theory, then, is also one of thinking between or across temporal frames (which emerge from, and configure different
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geographical locations), activating some of the problems associated with translation and untranslatability. Indeed, coming up against the limits of translatability, the epistemic limits, even the epistemic violence that occurs when we seek to override the untranslatable in the interests of imposing a single set of linguistic conventions on the field. A critical question: how do the norms that constrain the definition of critical theory in advance do violence to modes of communication and expressivity that do not or will not assimilate into its established terms? For critical theory to exist within a global framework, it has wrestle with the conditions and limits of translation. If critique interrogates the conditions under which we can know what we know, and those conditions are constituted by incommensurable or conflicting temporal and linguistic horizons, then untranslatability is one characteristic of our contemporary knowing (Apter, 2013).

And yet, a provisional generalization remains possible: the mandate to undertake an interdisciplinary and multilingual project that seeks to understand critically the historical conditions of crisis still motivates the production of critical theory within a global frame. But it was also established by those who were undertaking intellectual work both within and outside the university, those who understood that they could be, and often were, expelled from the university or never admitted, facing censorship, fighting or fleeing fascism. If critical theory is sequestered from social engagement and activism, vacating the very domain from which the political problematic emerges, it deprives itself of the capacity to trace that very emergence. This important relation between working inside and outside of the academy is linked to the problem of the border between the university and its world. Such a critical practice neither takes distance from facts nor negates their existence or importance; on the contrary, a constellation of such “facts” impresses itself upon our thinking, and so the world acts on us and exercises a historical demand on thought. Critical thought is at once immersed in matters of concern, responsive to their demand, evaluative of their damage and their potential and, in this way, both engaged with the present and oriented toward the future, formed in, by, and against the impress of the world.

Kant and Koselleck on the Tribunal

In spite of Latour’s advice to break with Kant, a return to Kant seems in order to understand how critique relates to the shaken ideals of both law and judgment, both of which are central to his work. The three Kantian critiques are ones that interrogate the conditions and limits of what we can know, but also what we can do, and that for which we may hope. Although Reinhart Koselleck (1959) mentions Kant very briefly in his Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society, he offers an important supplement, drawing attention to the “crisis” that is part of anything that is “critical” – there are also “critical” illnesses and “critical” turning points, and those are ones in which an immediate and thoughtful intervention is necessary. He proceeds by way of a conceptual history, which differs significantly from the Frankfurt School approach. And yet, both forms of inquiry seek to understand modes of thought, practices, informal and formal institutions and take as their task a thoughtful and knowledgeable response to what presents itself as most urgent, to a historical crisis that urgently makes its demand on thought. In a sense to be clarified, critique issues from within the very terms of crisis, linking the historical conditions of thought to thought itself.

Koselleck offers a genealogy of the idea of the critical worth considering as one seeks to understand how critique operates as something other than a subjective attitude in Latour’s sense. Koselleck is a historian who starts with the etymological problem of critique as it relates to crisis. Koselleck argues that critique emerges in the midst of crisis, querying how and whether forms of destruction or suffering can come to an end, and what, if anything, brings
about that resolution. Crisis is there as both a historical and conceptual condition of the critical. The ancient Greek “krino” carries several meanings, including to separate (to part or divorce), but also to choose, to judge, and to decide (Koselleck, 2006: 358). The Greek word krínein meant both “subjective critique” and “objective crisis.” It also implies the notion of measuring oneself, quarrelling, or even fighting. So in a crisis there is a sense of fighting, and this becomes important in Critique and Crisis, where the predicament of finding resolutions for religious wars is said to give rise to contemporary notions of critique and crisis. Critique does not exactly characterize a subjective decision, but denotes the critical time before a decision, the time in which a decision is taking form. Thucydides uses the term in his account of the Persian Wars to describe the acceleration of time indicating that a fight is about to conclude. A decision is about to be made, to come around, to take place (Ober, 2001). Of course, crisis also carries the sense of a “coming to a verdict” and so implies a legal procedure of some kind, if not a final legal judgment. Critique is a legal term, but the kind of decision-making process it characterizes extends beyond the juridical domain – especially when the justice cannot be found in law. 

Koselleck holds that there was no easy way of distinguishing between the subjective exercise of criticism and the objective sense of a crisis in classical Greek usage, and that the division between them is inaugurated within modernity. So perhaps Latour takes off where Koselleck ends. But that begs the question whether there is a way that critique and crisis still operate together. Can one take up a contentious point of view within a crisis, that is, without any distance from the demand to decide? What seems subjective is actually part of the ongoing debate and, so both social and political. For Koselleck, the term moves from its legal status to a broader political one, such that crisis characterizes any number of political issues that call to be decided – elections, bills, accepting legal reports, deciding matters of exile. Crisis precedes and actually helps bring about potentially harmonious conclusions. The obligations of citizens to judge were precipitated by crisis and made no sense outside those terms. In an Arendtian vein, Koselleck held that to be a citizen implies the ability to judge (Arendt, 1964: 26–27). Indeed, judgment does not belong to a court of law; the court of law, as it were, inheres in the capacity to judge; and judgment is activated by a crisis.

Koselleck suggests that the way that illnesses were diagnosed was not altogether different from how trials were run. A crisis had to be followed by a judgment (or diagnosis). When the term was transposed from legal to social and political domains, it tended to be used as “a transitional or temporal concept (Verlaufsbegriff)” – designating a time preceding decision (Koselleck, 2006: 361). In time, crisis came to be considered as an objective condition – a financial or diplomatic crisis – yet every crisis has to be determined to be one, and the determination of a crisis depends upon a very specific kind of judgment. Koselleck was interested in those determinations of judgment that an epoch has come to an end or is nearing its end. The end of one time and the beginning of another, so critical judgment emerges precisely at the moment of temporal indeterminacy when one asks, what time is it? A crisis is resolved not through the restoration of a prior order – that would be a way of denying the temporal crisis itself. Judgment is at once formed by crisis and opens up the way through.

Koselleck tracks the medical, religious, and legal vicissitudes of crisis, and mentions only briefly that crisis also characterizes the accelerated dynamism of revolutionary processes. The contemporary field of crisis theory takes the Marxian background – and the theory of ideology – as its governing framework, foregoing in large part the genealogy that Koselleck provides. Koselleck claims that Marx understood crisis as the forcible outbreak of contradictions. Koselleck opposes that view, suggesting that we might think again about how diagnosis and prophecy have worked together to structure history outside the terms of historical determinism. Of course, we could establish a prophetic tradition operating within Marxism as well, although that is hardly Koselleck’s interest. In
the end, Koselleck establishes himself as a diagnostician, a medical historian, as it were, who seeks to establish the “pathogenesis” of modernity. Whether Marx is part of the pathology or its resolution remains unresolved in his view, but he quickly leaves Marx and Marxism aside without a full consideration.

Although Koselleck’s book considers Hobbes rather than Kant as it tracks the permutations of critique, the Kantian resonance remains: critique is fundamentally bound up with law, with judgment or decision, and, perhaps most importantly, with the institution of the tribunal. Koselleck writes, “as judgment, trial and general tribunal, the word krisis was used forensically. So the term contained both pro and con as well as decision.” For Kant as well as Koselleck, critique was, from the start, less a subjective activity than a juridical scene. The modern association of critique with subjective acts, and crisis with an objective condition, analogous to a medical emergency, presents a historical problem that calls for decision, calling up a new approach to critique itself. But decision has suffered a particular historical fate. Belonging to an objective situation of political disarray where legitimate authority and good judgment seem neither actual nor potential, critique emerges in the form of both diagnosis and arbitration. Critique is not decisionist, but decision itself takes the form of judgment, which includes the diagnosis of conflict and the anticipation of its resolution.

Koselleck notes that it was Pierre Bayle who linked the concept of criticism to reason (Koselleck, 1988: 108), precipitating a displacement of sovereignty from the objective station of the King or other political authorities to the exercise of the independent mind. This would seem to confirm Latour’s suspicion that critique is a purely subjective exercise within modernity. When Koselleck does briefly refer to Kant, he understands him as leading the charge of the sovereign critics who threaten the full displacement of sovereign political authority (Koselleck, 1988: 121). Reason becomes politically consequential since the subordinate subject who exercises judgment comes to exist on the same level as the king. We can conjecture that this is one potential meaning of the Kantian claim that critique is to be understood as a revolution at the level of procedure (Kant, 2007: 25).

It seems odd to attribute such a radical position to Kant and, in the end, it proves not to be sustainable. On the one hand, Kant paid tribute to Frederick the Great in “What is Enlightenment?” and argued explicitly that philosophy depends upon the state to safeguard its freedom of thought. On the other hand, Kant argued in the 1781 preface to the *Critique of Pure Reason* that “our age is, in especial degree, the age of criticism, and to criticism everything must submit” (Kant, 2007: 9). He went on to claim that since neither religious nor political authority could exempt themselves from the demand to submit to criticism, it would seem that criticism, now figured as a tribunal, is then installed as the superior, if not ultimate, form of judgment, one that does make subjective critical judgment sovereign in relation to state power. The implication of Kant’s own thought is not one that he would pursue. It would seem that if a state failed to submit to critique, understood as a public tribunal, that state would lose its claim to legitimate authority. Arendt was perhaps more willing to pursue this strain of Kantianism than Kant himself. After all, it is Kant who wrote that the right to rebel is incoherent, since it gives the people sovereign power, and only the state can have sovereign power. Specifically, he argues that a condition in which there can be rights is one that has departed from the state of nature, and “is possible only when there is some means for individuals to be governed by the ‘general legislative will’” (Kant, 1999: 125). Any state that embodies the general legislative will be better than no state at all in his view. What he calls “a rightful condition” requires the centralizing of coercive power in a state as the only means of bringing about reciprocal coercion and obligation. The right to resist a state could only then be authorized by the state, and so is not a coherent possibility. This seems true, however, only to the extent that popular sovereignty is considered a contradiction in terms of a catachresis. If only the state can embody sovereign power, then the people, understood
as the subjects of a state, have rights only by virtue of that state, and are thus paradoxically, if not fatally, subject to the state's sovereign power when they claim their right to depart from the state itself. Of course, that contradiction dissolves once popular sovereignty proves no longer to depend upon the state from which it breaks in a revolutionary way, that is, when it breaks without the permission to break, freeing itself from that dependency and exercising the freedom to establish a new polity.

Critique for Kant is figured time and again as a tribunal that subjects the claims of authority to review. Kant describes his First Critique as answering

a call to reason...to institute a tribunal which will assure to reason its lawful claims, and dismiss all groundless pretensions, not by despotic decrees, but in accordance with its own eternal and unalterable laws. This tribunal is no other than the critique of pure reason. (Kant, 2007: 9)

Critique acts like law, even takes the place of law, reviews law, and is not exactly law. The tribunal that critique is cannot be housed “in experience” since it must belong to the faculty of reason in an a priori way, and so be something that we cannot precisely see or touch or know on the basis of the sensible world alone. And yet, it takes place in the sensible world, more specifically, in the public domain where critical adjudication is called for, and where a demonstration of truth must be provided. Critique does not take place through introspection, but through a “public” examination of the claims of religious and political authority. Those authorities “cannot claim the sincere respect which reason accords only to that which has been able to sustain the test of free and open examination” (Kant, 2007: 9).

When Kant claims that “this tribunal is nothing other than the critique of pure reason itself,” he differentiates it from “the battlefield of these endless controversies [that] is called metaphysics” (Kant, 2007: 7). An adjudicative law emerges in the midst of crisis (or battle) to put an end to the apparently ceaseless conflict. This form of judgment seeks to transform a state of war or embattlement into one of civility and reason, if not perpetual peace. For at least in the preface to the Critique of Pure Reason, Kant retells a saga of the rise and fall of monarchies, the vacillation between despotism and anarchy, and the rise of the rule of tedium in which human nature has turned against itself. And when critique emerges as a court of justice, it appears to end that sorry history – at last there is an adjudicator! However, this matter of “critique” is not a stationary court or a tribunal found in a specifiable location. Critique is also described as a kind of movement, indeed, a “path,” one that he calls the “only one left” and the most difficult task, and also, a set of burdensome questions, some of which are impossible to answer.

This consideration of Kant leads us to two separate problems. On the one hand, there is a question of whether critique is subjective or objective, or whether it actually bridges that divide in the way that Koselleck suggested. Kant’s metaphors are unstable here, for critique, he tells us, “one must look no further than oneself” and the valid judgments derived from reason. On the other hand, critique also seems to emerge in the midst of an ongoing conflictual juridical process, one that can also be regarded as a kind of historical pathology in need of a curative intervention. If Kant’s text oscillates between a subjective and objective rendition of critique, positing, on the one hand, a mind that is above the law, positing judgment as a law-governed and law-giving exercise, and, on the other hand, a public deliberation, an open examination of competing claims of sovereign authority, it is perhaps because subjective reasoning must be demonstrated, made clear to any and all who seek to verify its claims. These subjective processes assume a public dimension, and “the tribunal” is a metaphor that crosses, and links, the idea of subjective reason and public disputation.
If, however, critique is a popular activity such as public debate in which the people are free to weigh the claims of authority such as those made on behalf of religion and the state, then critique belongs not to a singular subject, but to the public. And yet, Kant will also claim that critique can never be a popular activity, even though it is in principle possible for any rational being to engage in critique (Kant, 1970: 13). Hence, though possible for every human, there will never be a majority who can do it, since the vast majority, he maintains, lack either education or capacity. Within a span of a few paragraphs, a radical democratic potential is opened up only to be swiftly closed down, providing a brief glimpse of what the public exercise of critique might be. If the law belongs to the state, then the tribunal that is critique either belongs to that state or has an autonomous status. The latter includes non-state-centered forms of adjudication – truth and reconciliation commissions or public tribunals that pursue forms of conflict resolution and seek to hold states accountable for the illegitimate use of power.

**Refugee Crisis and theSuspension of Law**

How does this Kantian discussion of critique bear on the post-Kantian forms of political crisis where modes of legal arbitration can be altogether missing or take spurious and violent forms that seek to shore up authoritarian regimes? Show trials, public prosecution of dissidents, and the increasingly normalized practice of indefinite detention raise the question of where, if anywhere, a tribunal can be found. The law no longer operates in the service of justice, but seeks to shore up the security of the state or the national territory, to exclude new migrants, to detain those who call the legitimacy of the state or its specific policies into question. Under conditions of indefinite detention, for instance, legal processes can proliferate that serve the aims of “security” and suspend the rights of due process, habeas corpus, the rules of evidence, the right to a timely trial and to a clear sentence or exoneration. Indeed, the legal processes involved in indefinite detention rarely lead to a trial, though sometimes do lead to hearings, where evidence is not disclosed and where the hearing ends with a renewed sentence for unknown reasons. Indefinite detention can be a way to contain migrant populations or to criminalize their efforts to migrate. It can also be a way of incarcerating people who are deemed to pose a security risk to the status quo of a state or an administrative power. Although the reasons for indefinite detention are different in the UK and in the occupied territories of the West Bank, the protocols are remarkably similar.

The tribunal of judgment figured by Kant’s Critique of Pure Reason has vanished in this scene, producing a contemporary crisis of considerable magnitude. The law does not arbitrate dispute; rather, legal processes become a modality of administrative power or administrative violence, forestalling potential dispute and the possibility of challenging the procedures of legal authority (Spade, 2015).

The temporality of indefinite detention is part of administrative violence, and when the temporal horizon is saturated in this way, the ideal of an operative and just tribunal appears to be an elusive ideal, if not a fiction. Indeed, fiction becomes, as a result, one of major modalities within which to think the contemporary problem of law, judgment, and justice. Kafka’s The Trial (published in 1925 but written a decade earlier) prefigured all too well the violence of the law as well as the violence of those administrative powers spawned in the ambient world of law. When one opens Kafka’s text, one expects the novel to follow a dramatic narrative sequence, moving from accusation, pretrial proceedings, trials that follow the rules of evidence, judgment, sentencing, punishment, or exoneration. And yet, one never moves past the accusation which becomes a pretrial proceeding without end. The judgment has already been made prior to any trial: punishment begins with the accusation, continues through the pretrial proceeding which itself becomes a form of indefinite detention – not within the prison wall, but within the life-world now structured by the absolute loss of the reliable tribunal.
A close reader of Kafka, Walter Benjamin writes within the world of a vanishing tribunal and the intensification of legal violence. Law is not the answer to violence if only because the law reproduces a violence of its own. Benjamin, however, made room for the extralegal and civil procedure of conflict resolution (Benjamin, 2002). Indeed, for Benjamin, questioning the framework of legal violence is surely critical, but will be regarded as “violent” by those who seek to contain and quash the threat to legal power and violence. The “technique of civil governance” is, importantly, not governed by any specific end – it resembles more closely a way of living with disputes or, rather, a way of learning to live with disputes without destruction. As a technique, it is governed neither by an instrumental logic nor by a teleological development. Ongoing, open-ended, characterized as “a pure means,” the technique of civil governance becomes another name for critique as a mode of life unregulated by law, as a form of arbitration, linguistic and extralegal.

In an arguably anarchist moment, Benjamin writes in “Critique of Violence” that “a totally nonviolent resolution of conflicts can never lead to a legal contract” since, for him, the legal contract reintroduces violence into the scene (Benjamin, 1920: 243). He later clarifies that “there is a sphere of human agreement that is nonviolent to the extent that it is wholly inaccessible to violence: the proper sphere of ‘understanding’, language [die eigentliche Sphäre der ‘Verständigung’, die Sprache]” (Benjamin, 1920: 245). The sorts of understanding that can be achieved through language, especially in the kind of understanding operative in the ongoing arbitration of conflict, constitute alternatives to legal violence. There is no sovereign tribunal to which conflicts are submitted: there is only a civil technique of governance, outside the law but not for that reason criminal, except in the eyes of a legal regime that seeks to maintain total authority over civil life.

For Benjamin, dispute and conflict are part of civil life. Perhaps there is no co-inhabited life without conflict and agonism and, if so, the question becomes: is it possible to cultivate an extralegal technique that accepts and works with conflict in an ongoing way, not to eliminate conflict, but rather to seek a form of resolution in a form of life? Of course, I take the liberty of elaborating some possible consequences of his view that he himself would not have pursued. The longing for a legal tribunal that would pronounce upon justice is coupled with the mourning over the impossibility of any such tribunal materializing in time and space. Benjamin read Kafka as elaborating the theological and political sphere of the deus absconditus. Critique would then be the site of both longing and mourning, irreducible to law, since the violence of law sets it infinitely apart from the ideal of justice. Critique, then, is bound up with the promise and failure of law, operating in its wake (Derrida, 2002).

The refugee crisis is a crisis for the refugee, but also for the xenophobe, and for the law. Indefinite detention has become a norm of the security state, a form of restraining populations in transit who are perceived to pose a security risk of some kind. The transfer of large numbers of people without clear legal pathways and with suspended or destroyed citizenship defines indefinite detention. The practice is often characterized by the absence of a clear allegation, the suspension of due process, rules of evidence, and the non-arrival of a trial. In the United States, anyone can now be immediately and indefinitely detained on the grounds that an allegation has been made that the person is a “suspected terrorist” or “belligerent.” This form of indefinite detention (without charge or trial) presumes potential criminality. But with the legal condition of refugees fleeing war and destitution in Syria or North Africa, the problem of “criminal” status emerges very differently. If people cross over the sea without clear legal passage, they may be charged with attempting to enter a country illegally. Yet those in transit are seeking to invoke internationally established norms of safe passage and a consideration of an asylum appeal. There is thus a crisis for law itself, given that an act that appears as a criminal infraction under a national legal code can appear as an entitlement and a right within the framework of international law. The crisis in this sense consists in the fact that
there is no ultimate legal tribunal or arbiter to decide the case and due process has been abandoned. If international law is set up to negotiate conflicts among local, regional, and national legal frameworks, what happens when international law comes into conflict with national law? No meta-tribunal exists for that adjudication. International law was supposed to be that tribunal, but is now party to the case.

Various countries have invoked national autonomy in order to break with the laws of asylum or the laws governing the laws of the sea, especially those that obligate ships to rescue people in emergency situations regardless of where they are from. Although none of those countries have made an explicit sovereign decision to kill, they have, through their invocation of national sovereignty, abandoned petitioning populations to indefinite detention or to death, disavowing the international covenants to which they are signatories. This tactical invocation of sovereignty facilitates a form of death dealing aided and abetted by those who make boats for refugees that are meant to break apart and spill people into the sea where their only options are death or rescue.

The tactical suspension of the obligations of international and regional covenants to refuse migration on grounds both demographic – or racial – and economic gives us one way to see how the legal terrain is itself a field of conflict with potentially fatal consequences. No binding power gathers and enforces those sovereign signatures on any of those treaties; the disparate sovereign states have agreed to provide oversight and yet they are the ones in need of oversight; their rogue operations highlight a loosely connected set of laws with no sovereign center; a state can shift from laws to regulations, from international to national frameworks, to regional agreements and back again; shifting the jurisdiction (national or international) under which it acts at any given time gives it the power to act as it pleases, bound by no one regulation or law.

Despite its complex genealogy, critique has always been bound up with crisis and with law, specifically a crisis in law that prompts the question about what sort of judgment is available when law proves to be unjust (Goodrich, 2008). Kant’s suggestion that critical judgment operates as a tribunal in the mind or perhaps in the public sphere, or the mind that demonstrates its thinking in public terms (the publication of a book would be one such demonstration) suggests that a single and ultimate tribunal has gone missing. The historical demand for the tribunal makes itself known in forms of civil governance and resistance that often seek to carry the ideal of justice that laws fail to embody. A tribunal ideally hears all sides of a conflict. Critique, emerging in its shadow and embodying its function, emerges the midst of a historical crisis where dispute and conflict prevail and where the actual or potential outbreak of violence has to be arbitrated. This is a demand for judgment – and justice – in the midst of a historical crisis or conflict whose end cannot be easily predicted (Arendt, 2003).

For Benjamin, an extralegal mode of understanding is a technique for conducting common life that may do without violence, but not without conflict. The communities that seek to provide rescue for refugees at sea undertake a critical practice, responding to a historical demand when states fail to do so. Critique is politically obligatory during times when violence assumes sovereign, legal, and administrative forms, and where “judgment” is indefinitely postponed or obfuscated or becomes itself a form of legal violence.

Those refugees and advocates who demand rights of passage, humane treatment, and swift review of petitions all express forms of judgment that animate international law at the various sites of its abandonment. When those who honor international law by rescuing refugees in crisis are charged with “the crime of solidarity,” then the legal system that condones such a move engages in criminal activity. The meanings of law and criminality have become reversed, and that crisis calls forth critique. Here critique marks the failure and violence of law, constituting a call for an operation of justice that cannot be reduced to a merely subjective exercise. Civil governance is an open-ended process, according to Benjamin, where we might understand justice as a living pursuit in the midst of crisis and conflict, anticipating their resolution. Critical
thought names the juncture of the crisis and its intervention, figuring that intervention as a rearticulation of the condition where crisis gives way to critique.

It is difficult to know and oppose violence when its workings go unnamed or when those modes of sovereignty and law that have been charged with the arbitration of conflict now conduct forms of death-dealing and dispossession. Critique emerges when the reversal and its consequences are grasped, when the crisis is registered, in responsive judgment and the resistance to normalization. There the demand for justice animates and embodies the abandoned ideal, and where public modes of solidarity find ways to animate anew a sense of justice in the abandoned law by giving it an extralegal life.

References


Further Reading