

Deep Cuts: Four Critiques of Legal Ideology

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This Article begins an effort to rekindle the intellectual tradition of critical legal theory. The context for the project is significant. On the one hand is the grip of a social crisis, the contours of which continue to confound the commentariat. Racism, xenophobia, gendered violence, migration and nation, climate change, health pandemics, political corruption. The parade is as intimidating as it is spectacular. On the other hand, the very tools of criticism we depend upon in identifying these characters in the parade, much less the spectacle of the parade itself, are themselves in crisis. There is, in a word, a crisis for critique itself. The working assumption of this Article is that these crises—crises in society and the crises of critique—are not unrelated. It is in this context that we believe in the need to revitalize the tools of critical legal studies, an intellectual songbook from the 1970s that deserves a 21st century reboot.

The argument is as follows. Among the crises of our time is the sense that law is either too marginal or too political to be of any use in the work for social justice—social justice rendered in any one of the crises mentioned above. We all know only too well, according to this sensibility, how to criticize judges, lawyers, and the academic elite. And these criticisms, of which everyone so easily partakes, all seem to bottom out in the same thing: law is either corrupt or ineffective. This Article suggests that this defeatist sensibility, and its affiliation with a popularized notion of legal criticism, is itself a legal ideology. Strangely enough, this ideology of defeat is the result of decades worth of ideology-critique that have now calcified into a block on our ability to see beyond them. That is, over the course of the twentieth century there emerged four traditions for criticizing the ideology of law, and today, these four traditions exhaust our collective abilities to formulate

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novel critical approaches. This Article names and evaluates these four critiques of legal ideology, but not with an eye toward rehabilitation. Rather, it is our hope that in making explicit our traditions of ideology-critique in law, we put ourselves in a better position for the next step: to imagine what the critique of legal ideology might yet become.

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INTRODUCTION

In these first decades of the Twenty-First century, crisis is the new normal: crises of community brought on by the continuing resurgence of racism, sexism, and xenophobia; environmental crises brought on by global climate change; global health and food crises brought on by the profound

distributional imbalances, dislocations, and vulnerabilities created by the capitalist Anthropocene; political crises of rising authoritarianism abroad combined with the deep polarization and loss of faith in the traditional democratic institutions at home; social crises re-emerging from the legacies of slavery, colonization, imperialism, patriarchy, and heteronormativity; educational crises borne out of the ever-deepening commodification of learning; financial crises borne out of the structural inadequacies of institutional oversight and regulatory procedures; employment crises resulting from system-wide disparities of wealth, equality, and opportunity; constitutional crises wrought by the rise of political opportunism and the erosion of the rule of law; crises of meaning in the ascendance of the so-called “thought leader”; crises of civic culture, public discourse, and “post-truth” sensibilities; crises of civic thought, public intellectualism, and the devaluation of the humanities.¹

If we are uncertain about the causes of these crises, or the accelerants of their proliferation, what is clear is their urgency. Everywhere it seems what was recently solid is melting, both literally and figuratively.² In many ways, if the present is unnerving, the future is downright ominous.³

In the midst of these crises, multiple questions arise: What stymies our collective efforts? What arrests our imaginative potential for social change? Is it enough to wear a Black Lives Matter t-shirt, join a Facebook group, or plant a sign about equality in your front yard? If crisis is everywhere, what might account for this prevalent sense of malaise, exhaustion, and immobilization, of impotence in the face of a world run riot? In the hinterlands of the internet everyone seems to find a license to criticize. In the low stakes of social media discourse, users enjoy this license to voice their views, to slash and burn, to “trigger” and “troll,” show truth to power. On the face of it, are these demotic riches really a good thing? Or is it, ultimately, unhelpful distraction? There is no denying that this ongoing explosion of new discourses—new voices, new viewpoints, new perspectives—has drummed up a background hum of false equivalences. There is also no denying that, for so many of us, media saturation leads to paralysis of judgment, or the curious reverse, judgement without any reflection at all. All out criticism via an absence of thought. Either we cannot decide, or we have already decided.⁴

1. See generally, Elizabeth Anker & Justin Desautels-Stein, *Introduction to the Symposium: The Stakes for Critical Legal Theory*, 92 U. COLO. L. REV. (2021); PIERRE SCHLAG, *AMERICAN ABSURD: A WORK OF FICTION* (2016); Akbar Rasulov, *Introduction: The Discipline of International Economic Law at a Crossroads*, in *NEW VOICES AND NEW PERSPECTIVES IN INTERNATIONAL ECONOMIC LAW* 1, 2-6 (John Haskell & Akbar Rasulov eds. 2020).

2. With the added layer of climate change, the reference is to Marshall Berman’s classic, *ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY* (1981).

3. Or maybe this is just another trope. See COREY ROBIN, *FEAR: THE HISTORY OF A POLITICAL IDEA* (2006).

4. See, e.g., WENDY BROWN, PETER GORDON, AND MAX PENSKY, *THREE INQUIRIES IN CRITICAL*

Indeed, this combination of “critical license” with media saturation churns out a popular skepticism always on the ready to “debunk,” hoping to “own” some opponent on the field of online sparring. But debunk what, exactly, and own who? And by what means? As many suspect, this tendency to wage war under the cover of “criticism” is all too often more illusory than real. As a cursory tour through the networks of the media’s culture industry attests, political, cultural, identitarian, and economic polarizations demand loyalty first and last.⁵ The debunking, the constant criticizing, the shrillness of public debate—all of it suggests the wholesale lack of anything resembling a clear and coherent understanding of what genuine criticism should be about.⁶ If information technology freely distributes a license to critique, and if the polarizing tendencies of racism, sexism, and nationalism are only raging, it should be clear enough that something has gone wrong.⁷ The license to critique is making things worse, whereas one would think that such a license would put everyone on alert about the dubiousness of truth-claims conveyed in the machineries of social media. And yet, social media has become the oracle of the age.⁸

All of this suggests not just a certain sense of doubt about the ultimate sincerity of intention behind all the different discursive exercises that we wage in the name of “criticism.” It also raises the possibility that our very idea of criticism itself no longer matches the reality of its practice.⁹ When information technology freely distributes the license to critique, but racism, sexism, and nationalism remain on the rise, something is lost in translation. Our capacity for public discourse has been profoundly revolutionized by new social media technologies, but the cultural reflexes we depend upon for their use are lagging behind. Perhaps the root of the problem lies with our enthusiasm for new communicative technologies. Or, it is the culture of

THEORY (2018); COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO DONALD TRUMP* (2017).

5. This combination of polarization, demands for loyalty, and the tendency to assume that since “everything bad” – racism, right-wing populism, fascist authoritarianism, xenophobia, trade protectionism, climate change denialism, the disregard for human rights – hangs together, the answer to it should also take a similarly “monolithic” form, seems to be characteristic of the contemporary historical conjuncture not only in North America but also in Europe. On the shielding effect this narrative creates and the politics that it enables, see further Rasulov, *supra* note 1, at 3-6.

6. For one view of the cathedral, see TERRY EAGLETON, *AFTER THEORY* (2003).

7. On the “crisis of identity,” see, e.g., JUDITH BUTLER, *SENSES OF THE SUBJECT* (2015); KWAME ANTHONY APPIAH, *LINES OF DESCENT: W. E. B. DUBOIS AND THE EMERGENCE OF IDENTITY* (2014); KIMBERLE CRENSHAW, *ON INTERSECTIONALITY: ESSENTIAL WRITINGS* (2020); ELLA SHOHAT, *UNTHINKING EUROCENTRISM: MULTICULTURALISM AND THE MEDIA* (2014); GLEN COULTHARD, *RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION* (2014); SARAH AHMED, *LIVING A FEMINIST LIFE* (2017); AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* (2014).

8. SAFIYA NOBLE, *THE INTERSECTION INTERNET: RACE, SEX, AND CULTURE ONLINE* (2016); ANDREW FEENBERG, *TECHNOSYSTEM: THE SOCIAL LIFE OF REASON* (2017); N. KATHERINE HAYLES, *HOW WE THINK: DIGITAL MEDIA AND CONTEMPORARY TECHNOGENESIS* (2012); JODI DEAN, *PUBLICITY’S SECRET: HOW TECHOCULTURE CAPITALIZES ON DEMOCRACY* (2002).

9. See EAGLETON, *supra* note 6.

criticism and our enthusiasm for the critical impulse that are making things worse.

As “unprecedented” as these concerns may feel, a century ago a very similar feeling of collective unease had caught the world by the throat. These were the interwar years, a time of collapse and rising terror, and the moment of what we know today as “critical theory” that emerged in pre-Nazi Frankfurt, Germany.¹⁰ It was also a moment in which a shadow was casting itself upon a modernizing age of technological, economic, and artistic efflorescence. Steeped in the relative affluence of the Weimar Republic, those scholars affiliated with the beginnings of Germany’s “Frankfurt School” saw the writing on the wall.¹¹ Busily deciphering its language, querying the odd sense in which the greater culture was unmoved, and demanding an interrogation of what was passing for “just the ways things were,” these theorists developed the first rounds of critical theory in a time of unmistakable “crisis.” Standing on the shoulders of Friedrich Nietzsche, Karl Marx, and Sigmund Freud, they studied how the status quo seemed to freeze in place, disabling an experimentalism of institutional imagination. Moving from Marx’s groundwork, this first round of critical theory often took “ideology” as the target. These early thinkers asked, what do we take for granted in our social, political, economic, and legal arrangements? What do we assume to be “natural” or “necessary” that in fact is contingent and might be otherwise? From the start, critical theory emerged in a crucible of crisis, aiming to shift our appreciations of the problems in the present—and even what we can see as a problem—so that we could have better insight both into the crises we face, and toward the path to transforming our society for the better.

Over time, a concern with ideology emerged in the work of legal theorists as well, though it wasn’t until the 1970s that the Frankfurt School’s influence had an effect.¹² And it is the story of how the critique of legal ideology developed and stalled that is the focus of this Article. Our claim is that the project of reimagining critical legal theory must begin with an understanding of how the critique of legal ideology has become increasingly deradicalized. Much of the problem, however, both for the broader spate of critical theory and for the more narrow terrain of critical *legal* theory, is that by the 1970s—just as critical theory and legal theory were making their introductions—the domestication and popularization of critique was

10. FREDRIC JAMESON, *MARXISM AND FORM: TWENTIETH CENTURY DIALECTICAL THEORIES OF LITERATURE* (1974); MARTIN JAY, *THE DIALECTICAL IMAGINATION* (1996); CATHERINE LIU, *AMERICAN IDYLL: ACADEMIC ANTIELITISM AS CULTURAL CRITIQUE* (2011); ANDREW FEENBERG, *THE PHILOSOPHY OF PRACTICE: MARX, LUKACS, AND THE FRANKFURT SCHOOL* (2014).

11. See, e.g., MARTIN JAY, *SPLINTERS IN YOUR EYE: ESSAYS ON THE FRANKFURT SCHOOL* (2020); *THE ROUTLEDGE COMPANION TO THE FRANKFURT SCHOOL* (Peter Gordon et al., eds. 2018).

12. Among the first of such studies was DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1975).

already well under way.

The interwar years reflected a moment of openness with respect to social transformation that would close with the coming of the Cold War.¹³ Of course, “openness” shouldn’t be confused for “goodness.” After the Great Depression, and before the New Deal apparatus went mainstream, there was considerable leeway in the public imagination for how to arrange the political, economic, and social affairs of both the national and international systems. The ideological “freeze” on the status quo, we might say, was in flux. Indeed, the idea of an American socialist movement was hardly the stuff of science fiction. The Bolshevik revolution of 1917 might not have been the template for social change in the West, but that was precisely the question: not whether social change, but what kind?¹⁴ That said, this openness with respect to how political economy might be organized was partnered with a totalitarian and deeply racist view of immigration and national community. Here was the rise of eugenics and a racialized right of sovereigns to exclude foreigners from the border.¹⁵

As the Cold War started to take shape, and however meaningful this “up-for-grabs” sensibility really was, it was overtaken by a new consensus about political economy, race and xenophobia, and the rule of law.¹⁶ This was the consolidation of an appreciation for heavy governmental regulation mixed with market competition, a suite of civil rights laws aimed at the elimination of racial discrimination both at home, at the border, and in international relations, and a sociological approach to law and legal thought.¹⁷ The

13. Sam Moyn’s treatment of Judith Shklar’s place in the political imagination is emblematic of this narrative. See Samuel Moyn, *Before-and Beyond-the Liberalism of Fear*, in BETWEEN UTOPIANISM AND REALISM: THE POLITICAL THOUGHT OF JUDITH SHKLAR (Ashendum and Hess, eds., 2020). See generally, AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2014); MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920* (2003); DANIEL YERGIN AND JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* (2002).

14. For some typical illustrations of the tone of the debate during the preceding decades, see, e.g., DANIEL DE LEON, *SOCIALIST RECONSTRUCTION OF SOCIETY: THE INDUSTRIAL VOTE* (1905); Thorstein Veblen, *The Socialist Economics of Karl Marx and His Followers*, 20 Q. J. ECON. 575 (1906); John R. Commons, *Is Class Conflict in America Growing and Is It Inevitable?*, 13 AMER. J. SOC’Y 756 (1908). For some recent takes on the history of American socialism in the early twentieth century, see also Elizabeth McKillen, *The Socialist Party of America, 1900-1929*, OXFORD RESEARCH ENCYCLOPAEDIA ON AMERICAN HISTORY (2017), <https://oxfordre.com/americanhistory>; Paul Heideman, *The Rise and Fall of the Socialist Party of America*, JACOBIN, Feb. 20, 2017, <https://jacobinmag.com/2017/02/rise-and-fall-socialist-party-of-america>.

15. See, e.g., KUNAL PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600-2000* (2015); MAI NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2014); ADAM MCKEOWN, *MELANCHOLY ORDER: ASIAN MIGRATION AND THE GLOBALIZATION OF BORDERS* (2011).

16. For discussion, see Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis*, 129 YALE L. J. 1784 (2020).

17. See JUSTIN DESAUTELS-STEIN, *THE JURISPRUDENCE OF STYLE: A STRUCTURALIST HISTORY OF AMERICAN PRAGMATISM AND LIBERAL LEGAL THOUGHT* (2018); JUSTIN DESAUTELS-STEIN, *THE RULE OF RACIAL IDEOLOGY: INTERNATIONAL LAW, BORDERS, AND THE RIGHT TO EXCLUDE* (forthcoming, 2022).

proponents of this view saw it as a means for closing down the frightening alternatives of fascism and socialism, and staking a position against the Soviet Union and for the rest of the world. In Europe, this quest for the middle way gave rise to a variety of different models and paradigms, from the German *Soziale Marktwirtschaft* (social market economy) to the Franco-Italian Eurocommunism.¹⁸ In the North American context, the logic of this political project came to be seen, more generally, as a form of “social-democratic compromise.” The essential idea, as Roberto Unger writes, was to replace revolution with management and reorganization with redistribution:

The social-democratic compromise implied [the] renunciation . . . of conflict and controversy. National governments won the power and the authority to manage the economy countercyclically, to compensate for the unequalizing effects of economic growth through tax-and-transfer, and to take those investment initiatives that seemed necessary to satisfy the requirements for the profitability of private firms. In return, however, they had to abandon the threat radically to reorganize the system of production and exchange and thereby reshape the primary distribution of wealth and income in society.¹⁹

The Cold War played a crucial role in stabilizing the capitalist system of the North Atlantic region and, through that, the broader political and institutional landscape from which concepts like social democracy and social market economy derived their cultural significance and momentum. Once the Cold War ended, the essential dynamics that sustained this implicit cultural and political equilibrium dissipated. Questions, which for several generations were closed down, began a process of anthesis. Opinions and views once dismissed as indefensible and beyond the pale crept back into the space of the public debate.

Among the first blossoming questions, starting already from the early 1990s, was whether the social-democratic compromise of the postwar era had outlived its usefulness. The initial response, favored by the political and cultural elites on both sides of the Atlantic, followed from Anthony Giddens’ highly influential thesis that came to be known as the Third Way.²⁰ In the US, the new paradigm found its main expression in Bill Clinton’s “New Democrats.” In the UK, it gave rise to Tony Blair’s “New Labour.” In Germany, it took the form of Gerhard Schroeder’s “Die Neue Mitte.” The general pattern was largely the same: sweeping deregulation, a rollback of the welfare state, promotion of “multicultural citizenship,” liberal

18. For background, see GERMANY’S SOCIAL MARKET ECONOMY: ORIGINS AND EVOLUTION (Alan Peacock & Hans Willgerodt eds., 1989); QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 189-191 (2018); Rick Simon, *Eurocommunism*, in TWENTIETH-CENTURY MARXISM: A GLOBAL INTRODUCTION 81-94 (Daryl Glaser & David M. Walker eds., 2007).

19. ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 35 (1996).

20. See ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY (1998).

egalitarianism, and promotion of judicial review and human rights formalism.²¹

A decade later the atmosphere of enthusiasm that accompanied the arrival of the Third Way had largely dissolved. Some of it had something to do with 9/11 and the “war on terror” that followed it,²² but in the main, the fact was that the new socio-political equilibrium promised by the Third Way camp had never quite materialized. What did materialize—a “hot, flat, and crowded”²³ “world on fire”²⁴ of “golden straitjackets”²⁵ and “new imperialisms”²⁶—was far less inclusive than the old model of social democracy it replaced, a realization that became increasingly obvious in the aftermath of the 2008-09 global economic crisis and the resulting rise of the politics of anti-elitist mistrust, populism, and polarization.

What came next was unsurprising. Where the foundations of social consensus are lacking and the institutional forms designed to induce and sustain it weaken, the climate becomes ripe for nostalgia. The litany of books and articles launched in the last few years suggests that, at least in the minds of the cultural, political, and legal commentariat, there seems little doubt that while the challenges are legion, the answer is always a return to the “old normal,” i.e., a resurrection of the social-democratic compromise.²⁷ What underpins this nostalgic narrative is a highly selective reading of history, and the rapid intensification of tone triggered in the last few years by the ascendancy of rightwing populist governments across the North Atlantic region, with the Trump administration at the proverbial forefront, has only made the cherry-picking all the worse.

Convictions fueling this yearning for a return to “normalcy” are grounded in an uncritical acceptance about how good the “old normal” really was. But more, and as Jedidiah Britton-Purdy correctly implies, there is the assumption that a return to the old norms and the socio-political consensuses they captured is not only historically possible but also politically sufficient.²⁸ There is a certain touch of magical thinking about

21. For a general characterization of the cultural and economic politics and the political and legal thought of this period, see NINA ESPERANZE SERRIANNE, *AMERICA IN THE NINETIES* (2015); ALWYN TURNER, *A CLASSLESS SOCIETY: BRITAIN IN THE 1990S* (2013); DANIEL T. RODGERS, *AGE OF FRACTURE* 247-255 (2011); Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19, 63-73 (David Trubek & Alvaro Santos eds., 2006).

22. See RODGERS, *supra* note 21, at 256-271.

23. See THOMAS L. FRIEDMAN, *HOT, FLAT, AND CROWDED* (2008).

24. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003).

25. See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* 101-111 (1999).

26. See DAVID HARVEY, *THE NEW IMPERIALISM* (2003).

27. For an illustrative treatment, see *CONSTITUTIONAL DEMOCRACY IN CRISIS?* (Mark Graber, Sanford Levinson, and Mark Tushnet eds., 2018).

28. Jedidiah Britton-Purdy, *Normcore*, *DISSENT* (Summer 2018),

<https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy>.

this kind of “normcore” utopianism, and it has a clearly discernible demobilizing effect. As Aziz Rana noted before Trump’s loss to Biden, it isn’t enough to think that by cancelling Trump that we will put an end to a culture of disregard for the established taboos and principles of traditional political intercourse. Indeed, if we fool ourselves into thinking that a switching out of our elected officials will somehow restore balance to American political life, the more oblivious we are about what such a “restoration” could even mean. The “political balance” of the old normal is itself an absolutely integral element of those historical dynamics that keep “the country . . . trapped in [a spiral] of social crisis and popular disaffection.”²⁹

The conclusion seems clear enough. What we need less of is reactionary and utopian fantasizing about rolling history back or making anything “great again,” and more of a radical politics that can push beyond the horizons of the social-democratic compromise.³⁰ And yet, as we stated at the outset, just when we need them the most the resources available for this sort of critical engagement are largely unavailable.³¹ Why? To return to the interwar moment of critical theory, that tradition that had begun with the Frankfurt School gradually spread throughout the humanities, ranging from the law school to the music school and everywhere in between, eventually

29. Aziz Rana & Jedidiah Britton-Purdy, *We Need an Insurgent Mass Movement*, DISSENT (Winter 2020),

<https://www.dissentmagazine.org/article/we-need-an-insurgent-mass-movement>.

30. See, e.g., JODI DEAN, *COMRADE* (2019); BERNARD HARCOURT, *CRITIQUE AND PRAXIS* (2020).

31. Numerous thinkers, following from and working within the critical tradition, have recognized the odd alliance between a deadened critique and a mode of popular criticism that is everywhere. Thus the need to reconceive the tools of critical theory for contemporary times of crisis. Bernard Stiegler, for example, has called for a new form of critique apposite the crisis of contemporary industrial society. For Stiegler, this society is characterized by a lack of belief in the future, a lack fostered in academic settings by the anti-foundational theory of the 1970s. See *FOR A NEW CRITIQUE OF POLITICAL ECONOMY* (trans. Daniel Ross, 2010); *TAKING CARE OF YOUTH AND THE GENERATIONS* (trans. Stephen Barker, 2010). Bruno Latour has argued that critical theory “has run out of steam” and that, rather than facts, science and other discourses must address the concerns through which facts become facts. Bruno Latour, *Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern*, 30 *CRITICAL INQUIRY* 225 (2004). Marjorie Levinson has questioned the utility of critique after its run with hegemony. Marjorie Levinson, *Posthumous Critique*, in *IN NEAR RUINS: CULTURAL THEORY AT THE END OF THE CENTURY* (Nicholas B. Dirks ed., 1998). For Stiegler, Latour, and Levinson, the problem with critique is not that it fails to undermine assumptions, but that it worked so well. Along different lines, scholars such as Barbara Smith and Barbara Christian argued that conventional forms of critical theory fundamentally excluded nonwhite voices and identities and, moreover, failed as methodologies through which to read the work of Black women, lesbians, and other marginalized identities for the fact that its starting assumptions are based in European modernism. Barbara Smith, *Toward a Black feminist criticism*, in *THE RADICAL TEACHER* (1978); Barbara Christian, *The Race for Theory*, 6 *CULTURAL CRITIQUE* 51 (1987). Henry Louis Gates, Jr., Paul Gilroy, and Homi Bhabha acknowledged such challenges even as they sought to inflect theory with ideas derived from traditions outside of its purview. How can critique adapt to accommodate such voices in an age when the legacies of institutional racism and misogyny, not to mention settler colonialism, manifest in nearly every cultural and political situation—from the films and books we consume to our changing climate and the rights of underdeveloped nations to modernize? Henry Louis Gates, Jr., *Talking Black: Critical Signs of the Times*, 69 *VILLAGE VOICE LIT. SUPP.* 20 (1988); PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993); HOMI BHABHA, *THE LOCATION OF CULTURE* (2012).

absorbed in a series of various “postmodernisms.” The situation for critical theory became one in which, for whatever its original core might have been, its very name became so popularized as to warrant a *right* to criticize without any reservation, remorse, or reflection.³² One possible cure, of course, is the nostalgic one: reaching back for the “old normal” of what critical theory was—and what it stood for—in the confrontation with early-twentieth-century fascism, and trying to replace the vulgar concept of criticism today with the “true” critical theory of the Frankfurt School.

Whatever may be the value of such an approach, this is not our prescription. The tools of critical theory are far from spent. But rather than advocating a “simple” return to what in effect is a wholly European and mostly male body of knowledge, our hope for the future of the critical tradition is vastly more capacious and ambitious: reaching beyond the anglosphere, beyond the old traditions of the Enlightenment, of existentialism, of classical political economy, we envision the renewal of critical theory in the service of relieving human suffering, fostering meaningful human community and collaboration, celebrating the richness of human complexity and power, remembering the sovereignty of the human spirit and the temporality of social crisis. To assist in the work of social transformation, the very idea of critique must eventually transform itself, becoming non-Western, non-colonial, non-masculine.³³ If the twinned situation of society *and* critique is one of crisis, the task for the critical theory of today is to become less of what it has been, and more of what it needs to be: truly human.³⁴

The task is daunting, to be sure. And yet, however much there may be to fear in the crises that beset our contemporary world, we know just as well that the human being is resourceful, thoughtful, indefatigable. There is always more in us, as Unger likes to say, than there is in the crisis confronting us. And as Marx famously put it, “Mankind inevitably sets itself only such tasks as it is able to solve”: whatever problems arise before it arise “only when the material conditions for [their] solution are already present or [are] in the course of formation.”³⁵ It is in the effort to reawaken our

32. See, e.g., TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNISM* (1996); PERRY ANDERSON, *THE ORIGINS OF POSTMODERNITY* (1988); FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1992).

33. Perhaps this leads to works like ANN LAURA STOLER, *DURESS: IMPERIAL DURABILITIES IN OUR TIMES* (2016); RITA FELSKI, *THE LIMITS OF CRITIQUE* (2015); ELIZABETH ANKER AND RITA FELSKI, *CRITIQUE AND POST-CRITIQUE* (2017). Or, perhaps, it leads elsewhere, into terrains like those travelled by VEENA DAS, *LIFE AND WORDS: VIOLENCE AND THE DESCENT INTO THE ORDINARY* (2006); AIJAZ AHMAD, *IN THEORY* (2008); Inderpal Grewal, *SAVING THE SECURITY STATE: EXCEPTIONAL CITIZENS IN TWENTY-FIRST AMERICA* (2017); NAHUM DIMITRI CHANDLER, *X: THE PROBLEM OF THE NEGRO AS A PROBLEM FOR THOUGHT* (2013); OYÉRÓNKÉ OYÉWÚMÍ, *THE INVENTION OF WOMEN: MAKING AN AFRICAN SENSE OF WESTERN GENDER DISCOURSES* (1997).

34. This vision of the human at the center of critical theory draws most explicitly on the work of Roberto Unger.

35. KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* 21 (Progress Publishers

ability to envision social transformation that we ask, how can critical theory enable a more emancipatory and revolutionary approach to the contemporary crises that beset us?

Our intuition is that the place to start answering this question lies not at the end, but at the beginning of this problematic. And while the particular field of law has never been at the forefront of critical theory more generally, we believe that this might very well have been a part of the problem. In this respect, in the rehabilitation of critical *legal* theory, there is much to be done. That said, we should emphasize at the outset that this Article does not answer questions about what critical legal theory, or critical theory writ large, ought to become, how it can become more emancipatory, more liberating, more human. And given the character of the pages you have just finished reading, no doubt such absences are likely to raise some eyebrows. But our sense is that, before we can offer an adequate prescription for how critical legal theory might arise in a time of global crisis, we need a much better understanding of what critical legal theory *has been*. And this is not for reasons of historical interest—far more importantly, it is because the historical development of the critique of legal ideology may very well have helped to insulate law from critical reimagination.

It is here that this Article makes its intervention, in the effort to expose what we have for a hundred years taken to be *legal ideology*, and the historical modes for its critique. This first move in the project to reimagine critical legal theory takes the form of the question: what is it that helps us to make sense of *Law*, to conceptualize our views of the legal world, to make the picture we have of it cohere? For it is this “thing” which ultimately colors our perceptions of what might or might not count as a crisis in the first place, how big or deep this crisis is, and what role, if any, we can play in resolving it. As we alluded to earlier, that “thing” in the language of early critical theory was ideology, but now in this context, the ideology of law.³⁶ In most of the late twentieth century jurisprudential debates, the concept and language of “legal ideology” found themselves increasingly repressed and uninvited.

In launching a program of reinventing critical legal theory for the 21st century, we want to break this trend, asking what the concept of legal ideology can mean, what functions it can be asked to perform, what role it can be expected to play in the crises of our times. To be sure, this focus on the ideology of law will strike some of our readers as exactly the sort of nostalgia that we find to be so counter-productive. Our answer is that in mapping out the main traditions of ideology-critique in Anglo-American legal thought that emerged during the years of the social-democratic

1977) (1859).

36. The last substantial treatment of legal ideology, in this particular sense, is probably DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE]* (1998).

compromise, we place ourselves in a good position not only for a broader critical stock-taking exercise, but also for the staging of any number of programmatic proposals for what critical legal theory and legal ideology might yet become. The different traditions of legal thought that we identify below will not always look familiar. One will find, for example, none of the traditional grandees of Anglo-American jurisprudence – and none of the “classical” exchanges and debates – no Hart-and-Fuller, no Dworkin-and-Hart, no *Of Law and the River*-period Carrington-and-CLS. But something would surely be wrong if this Article, in its anticipation of a re-launch of the critical legal project, ended up playing all the familiar tracks. When it is the project of critique itself that is in crisis, we need to hear the deep cuts.

We envision this exploratory foray – this review of Anglo-American legal critique – as only the first step on a long journey. In the discussion below we begin with a brief and abstract definition of ideology-critique. We then move on to the Four Critiques of legal ideology that have developed specifically in the field of legal studies: Legal Functionalism, Empirical Legal Studies, Postmodern Socio-Legal Studies, and Legal Structuralism.

I. WHAT IS THE CRITIQUE OF LEGAL IDEOLOGY?

The theory of ideology-critique that we propose to follow in these pages has a decidedly functionalist flavor: an ideology-critique *is* what an ideology-critique *does*. Rather than relying on scholars’ own accounts and self-characterizations to determine whether or not their work should be considered a form of ideology-critique, we have attempted to develop a more or less “objective” concept of ideology-critique.³⁷ For present purposes, this concept can be summarized as follows:

Ideology-critique purports to expose and denounce any given argument, doctrine, framework, or set of practices as “politically biased.” The aim is to inform some real or imaginary audience about the existence of a corresponding “ideology” and its deleterious effects on the particular segment of legal practice or society. Importantly, what counts as “ideology”

37. Most functionalists and legal realists, for example, never used terms like ideology and ideology critique. Nevertheless, a considerable part of their work, in our view, was not only distinctly critical in its orientation but was also aimed at exposing a very specific ideological formation: that of legal formalism and laissez-faire economic policy. To exclude this body of scholarship from our examination simply because it did not use on the surface of its discourse certain specific phrases, we felt, would do a considerable disservice to its legacy. It would also obfuscate the continuing influence of legal functionalism as a genre of legal-theoretical inquiry and the impact its operative assumptions have left on subsequent generations of legal scholarship. (Note that the background claim here is not only that we “owe” it to the sociological jurists to recognize how much of what those who came after them achieved by climbing onto their proverbial shoulders. The argument also cuts the other way: the less aware we may be of our debt to this body of scholarship, the more likely we will be to repeat its mistakes.) To capture such kind of complex historical and theoretical legacies, we decided, in short, that rather than approaching this matter in a more or less formalist fashion, it would make more sense for us ourselves to follow a more functionalist approach: an ideology critique is what an ideology critique does.

has no pre-existing formula and will often change from case to case. What matters, ultimately, is not the immediate content of what gets described or denounced as “ideological,” but the logical relationship that is posited thereby between that “thing” and the respective act of scholarly intervention. Schematically, this relationship combines three assumptions: (i) the presence of ideology in law is something that is both deeply problematic and fundamentally under-recognized in the ordinary legal discourse and legal scholarship; (ii) critique is the only reliable antidote against ideology; (iii) the function of all responsible legal scholarship is to resist ideology and to advance the cause of its critique. Acceptance and practical realization of this three-pronged formula is, essentially, what we propose to define as the *project* of legal ideology critique.

Whether it is conducted in the mainstream registers of legal realism and its derivatives, or in the more heterodox registers of legal structuralism, the practice of legal ideology critique must be theorized temporally. To be clear, we do not at all mean this in the sense of it being inserted within some kind of simplistic linear chronology in which these Four Critiques are somehow imagined to progress one after another like so many stages in the awakening of the Hegelian World-Spirit. Rather, the critique of legal ideology should be contextualized as a field of overlapping practices that move both forward and back. As a result, it is a mistake to read our survey as suggesting that, for example, the socio-legal critique “came after” the critique of empirical legal studies, or that functionalism is more “primitive” than legal structuralism. Our ordering is a function of how we have stylized the structure of argumentative practice, moving along the seams of an “inside-outside” distinction about the historical context of law. The outline of that progression is offered in the appendix which follows this Article on page 581.

It is in this posture that we offer two premises for the argument that unfolds ahead. The first is that there exists more than one concept of ideology circulating within the contemporary legal-academic discourse. The second is that a very large part of what legal scholarship does or purports to do is aimed at *critiquing* ideology, the implicit understanding there being that “ideology” generally stands for some kind of a *ruse*, *misconception*, or *mystification*. The claim that a large segment of contemporary legal scholarship is animated by this kind of confrontational dynamic, and that a legalized “hermeneutics of suspicion” has become the Ur-form of contemporary legal thought, is not, of course, very new.³⁸

38. The concept of the hermeneutics of suspicion was introduced in 1965 by the French philosopher Paul Ricoeur to capture the idea of a theoretical outlook strongly committed to unmasking the “illusions and lies of consciousness” and “circumvent[ing] the obvious and self-evident meanings in order to draw out less visible and less flattering truths.” Rita Felski, *Critique and the Hermeneutics of Suspicion*, 15 M/C J. (2012), <http://journal.media-culture.org.au/index.php/mcjournal/article/viewArticle/431>. See PAUL RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* (1970). Since then it has

However, the claim that we can find in the contemporary legal discourse several entirely different models of ideology, and that each of these models, furthermore, is culturally active and theoretically productive, is much less familiar. It is rather commonplace to say that a lot of what legal scholars do and say is motivated by arguments, narratives, and concepts that can be challenged as “ideological.” But what exactly does “ideological” mean in each of these contexts?

This Article suggests that there exist four very different traditions of answering this question. They repeat across different segments of the legal-academic literature, or at least that part of it that is available in the English language.³⁹ They are:

- (i) *Legal Functionalism*⁴⁰
- (ii) *Empirical Legal Studies*⁴¹

come to be used to describe a general mode of thought characteristic of much of contemporary social theory, literary criticism, etc. For an exploration of the different ways in which this mode of thought has come to be practiced by US legal scholars, see Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRIT. 91 (2014).

39. Like with most taxonomies, our categorical scheme is far from perfect. It would be futile to pretend otherwise. Under functionalism, for example, we have decided to include much of what would sometimes be described as legal realism. Decisions like these (and there are many) are open to charges of overgeneralization and post-hoc syntheticism. What has been “added” quite legitimately could be regarded as fundamentally un-addable, either because doing so has suppressed too many differences that otherwise are important or because, in their original historical contexts, the proponents of the respective schools or movements passionately disagreed with one another’s approaches or generally could not stand one another. A classic example would be the famously hostile exchange between Karl Llewellyn and Roscoe Pound about the place and use of realist methodologies which indicated a rift between the realist camp and the earlier tradition of socio-legal studies. See Karl Llewellyn, *A Realistic Jurisprudence – The Next Step*, 20 COL. L. REV. 431 (1930); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Karl Llewellyn, *Some Realism about Realism, A Reply to Dean Pound*, 44 HARV L. REV. 1222 (1931). But see also N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997) (arguing for a more nuanced view of this episode and reaching beyond the public confrontation to show the strong mutual respect and admiration the two scholars had for one another). Taking all this into account, it may be better to think of each of these proposed groupings more as helpful heuristics than as markers of historically active categories of self-identification that the scholars discussed below would recognize as their own. It may also be helpful to remember that, in practice, most works of ideology critique—the actual books, articles, and essays people write—will tend to combine, even if only unselfconsciously, the elements of more than one tradition. No text is ever entirely homogenous in terms of its intellectual profile. Even Duncan Kennedy’s *A Critique of Adjudication*, a text exemplary in its critical vigilance and self-awareness otherwise, on closer inspection turns out at different points to draw on several of the traditions canvassed in this Article, in ways that are not always easily reconcilable.

40. See, e.g., Roscoe Pound, *The Theory of Judicial Decision (part III)*, 36 HARV. L. REV. 940 (1923); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140 (1911); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); NICHOLAS TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW (1939); EUGEN EHRlich, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 488-95 (1936) [1913]; CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

41. See, e.g., LEE EPSTEIN & ANDREW MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH (2014); LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013); Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT’L L. 1 (2017); Wolfgang Alschner et al., *Champions of Protection? A Text-as-Data Analysis of the Bilateral Investment Treaties of the GCC Countries*, 2017 INT’L REV. L 1 (2017); Denise M. Keele et al., *An Analysis of Ideological Effects in Published versus Unpublished Judicial Opinions*, 6 J. EMPIR. LEG. STUD. 213 (2009); Gregory Shaffer and Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1

(iii) *Postmodern Socio-Legal Studies*⁴²

(iv) *Legal Structuralism*⁴³

The remainder of this Article provides an exposition of each of the Four Critiques. Before turning to that discussion, however, we offer a brief introduction to some of the intellectual connections between them. In Europe, the custom of critiquing “suspect” patterns of legal reasoning and forms of legal-theoretic thought as ideologically motivated goes back to the end of the nineteenth century. Under the influence of French solidarist jurisprudence and the German “free law” movement, there emerged a tradition of what later came to be known variously as “legal sociology” and “sociological jurisprudence.” In the United States, by contrast, the critique of ideology in law traces its roots generally to the tradition commonly known as American legal realism.⁴⁴ Over the middle decades of the twentieth century, these two traditions gave rise to a number of different theoretical movements and, accordingly, a number of different ways of thinking about the phenomenon of ideology in a legal context.

Initially there emerged what we call the First Critique, that of a “functionalist” critique of legal ideology. Its principal target was the

(2012).

42. See, e.g., Susan Silbey, *Legal Cultures and Cultures of Legality*, in HANDBOOK OF CRITICAL SOCIOLOGY 470 (JOHN R. HALL ET AL. EDS., 2010); Susan Silbey, *Everyday Life and the Constitution of Legality*, in BLACKWELL COMPANION TO THE SOCIOLOGY OF CULTURE 332 (MARK D. JACOBS AND NANCY HANRAHAN EDS., 2005); Roger Cotterrell, *Law in Culture*, 17 *RATIO JURIS* 1 (2004); ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* (2002); MICHAEL TIGAR, *LAW & THE RISE OF CAPITALISM* (1977); Joanne Conaghan, *Gendered Harms and the Law of Tort: Remedying (Sexual) Harrassment*, 16 *OXFORD J. LEGAL STUD.* 407 (1996); PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J. L. & HUM.* 3 (2001); Austin Sarat, *The Profession versus the Public Interest: Reflections on Two Reifications*, 54 *STAN. L. REV.* 1491 (2002); Susan Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 *L. & SOC. REV.* 165 (1987); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING* (2016).

43. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Karl Klare, *The Public/Private Distinction in Labor Law*, 130 *U. PA. L. REV.* 1358 (1982); Karl Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 *INDUS. REL. L. J.* 450 (1981); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983); John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 *STAN. L. REV.* 435 (1989); Pierre Schlag, *The Aesthetics of American Law*, 115 *HARV. L. REV.* 1047 (2002); JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L. J.* 997 (1985).

44. An important qualification has to be made, of course, in respect of “diagnosing” entire career oeuvres and scholarly life projects as being or not being a part of something called “legal realism” or some other such thing. Choosing to work in the mode of one tradition at one point in your career is not at all a guarantee that you will not switch to another tradition later. People change, their views about law and legal study evolve. Large segments of Karl Llewellyn’s *The Common Law Tradition*, for example, indicate a strong predisposition towards what in the context of this Article’s argument could be identified as the Legal Structuralist tradition. By contrast, most of *The Cheyenne Way*, written twenty years before that, seems to belong squarely within the Post-Empiricist socio-legal studies tradition, while many parts of *The Bramble Bush*—especially that first lecture—betray an unmistakable affinity for functionalism. Evidently, what Llewellyn thought about law, ideology, and critical legal thinking in his late sixties changed quite dramatically from what he had to say on the subject in his forties or mid-thirties.

ideology of legal formalism and its main defining trait was its faith in the critical power of social sciences: to recognize the contours of formalist ideology and to free the legal mind from its pernicious influence required an earnest and whole-hearted engagement with the burgeoning science of society. For these thinkers, formalism was a smokescreen that blocked one's view of law's objective reality, and the social sciences a crisp wind to clear the air. The more the legal professional took to heart the lessons of social sciences, the main of which, as functionalism's name suggests, was to view all legal phenomena in essentially functional terms, the quicker we would all break out from the prison-house of ideology.

Several decades after functionalism, but still operating within the same broadly "realist" umbrella, there developed the Second Critique, a body of scholarship called empirical legal studies ("ELS"). In the First Critique, the phenomenon of ideology was conceptualized as something akin to an intellectual virus operating on the "inside" of legal thought and discourse, compelling jurists to adopt sloppy modes of reasoning. In the Second Critique, however, ELS scholars conceived of ideology as an essentially external force: a factor that approaches Law from the "outside" and, if not properly checked, threatens to corrupt the course of the jurist's reasoning, thus politicizing the broader operation of the legal system. How can the corrupting influence of this externalized, ideological threat be checked? The answer, as the name "empirical legal studies" suggests, is to follow a rigorous empirical protocol: if we want to establish the objective truth about any given legal event, process, or abstract doctrinal question, our thinking about it has to be grounded in empirically verifiable observations. Detailed statistics, accurate data, and careful measurement are the best defenses against ideological corruption.

Note the fundamental distinctions between the First and Second Critiques: for legal functionalists, ideology presents itself as naturally harmonizing philosophy, and what it tended to do to legal professionals was delude them into misrecognizing the objective realities of law. What they saw as abstract forms and principles, were in truth, fragments of a politically contingent social system. In the ELS tradition, by contrast, the concept of ideology assumes a much more concrete expression. Ideology shifts away from a natural plane of legal philosophy and into a personal agenda or a partisan bias, and its real-world impact is the quotidian corruption of the judicial process. Such perversions include, most notably, the facilitation of a culture of illegitimate judicial activism.

Note also the basic parallels between the two Critiques: both for legal functionalists and for ELS scholars, *legal* ideology is largely indistinguishable from *political* ideology, and the path to redemption in each case begins with the push for greater analytical rigor, intellectual due diligence, and a system of *interdisciplinary check-and-balances*. Law, in

short, is a species of politics. The first task of all responsible legal scholarship is to show us how and why this state of affairs should be ended, and its first ally in this endeavor is the world of social sciences. For functionalists, the problem is an ideology of illusion internal to law, and the answer to the question of critical method was found in the concept of *sociology writ large*; for ELS scholars, the problem is a political ideology external to law, and the answer lies in the empirical study of the influence of that political relation.

The Third and Fourth Critiques are those of postmodern socio-legal studies, and legal structuralism, respectively. The Third and Fourth Critiques also trace their genealogy from a broad combination of American legal realism and European legal sociology. Unlike functionalism and empirical legal studies, however, they take a rather dim view of the standard realist belief in the emancipatory power of scientific objectivity, analytical rigor, and the use of empirically derived data. They are both, to some degree at least, *post-empiricist*. For these latter two Critiques, the idea of objective knowledge, especially in its application to legal phenomena, is deeply problematic. And while, of course, trying to be more analytically rigorous in one's reasoning and paying more attention to the empirical patterns of different types of legal conduct are not in themselves bad things (and indeed, in today's intellectual climate seem all the more worth cherishing), from the perspective of the Third and Fourth Critiques it is difficult to see how empiricism offers a way out of ideology, inasmuch as empiricism simply offers yet another ideological manifold. Indeed, some of the most deeply ideological theoretical projects in the history of twentieth-century legal thought have been grounded in decidedly rigorous analytical protocols – think, for example, of the Chicago-style law-and-economics⁴⁵ or Kelsenian positivism⁴⁶ – or channeled an intellectual sensibility that is nothing if not expressly committed to empirical self-awareness – think again of Chicagoan law-and-economics or the ELS tradition itself for that matter.

A general attitude of skepticism in respect of realism's empiricist legacy is not, of course, the only factor that distinguishes the Third and Fourth Critiques from the First and the Second. Another important line of distinction cuts through their respective conceptions of law's general relationship with politics. While no theoretical movement is more commonly associated today with the thesis that "all law is politics" than critical legal studies (CLS), a school of thought that (in its first wave) epitomizes the structuralist tradition more effectively than any other, the

45. For a general background on the Chicago tradition in law-and-economics, see NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 51-83 (1997).

46. See, e.g., HANS KELSEN, *GENERAL THEORY OF LAW & STATE* (2006); HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* (1992).

idea of law-as-a-direct-continuation-of-politics has been much more of a defining theme for the postmodern law and society people. Indeed, the most distinctive feature of the early CLS approach to the concept of legal ideology came in a rather different context: it was its reinvention of the standard realist critique of the legal form into the broader framework of structuralist semiotics that really set the CLS tradition apart from everyone else.⁴⁷ In this perspective, the basic ontology of legal ideology was neither that of a “substantive theoretical mistake” that inspired an incorrect understanding of the legal doctrine (the view of legal functionalism), nor that of a “corrupting external factor” that led to the proliferation of illegitimate judicial activism (the view of empirical legal studies). For legal structuralism, the site of legal ideology is the legal system’s collective unconscious. It is the very “grammar” of legal thought that made law as a social system and a form of reasoning, compelling legal decision-makers to recognize only some categories of claimants and to ignore the plight of all others, to privilege only some kinds of economic and social interests, and to downplay the rest.

As a result of this reorientation toward a distinctively *legal* conception of legal ideology, legal structuralism not only managed to bring greater attention to the essential ubiquity of ideology in law but also, with its emphasis on ideology as an indispensable attribute of the legal form itself, proceeded to carve out three entirely new objects of study for the students of legal ideology: (1) the foundational structure of the legal unconscious, (2) the operative lexicon of the black-letter law system, and (3) the generative patterns of legal argument (or what has also been called the patterns of legal justification).

A third factor that separates socio-legal and structuralist critiques from the functionalist and ELS critiques is the much wider range of theoretical influence relevant to each. The first and the most obvious source of inspiration was Marxism. In both the Third and Fourth Critiques, it is important to emphasize that the legal form reifies, entrenches, and naturalizes the very same political and economic inequalities which the legal system otherwise is supposed to address and remedy. In both cases, the idea shows a profound influence of Marxist and post-Marxist thought. Of course, the broader model of the general relationship between the legal and the economic domains differs rather significantly from that assumed in classical Marxist theory. But neither of these Critiques would have developed its understanding of legal ideology the way that it did without a deep and serious engagement with Marxism.

In addition to Marxism, one finds traces of many other “grand theories” in the two “post-empiricist” modes of ideology-critique, from Freud’s

47. See DESAUTELS-STEIN, *supra* note 17, at 35-70.

theory of the Id and Weber's theory of disenchantment to Foucault's concept of disciplinary power and Judith Butler's idea of gender performativity. The degree of borrowing in each case varies. In the Fourth Critique, for example, phenomenology is important, particularly in the way it consistently dismisses the dualist ontology of "inside" and "outside" so central to the functionalist and the ELS traditions.⁴⁸ From the legal structuralist point of view, there is no "inside" of legal reason in which one can find, say, the correct undistorted meaning of legal concepts, doctrines, and institutions. Nor, by the same token, is there really such a thing as an easily identifiable "outside" from which a judge or a legal scholar can import their partisan politics or personal agenda into their analysis of the legal materials. What there is instead are structures of legal languages, a never-ending series of lived engagements with it on the part of individual judges and scholars, engagements that allow them to experience this structure both as something spontaneously self-evident, natural, and practically useful, as well as something deeply alienating, frustratingly rigid, and reified.

The same skeptical attitude towards the inside-outside ontology can also be found, albeit not as visibly, in the Third Critique. Here the argument is typically made in a more tentative fashion and is given a fundamentally different explanatory logic. The central theme comes from the idea of dialectics or mutually constitutive performative practices. The concept of law, the argument goes, has no fixed essence: the boundaries of the legal system vis-à-vis the broader social reality beyond its plane, just like the boundaries of legal thought vis-à-vis other discursive and cultural forms, are not only inherently malleable but also historically contingent. As the mutually constitutive relationship between Law and Society or Law and Culture shifts and evolves, Law, being both that which it positively is and that which is a negative image of what it is not, constantly spills over into, and opens itself up to, its various dialectical counterparts, thus making any attempts to establish a fixed boundary between its "inside" and its "outside" impossible.

Each of these summaries, of course, capture the Four Critiques in broad and often blurry contours. Our aim in sketching them so impressionistically has been to convey a sense of some of their relations with one another, and in so doing, to lay the ground for this article's main thesis and contention. It is to this effort that we now turn.

II. FIRST CRITIQUE: LEGAL FUNCTIONALISM AND THE CRITIQUE OF

48. *Id.* at 71-93.

LEGAL FORMALISM AS GRAND IDEOLOGY

A. The End of Ideology

The combined effects of the two world wars and the economic catastrophes of the period in-between helped consolidate a consensus about the appropriate route for political, social, and legal change.⁴⁹ This consensus was two-sided. On the one hand, there developed a particular view about how to define the specter of “ideology.” On the other hand, there emerged a program for what to do after ideology had been properly abandoned.

To the first hand, first. In these postwar years of the United States, there was the increasingly popular idea among intellectuals that the hortatory powers of the grand ideologies, writ large, had gone out of fashion. On this view, an ideology was considered something like a broad blueprint for social engineering, a set of interconnected ideas that necessarily led to particular forms of political action.⁵⁰ This purportedly neutral construction of ideology could manifest in any political program, left, right, and center.⁵¹ As Raymond Geuss suggested, “a ‘total ideology’ was (a) a program of action (b) based on an explicit, systematic model or theory of how the society works (c) aimed at radical transformation or reconstruction of the society as a whole (d) held with more confidence (‘passion’) than the evidence for the theory or model warrants.”⁵² An ideology, on this view, was like the dinosaur: Classic Liberalism, Capitalism, Socialism, Fascism, Anarchism—these were the sorts of master narratives that had once dominated the political imagination, but whose time had come and gone.⁵³ These ideologies, these programmatic and totalizing if not totalitarian visions for political and social action, had characteristically taken the form of rigid formulas and doctrinaire plans, and in the context of this postwar consensus, grand ideologies were disfavored for exactly this reason.

By the 1950s and ‘60s, many American scholars were suggesting that, rather than rely on totalizing ideologies, what was needed instead were more realistic, more flexible, more functional, more empirical assessments of real people’s needs. And it was this latter prescription for a more *realistic* understanding of society that reflects the second side of the postwar consensus. The dogma of ideology, in this consensus view, stood in poor contrast against the rich and supple postures of interdisciplinary expertise.

49. See HOWARD BRICK, *TRANSCENDING CAPITALISM: VISIONS OF A NEW SOCIETY IN MODERN AMERICAN THOUGHT* (2015); RAYMOND ARON, *THE OPIUM OF THE INTELLECTUALS* (1955); Michael Polanyi, *On Liberalism and Liberty*, 4 *ENCOUNTER* 29 (1955).

50. DANIEL BELL, *THE END OF IDEOLOGY* 402 (1962).

51. MARTIN SELIGER, *IDEOLOGY AND POLITICS* (1976).

52. RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 11 (1999).

53. FELIKS GROSS, *EUROPEAN IDEOLOGIES: A SURVEY OF TWENTIETH CENTURY POLITICAL IDEAS* (1948).

Or to put that another way, whereas totalizing ideologies had been the currency of the long nineteenth century, a postwar *End of Ideology* program suggested a turn to real, material needs and interests.⁵⁴ What had gone wrong? Ideology in the sense of grand political narrative. What to do? Pursue a program grounded in the empirical expertise of the social sciences that rejected ideological dogma. Here, ideology comes to be defined precisely as the opposite of a naturalizing empiricism.⁵⁵

For sociologists associated with the “End of Ideology” program like Daniel Bell, blueprint ideology was a problem less deserving of a solution than of just being avoided altogether. As Bell explained it, nineteenth century visions of capitalism simply failed to meet the needs of modern industrial society.⁵⁶ Here had been the

image of capitalism in the early forties: the capitalist was an old miser sitting on his pile of sterile bullion, which weighed down the economy. Since *he* found it impossible to inject the money into an economy which needed it, if that economy was to provide jobs and the standard of living it was technologically capable of producing, the government would have to force him to disgorge it—or tax it away and spend it on useful projects.⁵⁷

The traditional ideological emphasis on private property and freedom of contract as the engines for *laissez-faire*, Bell assured, had finally lapsed. The ideology of traditional capitalism was, here in the middle of the Twentieth Century, exhausted.⁵⁸

If so, perhaps, the ideology of socialism was the preferred alternative? Nope. Like the doctrinaire vision of *laissez-faire* capitalism, the doctrinaire ideology of a socialist world order was also too disconnected from the real world of social needs and interests. “The socialist movement,” Bell explained,

by the way in which it rejected the capitalist order as a whole, could not relate itself to the specific problems of social action in the here-and-now, give-and-take political world. In sum, it was trapped by the unhappy problem of living *in* but not *of* the world . . . It could never resolve, but only straddle, the basic issue of either accepting capitalist society and seeking to transform it from within, as the labor movement did, or becoming the sworn enemy of that society, like the Communists. A religious movement can split its allegiances and (like Lutheranism) live *in* but not *of* the world . . . a

54. Howard Brick, *The End of Ideology Thesis*, in *THE OXFORD HANDBOOK OF POLITICAL IDEOLOGIES* (Michael Freeden and Marc Steers, eds., 2013).

55. See, e.g., GEORGES CANGUILHEM, *A VITAL RATIONALIST: SELECTED WRITINGS* (2000); BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* (1993).

56. BELL, *supra* note 50, at 85.

57. *Id.* at 80.

58. *Id.*

political movement cannot.⁵⁹

All in all, Bell claimed in what came to be the call-sign of the new post-ideological consensus, the “End of Ideology” had arrived.⁶⁰ In its place would come a social-democratic compromise, a mixed economy, the Welfare state, decentralized power, and above all, an understanding of the necessity of an anti-ideological, utterly *realistic* view of politics, the market, and civil society.⁶¹

The program for political science, economics, and sociology was up and running.⁶² But what of law? Ought judges, lawyers, and legal theorists make a similar turn?⁶³ If so, what would the “End of Ideology” mean for the postwar world of law? Interestingly, a version of the story had already been in the telling, and this was the story of legal realism.⁶⁴ Now to be sure, there are few areas of legal thought as contested as just what exactly the legal realist movement had been all about. And given our current interest in mapping out twentieth-century forms of ideology-critique, we will abstain from engaging the full breadth of that fascinating conversation.⁶⁵ However, a point about which there is little disagreement is that much of legal realism was set against something called legal formalism—another contested terrain.⁶⁶ If we follow Bell’s version of the problem of ideology, however, we arrive at what is at least a useful shorthand for thinking about the First Critique: a functionalist critique of legal formalism as a distinctively *legal* ideology, a grand master plan of Law, a blueprint for judges tasked with the business of matching the legal order with the immanence of the natural.⁶⁷ Thus, just as sociologists and political scientists would come to offer an empirically-grounded realism as the antidote to the grand ideologies of the

59. *Id.* at 278-279.

60. *See, e.g.*, SEYMOUR MARTIN LIPSET, *POLITICAL MAN* 404-405 (1960) (“The fact that the differences between the left and the right in the Western democracies are no longer profound does not mean that there is no room for party controversy. But as the editor of one of the leading Swedish newspapers once said to me, ‘Politics is now boring. The only issues are whether the metal workers should get a nickel more an hour, the price of milk should be raised, or old-age pensions extended.’ These are important matters, the very stuff of the internal struggle within stable democracies, but they are hardly matters to excite intellectuals or stimulate young people who seek in politics a way to express their dreams. This change in Western political life reflects the fact that the fundamental political problems of the industrial revolution have been solved: the workers have achieved industrial and political citizenship; the conservatives have accepted the welfare state; and the democratic left has recognized that an increase in over-all state power carries with it more dangers to freedom than solutions for economic problems. This very triumph of the democratic social revolution in the West ends domestic politics for those intellectuals who must have ideologies or Utopias to motivate them to political action.”)

61. *Id.* at 402.

62. *See* DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1990).

63. *See* David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L. J.* 1 (1972).

64. *See, e.g.*, John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459 (1979).

65. *See Symposium: The New Doctrinalism: Legal Realism and Legal Doctrine*, 163 *U. PA. L. REV.* 1845 (2015).

66. *See* DESAUTELS-STEIN, *supra* note 17, at 123-151.

67. *Id.*

nineteenth century, realist-inspired jurists offered a similar critique of the ideology of legal formalism.⁶⁸

To get a picture of this legal ideology writ large in the language of legal formalism, consider the illustrative work of the economist-philosopher Friedrich Hayek. As Hayek described his project in *The Constitution of Liberty*:

The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because . . . *the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule . . .* This, however, is true only if by 'law' we mean the general rules that apply equally to everybody. This generality is probably the most important aspect of that attribute of law which we have called its 'abstractness.'⁶⁹

In crafting this naturalizing understanding of law, Hayek drew an important distinction between the Rule of Law (rules that apply equally and generally) and legislation (rules that are partisan). The former concept—the Rule of Law—is what gives the human subject its freedom. This freedom-enhancing quality is a result of several factors, one of which is its provenance. For Hayek, the Rule of Law is not the product of deliberate human consideration. It is rather a natural evolution, a material to be discovered in the world rather than produced.⁷⁰ These naturally evolving common law rules are neutral, general, and abstract, discoverable and applied by the judiciary, without any preference for a particular class or party. Hayek continued, “[f]or here no human decision will be required in the great majority of cases to which the rules apply; and even when a court has to determine how the general rules may be applied to a particular case, it is the implications of the whole system of accepted rules that decide, not the will of the court.”⁷¹ Citing John Marshall, Hayek intoned, “[c]ourts are the mere instruments of the law, and can will nothing.”⁷²

In contrast with this vision of the Rule of Law, Hayek identified legislation as a rival way of formulating legal prescriptions. Whereas the Rule of Law gives freedom, legislation and regulation take it away. As a

68. See Joseph Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988).

69. FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 221-222 (1978) (emphasis added).

70. *Id.* at 225 (“Most of these rules have never been deliberately invented but have grown through a gradual process of trial and error in which the experience of successive generations has helped to make them what they are. In most instances, therefore, nobody knows or has ever known the reasons and considerations that have led to a rule being given a particular form. We must thus often endeavor to *discover* the functions that a rule actually serves.”).

71. *Id.*

72. *Id.* at 224.

political act of intervention, legislation “emanates from the legislative authority [and] is the chief instrument of oppression.”⁷³ This oppressive form of law is outcome-determinative and focused precisely on partisan interests, whereas the Rule of Law is general and neutral. Citing Oliver Wendell Holmes, Jr. in support of the prevalence of this politically oriented view of legislation, Hayek warned that “[t]o say that laws rule and not men may consequently signify that the fact is to be hidden that men rule over men . . . The confusion of these two conceptions of law and the loss of belief that laws can rule;” Hayek further explained “that men in laying down and enforcing laws in the former sense are not enforcing their will, are among the chief causes of the decline in liberty.”⁷⁴

Even with this very brief sketch we can already see the outlines of the kind of grand ideology that so worried the sociologists and political scientists.⁷⁵ Hayek’s was a vision that assigned marching orders for judges and lawyers, tasking them with the completion of a legal order that properly mirrored the historically evolved norms of property and contract, and the separation of judges from so-called political points of view. Of course, for the legal realists and their heirs, Hayek’s seemingly neutral conception was itself a form of political ideology, assigning to Law a blueprint for action somehow immanent in the very fabric of law itself. To avoid Hayekian errors of this sort, the post-realists would divest Law of these ideological trappings by studying the legal discipline as it *actually* was, not through the lens of a broad and impossible ideology. What the ideology of legal formalism produced was a sense that law was fully autonomous from society, in precisely the way that mathematical principles are autonomous of social context. But this was a mistake, for law was deeply embedded in society, and law could only be understood in that social context. Law wasn’t like math at all. And so it was in this way that the “End of Ideology” program in political science and sociology joined an alliance with legal scholars, giving rise to an approach called legal functionalism.⁷⁶

B. Functionalism over Formalism

The single most important theme at the heart of the First Critique was captured already at the start of the twentieth century by the great dean of American jurisprudence Roscoe Pound, and it was this: there exists a fundamental difference between what the legal system looks like “in the books” and what it looks like “in action.” It is the latter picture that is more accurate, and the business of all forward-looking legal scholarship is to

73. *Id.*

74. *Id.*

75. See Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. (1924).

76. See Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

work tirelessly on uncovering and reporting it.⁷⁷

Focusing only on studying the “law in the books,” argued Pound, was not just a recipe for ignorance and self-deception. It was also advocated by the most reactionary political elements in the legal academic community, the so-called “legal formalists,” or as Pound described them in his 1908 article, the erstwhile proponents of “mechanical jurisprudence.”⁷⁸ Formalists, Pound contended, blocked the study of law in action because they were worried that if people came to know how the legal system actually functioned in practice, it could put the lie to the idea of law as a mechanical system. At stake was the highly conservative political program embodied in much of the existing case law, a program which the legal formalists sought to legitimate by presenting the case law in question as a product of neutral, objective, politically impartial legal reasoning, and to entrench through the suppression of inquiries into the program’s social and economic consequences.

Fighting legal formalism was not just a matter of giving support to a historically progressive political cause. No less importantly, it was also a prerequisite for achieving a greater degree of theoretical hygiene. Regardless of whether this is what “formalists” even really believed, for Pound and thinkers like him, the thesis that judges could and should decide disputes solely on the basis of deductive logic and close textual analysis of the applicable rules and precedents was pure sleight of hand. A socio-legal inquiry that married the empirical observation of law’s practical consequences with a systematic investigation of law’s role in “social engineering” was the most effective antidote to magical thinking.

Around the same time as the development of Pound’s sociological jurisprudence, something similar was cooking up in continental Europe. One of the principal *dramatis personae* was the Austrian legal scholar Eugen Ehrlich, a founding figure in the modern discipline of legal sociology. As Ehrlich saw it, the examination of statutes and court reports was of little value in the hunt for law’s “true reality.” In relation to statute books, Ehrlich observed,

[any] attempt to imprison the law of a time . . . within the sections of a code is about as reasonable as [the] attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool, and but little water can be put in the pond.⁷⁹

In contrast with Holmes’ belief that the study of law was essentially an inquiry into what courts will do in fact,⁸⁰ Ehrlich believed that a myopic focus on judges was a disservice to the sociological project. A singular

77. Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

78. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

79. EHRLICH, *supra* note 40, at 488-95.

80. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

focus on court reports resulted in an inevitable distortion:

Only a tiny bit of real life is brought before the courts and other tribunals; and much is excluded from litigation either on principle or as a matter of fact. Moreover the legal relation which is being litigated shows distorted features which are quite different from, and foreign to, the same relation when it is in repose. Who would judge our family life or the life of our societies by the law-suits that arise in the families or in the societies?⁸¹

In a modern capitalist society, where so much of legal practice is conducted by means of legal formalities, of course it was true that most lawyers began their assessments of the applicable law by studying the respective legal documents. Ehrlich maintained, however, that it would always have to be “supplemented by direct observation of life”:⁸² “of commerce, of customs and usages, and of all associations, not only of those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those it has disapproved.”⁸³ For even if it is only the content of the written contract and nothing else that will be “enforced by the courts . . . in case the parties resort to litigation,” outside the judicial setting, the legal rules embodied in this document are going to be the “living law” only insofar as the parties in question “habitually insist” upon following them.⁸⁴ Any failure to recognize this fact “results in an erroneous and distorted picture of life itself.”⁸⁵

One may protest, following Holmes, that in most cases the lawyer is only required to know what the courts are most likely going to order by way of official enforcement. But Ehrlich argued that the enterprise of legal work is not judged only by its potential usefulness to the world of legal practice. The achievement of theoretical clarity and the maintenance of analytical rigor are critical to knowing the “living law.”

Of course we can learn only so much of the living law from the document as has been embodied therein. How shall we quarry that part of the living law that has not been embodied in a legal document but which nevertheless is a large and important part thereof? There is no other means but this, to open one’s eyes, to inform oneself by observing life attentively, to ask people, and note down their replies. To be sure, to ask a jurist to learn from actual observation and not from sections of a code or from bundles of legal papers is to make an exacting demand upon him; but it is unavoidable, and marvellous results can be achieved in this manner.⁸⁶

Some twenty years after Ehrlich, another prominent East European jurist

81. EHRlich, *supra* note 40, at 488-95.

82. *Id.* at 495.

83. *Id.* at 493.

84. *Id.* at 498.

85. *Id.*

86. *Id.* at 505.

would take Ehrlich's outline of the new method to its full logical conclusion. The "object of the new science called the sociology of law," explained the Russian émigré scholar Nicholas Timasheff, consisted of "[t]he determination and the coordination of human behaviour in society by the existence of legal norms."⁸⁷ Its "chief method" was "causal-functional investigation,"⁸⁸ and its central presumption was the idea that law was but "one of the forms of social coordination." Law was the specific "structure of this form of coordination, i.e. the system of human actions and reactions composing this form" and the "conditions of its efficacy or nonefficacy" that constituted the sociological lawyer's main object of investigation.⁸⁹ To perform it successfully, the jurist required a strong grasp of the applicable legal regime, but also empirical erudition and a broader awareness of law's place in society. "Abstract configurations of chains of human actions and reaction must be searched for," Timasheff explained, "chains in which legal norms and aspects of human behaviour fulfil alternately the active or passive roles."⁹⁰ Where Ehrlich's idea of legal sociology went little further in its methodological sophistication than "actual observation," Timasheff demanded an accounting for every legal nook and cranny. One had to pay attention to subjective self-reportage, but also take into account general sociological observation, social experiments, and comparative legal study.⁹¹

Back in the U.S., another classical illustration of the First Critique is available in Felix Cohen's legendary essay from 1935, *Transcendental Nonsense and the Functional Approach*.⁹² Whether he realized it or not, Cohen's title captured not just the essential thrust of realism but also one of the fundamental intellectual trends of his time. There is the explosive and critical energy associated with the demolition of "transcendental nonsense," or what Bell would later call "Ideology," and there is the professional work of getting down to business, the "functional approach" that would give the moderns their own blueprint for legal empiricism. These two parts reflect the two sides of the "End of Ideology" consensus already alluded to and was soon coming around the corner: (1) Formalized abstractions about property, contract, or "the rule of law" were more than impractical. As "blueprints for action," such concepts described legal architectures that mischaracterized the reality of law. (2) After departing from the transcendental nonsense of legal abstraction, the work to be done was, as Bell might have said, in the give-and-take world in which the domains of

87. TIMASHEFF, *supra* note 40, at 30.

88. *Id.* at 30-31.

89. *Id.* at 31.

90. *Id.*

91. *Id.* at 38-40.

92. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). For some of the background to this essay and a contextualizing discussion, see DAVID KENNEDY & WILLIAM FISHER III, *THE CANON OF AMERICAN LEGAL THOUGHT* 163 (2006).

law and politics necessarily bleed from one to the next. This understanding of the “End of Ideology” led to the task at hand, what Cohen called the functionalist approach. Like Pound, Ehrlich, and Timasheff, functionalists would consequently come to assess the complex social reality in which legal concepts are embedded, all the various social interests in play, their functions, their social contexts, and everything else.⁹³

This turn to legal functionalism marks the passage between the realist critique of legal ideology (in the guise of an abstract Hayekian type of formalism) and the practical work of what would later become known as the Legal Process school.⁹⁴ The idea was that even if it was impossible to determine *ex ante* the correct substantive answer to any given controversy, it should always be possible to put in place a properly calibrated, balanced, and intellectually rigorous decision-making process. And if taken seriously, that process would enable its participants to arrive at sufficiently reasonable and pragmatic solutions. The background theoretical framework that gave this narrative its internal coherence was a combination of the classical liberal distrust of all forms of subjectivism, idealism, and moral absolutism,⁹⁵ a definition of objectivity as a function of inter-subjective inclusivity and respect “for reason,”⁹⁶ and a belief in the possibility of “minimizing resentments” by reinforcing procedural formalism.⁹⁷ The core idea, however, was the assumption that form and technique could usually replace substance and ideals.⁹⁸ “Arriving at decision through clearly delineated procedures, based on objective principles,”⁹⁹ offered the best insurance against political bias and abuse, and the key to making the best use of this general insight was understanding the distinction between “questions of value or of positive fact.”¹⁰⁰ Only rarely, the argument went, lawyers might find themselves caught up in a genuine moral dilemma: the so-called “hard case” scenarios, where personal ethics and grand abstract ideas would necessarily come into play.¹⁰¹ But most of the time, problems confronting a legal decision-maker could be easily recast as questions of “positive fact” and thus safely removed from the arena of subjective opinion. One version of the argument found the key to doing so in looking for “issues of expedience” rather than “issues of principle.” Another

93. DESAUTELS-STEIN, *supra* note 17, at 152-71.

94. Charles Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013).

95. On the centrality of this distrust to the classical liberal tradition, see generally UNGER, *infra* note 132.

96. See GEOFFREY KABASERVICE, *THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT* 112 (2004).

97. *Id.* at 111-12.

98. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 253 (1992).

99. KABASERVICE, *supra* note 96, at 109.

100. Cohen, *supra* note 92, at 820.

101. *Id.* at 841.

focused on the need to ensure as wide a representation in the legal arena of all the competing interests present in the “political marketplace” as may be reasonably possible, so that whatever consensus might emerge out of these interactions could safely be confirmed, as a matter of positive fact, to be an embodiment of the society-wide – and therefore unbiased in any narrow partisan sense of the term – objective morality.¹⁰²

The central text of the Legal Process tradition was the famously unpublished (but widely circulated) eponymous set of teaching materials prepared in the mid-1950s by Harvard professors Henry Hart and Albert Sacks.¹⁰³ And though the general intellectual politics it expressed often stood in contrast against that of the realist generation, there was a rather visible direct line of descent that connected the Legal Process tradition to the realist lessons about functionalism.

Functionalism, as Cohen explained, was essentially “a call for the study of problems which have been neglected by . . . scientific methods of observation.”¹⁰⁴ In the absence of any autonomous method for determining the correct application of legal materials to social problems, guidance came from social reality itself. What started out as a searing act of critique “logically” evolved into a celebration of positivist social science. What had been wrong with legal formalism, in the end, was not just that formalists had values and politics whose existence they sought to deny, but that these values and politics were also “out of touch with social reality” because they channeled and expressed only the narrow class interests of the legal elite in question. To offset this classist bias, it became necessary to expand the base from which social values and politics would be imported. The wider this base became, however, the more pressing became the challenges of establishing a robust enough procedure to feed the respective value content into the corresponding segments of the legal debate. The solution – in addition to commissioning in-depth anthropological studies of what different groups of people actually believed and valued – obviously required paying more and more attention to matters of institutional design, technical details, and the art of discourse-moderation.

As early as the mid-1930s, notes Morton Horwitz, scholars like Lon Fuller began to question the “political implications of the realist turn to social science.”¹⁰⁵ Having started out as an intellectual radical reform movement, realism, noted Fuller, like Pound’s legal sociology before it, inevitably gravitated in the direction of “an essentially reactionary” political program.¹⁰⁶ A large part of it, he concluded, could be traced to the particular

102. See Richard D. Parker, *The Past of Constitutional Theory – and Its Future*, 42 OHIO ST. L.J. 223, 228 (1981).

103. HORWITZ, *supra* note 98, at 254.

104. Cohen, *supra* note 92, at 829.

105. HORWITZ, *supra* note 98, at 211.

106. See Lon Fuller, *American Legal Realism*, 92 U. PA. L. REV. 429, 461 (1934).

theoretical compromise its version of the critical enterprise ended up endorsing. To bring the functionalist method into law, as the likes of Cohen, Pound, Ehrlich, and Timasheff proposed, was to advocate essentially the assumption of a decidedly empiricist theoretical outlook. The problem with the general idea that lawyers had to pay greater attention to law's immediate social context was what exactly, in the given context, the concept of "paying greater attention" was really supposed to mean. In the particular cultural setting in which these arguments had been made, the common assumption seemed to be that it basically meant embracing a relatively crude vision of anthropological empiricism:¹⁰⁷ try to see what people usually do, ask them what they think about that, tweak a thing or two, record any patterns that appear to emerge, see if anything like "a dominant characteristic"¹⁰⁸ can be identified that might explain these patterns. Rinse and repeat.

To critique legal ideology in the functionalist mode was to advocate for the replacement of a commitment to formalist solipsism with this sort of naïve empiricist protocol. But since empirical inquiries provided ever-increasing masses of frequently indeterminate data, the real question for the functionalist lawyer became: What sort of *process* should one institute in order to give all these empirical findings about the "living law" the proper response and recognition that it deserves? As Charles Barzun notes of the Hart and Sacks materials,

Hart and Sacks were thus groping, however awkwardly at times, to define law as an academic discipline with methods that could properly be understood as *scientific*, comparable to those employed by economists, psychologists, or sociologists. In short, Hart and Sacks sought to justify their characterization of law as a 'craft' on the grounds that all knowledge, including that derived from the social and even natural sciences, was, in a sense, *craft* knowledge—that is, knowledge of how to *do something*.¹⁰⁹

Consistent with both Bell's assessment of the necessary blending of capitalism and socialism, and Cohen's legal functionalism, these post-realist scholars believed in an analogy between the work of legal theorists and the work of social scientists—work that had the same aim, namely, to better describe and understand the world in which we live. Hayekian types lived *in* the world of Law, but they were not *of* it. The Legal Process tradition would correct this mistake. It was the task of lawyers and judges to learn from the disciplines of economics, political science, and sociology

107. See John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195, 262 (1980) ("Moore started with something close to a crude anthropology: Ask the natives what they do. And for a scientific demonstration he relied on what would today be known as a natural experiment. The natives on one side of the river carry water on shoulder poles, those on the other side, on their heads; what accounts for this difference?").

108. Schlegel, *supra* note 64, at 542.

109. Barzun, *supra* note 94, at 7.

in order to both better predict legal outcomes and chart the “best” course for those outcomes,¹¹⁰ and the adepts of the Legal Process approach took this idea as its always-already assumed starting point. It was not only that lawyers work to uncover law’s “external” reality, its shape and presence in “social life.” An equally central task was to ensure that all these empirical findings were brought together in as objective and procedurally inclusive a manner as possible.

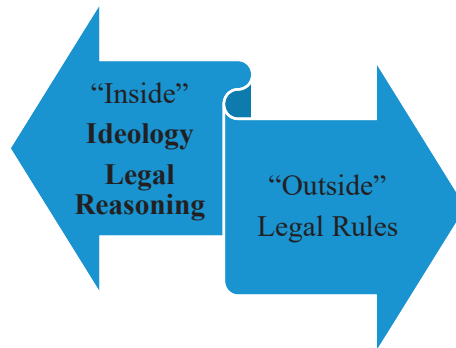
As the preceding discussion illuminates, the First Critique is premised on two essential distinctions. The first distinction is the one between “law” and “non-law”: the institutional and normative structures of the legal system and the external social context in which these structures are situated. Law, from the standpoint of legal functionalism, has to be situated vis-à-vis its surrounding political, economic, and social context, because it is only through this process of contextualization that lawyers can gain purchase on law’s true reality as it is actually “lived.” This is the key to the legal system’s real and potential capacity for changing the world outside itself. The thrust of the First Critique is to unmask the internal space of Law as a relatively distinct social form. At the same time, it denounces the assumption that the truth of this social form can ever be grasped if the jurist fails to exit the “insides” of law.



Legal functionalism’s second distinction also takes the form of an inside-outside dichotomy. The difference is in the location of the proposed boundaries: where in the first case the essential dividing line was drawn between Law and its Social Context, in the second case the dividing line separates the subjective process of legal thought, i.e. the reasoning developed by a judge or a legal scholar, from the objective substance of the legal doctrine, i.e. the legal materials on which this act of reasoning focuses. Attentive readers will note that a similar assumption was made in the formalist tradition. But is not formalism the sworn enemy of the

110. Holmes has suggested as much in an earlier piece, again pointing to how typical it was for thinkers to blend realist and process arguments in a single article. Holmes, *supra* note 80, at 469.

functionalist? Sure. But while functionalists would attack formalism for its misplaced solipsism, and urge the displacement of formalist analytics by ones grounded in the idea that Law and its Social Context are mutually constitutive, the traditional formalist distinction between reasoning and doctrine, practice and material, rules and their application was, for the most part, kept intact. After all, so long as legal doctrine might survive as an independent and autonomous terrain “outside” of the subjective terrain of judicial reasoning, the Rule of Law remained safe.



Keep in mind: the form of legal reasoning that is presented as ideological in the First Critique is that typically characteristic of the traditions of legal formalism, mechanical jurisprudence, and all other similarly inward-looking, deductively-driven protocols of legal thought (such as, for example, natural law). The worrisome possibility that legal functionalism might *itself* prove ideological was ruled out from the start. Unlike the formalism of mechanical jurisprudence, denounced as “fake legal science” (the “fake news” of its time), functionalism gives the discipline the keys to a *real* legal science. And science, because it is true, objective, and empirically verified, by definition, cannot be ideology. As we will see below, the functionalist critique of ideology would, in time, serve itself as a target for the Third and Fourth Critiques. But before turning to those developments, let us first survey the way in which the intellectual attitudes of the First Critique were deepened in the space of the Second.

III. SECOND CRITIQUE: EMPIRICAL LEGAL STUDIES AND THE CRITIQUE OF JUDICIAL IDEOLOGY AS PIECEMEAL POLITICS

A. Empirical Legal Studies and Judicial Activism

As the twentieth century progressed, the First Critique’s functionalism had some dramatic effects. First, and despite the efforts of the functionalists to protect it, the demand to situate law in a social context raised some

troubling questions for those aspiring for traditional fidelity to the Rule of Law. If judges were now meant to adjudicate disputes more “realistically” about the law’s role in serving social needs, what of the idea that ours is a government of *laws* and not *men*? Does not the task of formulating socially responsible laws belong to legislators, not judges? Was not the Rule of Law essentially a conception of legal rules that might be applied impartially, generally, consistently, and impersonally, *without a view of the instant outcome*? And if the answers were in the affirmative, how to reconcile such a Rule of Law conception with a view of the legal process that was explicitly post-hoc, purposive, and just downright *political*?

Second, the term “ideology” itself underwent a transformation. No longer understood as signifying some broad blueprint of transcendental nonsense à la Hayek, the specter of ideology shrank dramatically. While the grand and totalizing legal ideology of the formalists had been an object of critique for the realists and functionalists, in the wake of the First Critique the concept of “ideology” went from being conceived as a massive plan for Law to a mere synonym for politics, or a lawyer/judge’s policy preference. The effects of this reduction are still with us today: ask of a judge’s “ideology,” the answer will surely revert to something of the judge’s political views. The idea that a judicial ideology might refer to a “total ideology” like Capitalism or Socialism or some Hayekian philosophy is today very unusual; it is rather to ask of what the judge thinks about abortion, or gun control, or judicial activism itself. A judicial ideology now refers only to piecemeal politics, never the grand master plan. Thus, the “End of Ideology” program generated not the end of ideology in law, but rather both a *diminishment* and *relocation* of ideology in law. Whereas in the First Critique the target was a large-scale campaign to promote the power of an autonomous Law, the result was to reduce ideology to a kind of piecemeal politics existing outside the space of law, properly understood. The phrase “legal ideology” no longer really made sense, since the problem was now about a distinction between a judge’s political views (which would come to be called “judicial ideology” or “judicial politics”), and the law’s non-ideological, internalized workings.

Phrases like “judicial ideology” and “judicial activism” are suggestive of the character of the Second Critique. In the contemporary rhetoric of the law school, newspapers, television punditry, and the like, the specter of judicial activism is premised on the possibility of a judge *not* being an activist, or *not* being ideological in her adjudications. After all, if there was no choice about whether a judge might exercise her ideological preferences, or if a legal ideology was so pervasive that its effects had little to do with one’s political preferences, we could hardly criticize. That is, despite the popularity of the “End of Ideology” program and the power of legal functionalism, the idea that judges might still decide cases in the light of the

Rule of Law, bereft of ideological influence, retains considerable rhetorical power. Indeed, every time we hear a complaint about judicial activism or the interference of judicial ideology (again, which is now simply a synonym for politics), the complaint is that the judge allowed her subjective opinions to trump what ought to have been an impersonal application of rule to fact. This might suggest Chief Justice Roberts' analogy between judges and umpires, or something less sporty, but in any case, what is left after legal functionalism is a contemporary contest between a shrunken sense for Law (no longer conceived as a grand master plan) and a shrunken ideology (construed as a judge's personal politics). Ultimately, the relevant effect of the "End of Ideology" program is a shoring up of the old idea that on the one side of the ledger is a reduced legalism or the Rule of Law, and on the other side is a reduced ideology or policy preference. Law *qua* law is not ideological. Law only becomes ideological once Politics infects the legal scene.¹¹¹



It would seem that judges are largely conscious of this contest between the "internal" demands of a non-ideological Rule of Law and the "external" demands of small-scale political ideology.¹¹² In the wake of legal realism and legal functionalism, judges, lawyers, and academics actively negotiate the effort to keep judicial ideology at bay. Indeed, playing the barbarian at the gate, ideology as politics is regularly conceived as among the keenest threats to the Rule of Law.¹¹³ This particular version of the problem, as we have suggested, is a consequence of the mid-century functionalist attack *on* ideology. That attack was at once a pillory on abstraction and a prayer for a more politically-oriented understanding of law—but an understanding of

111. Joshua Fischman & David Law, *What is Judicial Ideology and How Should We Measure It?* 29 WASH. U. J.L. & POL'Y 133 (2009).

112. Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

113. See ALLAN HUTCHINSON & PATRICK MONAHAN, eds., *THE RULE OF LAW: IDEAL OR IDEOLOGY* (1987); DAVID SUGARMAN, *LEGALITY, IDEOLOGY, AND THE STATE* (1983).

law in political context, not a politicization of law from the inside, of law itself. If we wish to understand the political, economic, and social process in which law happens, we were told, we have to leave behind the old-fashioned fantasy of the Rule of Law, and create it anew.

It is precisely because so many jurists *did not* want to leave that old-fashioned fantasy behind that today's truest heirs to the "End of Ideology" program are not found in the legal mainstream but are instead working in the interdisciplinary space occupied by political scientists and empirically minded legal scholars.¹¹⁴ We say that these may be the true heirs of the "End of Ideology" program because, while many jurists desire fidelity to a Rule of Law, the most aggressive forms of "realism" are practiced by the political scientists. Rather than paying attention to what judges say,¹¹⁵ they focus on what judges "actually" do. This is an intellectual task resolved through the observation of judicial conduct,¹¹⁶ empirical indicators purported to capture the operative logic of the judges' hidden behavioral reality.¹¹⁷ The "internal" domain of legal reasoning, it turns out on this view of things, is a red herring when it comes to ideology. Legal reasoning is just for show, perhaps a necessary illusion, but ultimately nothing more than cover for the "external" reality of judicial politics.¹¹⁸

One of the main constructs developed among political scientists to study this external space of judicial ideology was "the attitudinal model."¹¹⁹ Used to explain the background causal relationships that connect a given set of facts and the judge's propensity towards bias or impartiality, the model's central premise derives from the idea that a judge's personal policy

114. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Thomas Miles & Cass Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

115. *Id.* at 35.

116. See generally, J. Mitchell Pickerill & Christopher Brough, *Law and Politics in Judicial and Supreme Court Decision Making*, in THE ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR (Robert M. Howard & Kirk A. Randazzo, eds., 2018).

117. Jeffrey Segal, *Judicial Behavior*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE (Robert Goodin ed., 2008).

118. This is what political scientists sometimes call "the legal model" of judicial behavior. It is generally discredited. JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 48 (2002). *But see* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUDGES MAKE (1997); Tonja Jacobi, *The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 110 NW. U.L. REV. 259 (2006).

119. HAROLD SPAETH, SUPREME COURT POLICY MAKING 64 (1979). Political scientists sometimes link the attitudinal model to an "indeterminacy thesis" associated with legal realism. As Michael Bailey and Forrest Maltzman put it, "[t]he attitudinal model builds on two intellectual foundations. First, legal realism in the early twentieth century highlighted the indeterminacy of law. This indeterminacy allows justices to inject their personal views (perhaps unconsciously) into the development of the law." The second foundation is "the behavioral revolution in the middle of the twentieth century." MICHAEL BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 4-5 (2011). We agree, however, with Epstein and Knight when they argue that "[i]n fact, it was less the realists' writings than an empirical observation that led Pritchett to consider the importance of ideology in the first place." Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 13 (2013).

preferences (judicial ideology) are the strongest determinants in producing a given case's outcome: judges who have "liberal" political leanings will make "liberal" decisions, judges who have "conservative" leanings will make "conservative" decisions.¹²⁰ The key question, of course, would be how to determine a judge's political leanings in the first place. In the years since the attitudinal model was first proposed, there have emerged a number of alternative methods for discovering and measuring what is understood to be the judges' background ideological influences, ranging from the very basic and primitive to truly complex and sophisticated.¹²¹ Curiously enough, most of them make more sense the higher up we go the proverbial food chain: Supreme Court justices *apparently* have the most amount of "ideological" discretion, while trial court judges have the least.¹²²

These developments in the field of political science inevitably triggered a parallel process in legal scholarship,¹²³ including the emergence of a theoretical project expressly preoccupied with the empirical analysis of judicial behavior.¹²⁴ Following the lead of political scientists Jeffrey Segal and Harold Spaeth, legal scholars like Lee Epstein and Jack Knight popularized the view that, as demonstrated by their extensive empirical studies, legal reasoning played very little role in deciding legal controversies. To explain the objective reality of judicial decision-making, they argued, one would be better served adopting a rational choice or "strategic account" outlook that focused on understanding and recording each given judge's personal policy preferences. In part perhaps because it was developed by scholars with sophisticated training in both the disciplinary fields of law and political science, Epstein and Knight's "strategic account" theory did not, unlike the basic attitudinal model, assume that these personal policy preferences told the *whole* story.¹²⁵ Rather, it explained, "justices are strategic actors who realize their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect to make, and the institutional context in which they act."¹²⁶ Following this important example, in subsequent years

120. HAROLD SPAETH, SUPREME COURT DATABASE (2015).

121. Christopher D. Johnston et al., *On the Measurement of Judicial Ideology*, 37 JUST. SYS. J. 169 (2016); Adam Bonica et al., *Measuring Judicial Ideology Using Clerk Hiring*, 19 AM. L. & ECON. REV. 129 (2017); Michael Bailey, *Measuring Judicial Ideology*, in Howard & Randazzo, *supra* note 116.

122. See LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 231 (2013).

123. The entire discipline of law and economics is, in a sense, a variety of this End of Ideology after-effect. Like those scholars fascinated with judicial activism and ideology, law and economics scholars have for more than a generation sought out the economic explanations for what is "actually" going on behind the legal curtain. Lauren Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 L. & SOC. REV. 181 (2004).

124. See generally, LEE EPSTEIN & ANDREW MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH (2014).

125. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND ATTITUDINAL MODEL REVISITED 111-13 (2012).

126. EPSTEIN & KNIGHT, *supra* note 118, at 10. See also Lee Epstein & Jack Knight, *The Economic*

it became increasingly common for ELS scholars to present ideology as an extremely potent, but non-exhaustive variable in the determination of judicial decision-making.¹²⁷

We have canvassed now two different modes of ideology-critique in law. The First Critique belongs to legal functionalism. Functionalist scholars challenged the starting assumptions of legal formalism which implied that, both as a social phenomenon and as a mode of discourse and reasoning, law could exist in a relatively splendid isolation from the rest of the broader social context. The critique they constructed was a critique of ideology conceived as a grand masterplan: a totalizing vision and a philosophy that was not just dead wrong in substance but also all-powerful in terms of its rationalizing effects. To counter the influence of this sort of totalizing vision required apprehending the law in the context of its true social reality: the living law, law in action, law as it actually functions. Analytically, the functionalist model of ideology-critique is premised on two structural distinctions. The first is the distinction between law and the external non-legal (social) context in which law has to be situated in order to understand its reality. The second is the distinction between law's objective constituent materials – legal rules, doctrines, operative concepts – and the mental understanding one can have of these materials. To become a victim of ideology is to allow the “wrong” theory of law to cloud one's mental understanding.

The Second Critique belongs to the tradition of empirical legal studies, a movement that in historical terms emerges roughly half-a-century after the first sighting of the functionalist tradition. After the fall of formalism, the internal space of law was no longer thought of as a proper location of ideology, since that inner space had been “cleaned out” of its formalist dogma. Functionalist reasoning, in contrast, was not ideological, since it was just a way of getting at law's political reality. Ideology was now placed on the political outside, and the critic's task was to understand the ways in which this ideological outside could influence the relatively inert internalized space of law. Spurred on by the writings of scholars like Segal, Spaith, Epstein, and Knight, a new concept of ideology gradually began to take form, one that conceived of ideology as an essentially external factor operating from outside the properly legal plane and entering it through the personal politics and biases of legal actors. In this posture, the social reality of ideology devolves essentially into extra-legal values, prejudices, and partisanship, and the practice of rigorous empirical inquiry is imagined to

Analysis of Judicial Behavior, in THE OXFORD HANDBOOK OF JUDICIAL BEHAVIOR (Lee Epstein & Stefanie Lindquist, eds, 2017). For early criticism and advocacy for positive political theory, see Frank Cross, *The Justices of Strategy*, 48 DUKE L.J. 511 (1998).

127. See, e.g., Jack Knight, *Are Empiricists Asking the Right Questions about Judicial Decisionmaking?* 58 DUKE L.J. 1531 (2009); CASS SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).

provide the most effective defense and prophylactic against ideology's corrupting influence. There is, thus, on the one hand, a system of positive legal rules, doctrines, and institutions and, on the other hand, the relationship that connects this system to the ideologies of individual legal actors, such as judges. This relationship forms the principal object of study for every critically inclined scholar, and the methodology of empirical analysis is the main theoretical instrument this scholar is meant to use. The implied assumption here, in other words, holds that empiricism does not only offer an entirely reliable protection against ideology – it also immunizes its practitioners against ideological infection.

Worth noting are some continuities between the two Critiques. Both abide by the distinction between an internalized Law and an externalized Society, and in this sense the Second Critique is fundamentally beholden to the First. In order to gain purchase on Law's reality, we must bypass the ideological mirage. For the First Critique, the illusion is the one that fools us into thinking that Law is autonomous from its social contexts. Proponents of the Second Critique agree wholeheartedly. But they push the ball forward, claiming that the illusion is that legal reasoning in any form has a substantial impact on the way judges go about making their decisions. It is not that these scholars have come to conclude that functionalism is as ideological as formalism, since they accept the necessity of placing law at the service of social context. It is rather that they see all modes of legal reasoning as basically useless.

Where the two Critiques most substantially differ is on the question of how to locate the ideological trouble-maker. In the First Critique, as we have explained, the target is the "internal" space of Law, for this is where legal formalism was thought to reside. In the Second Critique, which takes for granted the successful work of the First, focus comes to the political space "external" to Law. For it is in the judge's political preferences that we find the motors of judicial activism, and it is this form of small-scale political ideology that the Second Critique is out to expose and denounce.

B. Ideology as Manipulation

A basic assumption on the part of both of the first two Critiques is that ideology is something that generally sits at the intersection between politics and language but ultimately goes beyond simple, blunt propaganda. Ideology involves a certain process of language manipulation—"twisting words," "playing with meaning"—that is performed with a view to induce politically significant effects, for example, by changing people's ideas and representations about the world around them and their place in it. But it does not just "tell" people that they should do something right here and right now.

A classic example of this way of thinking about ideology can be found in

the oft-quoted definition by Martin Seliger: “Ideology is a set of ideas by which men posit, explain and justify ends and means of organized social action, and specifically political action, irrespective of whether such action aims to preserve, amend, uproot or rebuild a given social order.”¹²⁸ Generally, this way of thinking about ideology is characterized by a strong sense of instrumentalism—ideology is either a tool that people deploy or an art-form that they practice—as well as a deeper, underlying belief in concepts like scientific neutrality, objectivity, truth, empirical facts, and impartiality. In this view, what is crucial about ideology is that it concerns how people use language and ideas when they communicate with one another. What sets “ideological discourse” apart from “scientific discourse” is the distinct refusal or failure to remain objective and impartial in ways that result in politically significant consequences. The failure to remain objective and impartial comes as a result of ignoring empirically substantiated facts in favor of some pre-established set of convictions. The only effective antidote is the consistent promotion and cultivation of the kind of culture of critical self-awareness and analytical rigor traditionally associated with natural sciences. The less there is enthusiasm for sciences and knowledge informed by empirical evidence, it follows then, the higher will be the likelihood of ideological “capture.”

And what follows from ideological capture? Politics, in a nutshell, is the process of some people governing other people. Much of this process presumes and relies upon coercion. An even larger part, however, is premised on the dynamics of consent: whether through coercion or not, those who are governed, ultimately, must *consent* to the rule so imposed. Ideology, on this view of things, is what allows the powerful to bypass or limit the need to use coercion by going straight to the moment of consent. The key to achieving this objective is the mastery of what the British journalist Steven Poole, in a pointed reference to George Orwell’s *Nineteen Eighty-Four*, calls the art of unspeak—smuggling super-charged political opinions under the cover of ostensibly neutral and objective language.¹²⁹

What is it that makes unspeak so effective? The typical answer is that it is something about our modern society itself that prevents us from “seeing clearly.” What makes the art of unspeak possible is not an inbuilt weakness of the human mind. It is that the social forms in which we live and breathe

128. SELIGER, *supra* note 51, at 14. That this definition represents one of the most widely used points of reference in the literature on ideology, is not difficult to see. It is cited and invoked, often both as a starting point and as a working definition, by everyone from critical theorists to political scientists. See, e.g., Daniel Koehler, *Deradicalization and Disengagement Programs as Counter-Terrorism and Prevention Tools. Insights from Field Experiences Regarding German Right-Wing Extremism and Jihadism*, in COUNTERING RADICALIZATION AND VIOLENT EXTREMISM AMONG YOUTH TO PREVENT TERRORISM 120, 130 (Marco Lombardi et al., eds., 2015); Christopher Flood, “Introduction,” in POLITICAL IDEOLOGIES IN CONTEMPORARY FRANCE 1, 1 (Christopher Flood & Laurence Bell, eds., 1997); TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION 6-7 (1991).

129. STEVEN POOLE, UNSPEAK (2006).

grow ever more complex and opaque. As the American economist John Kenneth Galbraith famously put it in his account of the practices of “conventional wisdom”:

Because economic and social phenomena are so forbidding, or at least so seem, and because they yield few hard tests of what exists and what does not, they afford to the individual a luxury not given by physical phenomena. Within a considerable range, he is permitted to believe what he pleases. He may hold whatever view of this world he finds most agreeable or otherwise to his taste.¹³⁰

By manipulating the language that is used to describe and represent the social forms around us, practitioners of unspeak change people’s ideas and views about the world, including their beliefs about right and wrong. In this tinkering with beliefs about good and bad, natural and artificial, universal and particular, the “unspeakers” encourage their audience to consent, decide, and conclude in ways which they otherwise may have rejected or resisted. In doing so, ideology makes the art of politics and government less violent and less overtly oppressive. It also makes it more insidious and deceitful.

The narrative of ideology as the practice of unspeak belongs to a tradition which is predicated on a broadly conspiratorial understanding of legal and political speech, and the field of public discourse more generally. It seeks to discern motives and biases, cover-ups and slippages, moments of “spin” and “sleights of hand.” In doing so, it construes ideology as a largely conscious or semi-conscious practice performed by those “in the know” on an unsuspecting public. It often brings focus to the importance of belief systems, assumptions, epistemology, evidence-based reasoning, the knowledge of facts, “forgotten history lessons,” and objective truth.¹³¹ Historically, from the broader cultural standpoint, an enthusiasm for this mode of ideology-critique has been mostly characteristic of what might be generally termed the classical liberal mindset in the sense of liberalism as the shared philosophical sensibility of Kant, Montesquieu, and Adam Smith, rather than liberalism as a left-leaning political agenda.¹³² Inasmuch as this mindset continues to remain the dominant cultural mindset across the broader space of contemporary Anglo-American public discourse, the idea that ideology is essentially a form of politically motivated lying

130. JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 7 (1999) [1958].

131. For typical examples, see, e.g., Vishaal Kishore, *Free Trade and Comparative Advantage: A Study in Economic Sleight of Hand*, in *RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW* 90 (UGO MATTEI AND JOHN HASKELL, EDs. 2015); MATT KENNARD, *THE RACKET: A ROGUE REPORTER VS. THE MASTERS OF THE UNIVERSE* 55-66 (2015); DAVID MARQUAND, *MAMMON’S KINGDOM: AN ESSAY ON BRITAIN, NOW* 77-96 (2014). See also, more generally, JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000).

132. For further background on the classical liberal tradition, see DESAUTELS-STEIN, *supra* note 17, at 123-151; ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975); DOMENICO LOSURDO, *LIBERALISM: A COUNTER-HISTORY* (2011).

remains the most popular approach to constructing the concept of ideology in modern Anglo-American usage. It is also the underlying message of the First and Second Critiques of legal ideology.

IV. THIRD CRITIQUE: POSTMODERN LAW & SOCIETY SCHOLARS AND THE CRITIQUE OF PRACTICE

As we transition from the first two Critiques and their grounding in empiricism as the antidote to ideology, the concept of ideology shifts in the space of the Third Critique, moving out of what we can call an ideological foreground and into a more murky “background.” As we explain below, this understanding of ideology as background will draw on quite different intellectual resources than those we have seen so far, including Marxism and postmodernism. Advocates of the first critique of legal formalism were emblematic of a general interest in finding some middle way between “rigid formulas” of capitalism and socialism, the so-called great ideologies. And it really was a “middle way,” not some way that might discard capitalism and socialism altogether. Indeed, there was much that the End of Ideology theorists found attractive about socialism, including Marx’s emphasis on the material foundations of politics and civil society. It is, after all, only a short step between Marx’s materialist emphasis on life “on the ground” and the functionalist mantra of social needs and interests. As Marx explained,

[t]he premises from which we begin are not arbitrary ones, not dogmas, but real premises from which abstraction can only be made in the imagination. They are the real individuals, their activity and the material conditions under which they live, both those which they find already existing and those produced by their activity.¹³³

But whereas Bell and others would press this “materialism” into the service of constructing a “modern” approach to liberalism, Marx’s critique was already aimed precisely at just such an intellectual maneuver. As Slavoj Žižek has argued, “the idea of the possible end of ideology is an ideological idea par excellence.”¹³⁴

We will return to this point, but for now let us state at the outset how the Third Critique both distinguishes itself from and allies itself with the prior two. First, whereas the functionalist critique targets ideology in the internal space of Law, and the ELS critique targets ideology in the political spaces external to Law, the Third Critique—postmodern socio-legal studies—orients itself toward a complex blurring between the two spheres of Law and Society. As we will see, the main vehicle for this blurring is the idea that certain types of everyday legal practices constitute at one and the same

133. KARL MARX AND FREDERICK ENGELS, *THE GERMAN IDEOLOGY: PART ONE* (C.J. Arthur ed., 1970).

134. SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* (2009).

time “social” and “legal” practices, which means that drawing any distinction between them is really more a matter of choosing a particular “perspective” rather than uncovering their “objective essence.”¹³⁵ A different way of putting this is to say that the Third Critique places ideology both on the “inside” and on the “outside” of the legal form, by recognizing that Law and Society are mutually constitutive forces.¹³⁶ It is this emphasis on perspective, mutual causality, and the primacy of hybrid practices that are at once and always already both legal and social, that lends this Third Critique the label of the postmodern.

Second, postmodern socio-legal studies is nevertheless consistent with legal functionalism and empirical legal studies in the sense that all three of them give at least some degree of credit to the value of legal rules, while at the same time taking a rather skeptical stance in relation to the “elite” and “mandarin” forms of legal reasoning.¹³⁷ Like their ELS cousins, however, socio-legal scholars assume that the bulk of ideological content lies beyond the terrain of legal rules and legal argument.¹³⁸ But unlike ELS, they put forward a much broader conception of legal ideology, how ideology really functions, and in particular, how it functions to legitimate the interests of the powerful at the expense of the subordinated.¹³⁹ For proponents of the Third Critique, it is a mistake to reduce the concept of legal ideology to personal values or individual policy preference. Where ELS seeks to identify the political biases shaping the course of judicial decision-making, the Third Critique of socio-legal studies purports to analyze the “everyday” basis of every aspect of law’s social reality.¹⁴⁰ This is that shift from foreground to background, mentioned above. Thus, in the Third Critique, the phenomenon of ideology refers as much to the specific set of strategies and practices that conceal any contradictions in the lawyers’ professional experience of the legal system, as it does to the idea of a more “global” collective consciousness that conceals the broader system of power hierarchies. Moreover, while the ultimate function of ideology is to enable and sustain a regime of political repression, its mechanisms and practices are not only diffuse and complex, but also highly disparate, local, particular, and frequently working at cross-purposes.¹⁴¹

135. See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1972).

136. Marianne Constable, *Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law*, 19 L. & SOC. INQ. 551 (1994).

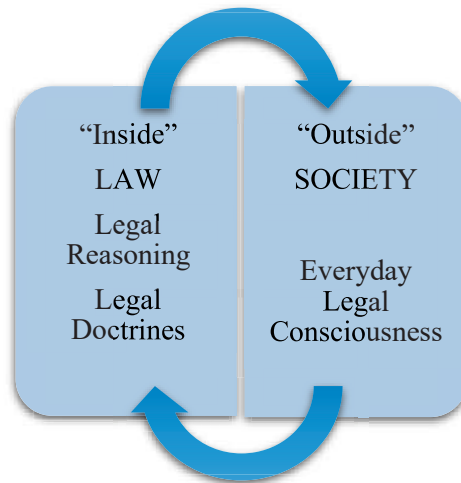
137. See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

138. Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 L. & SOC. REV. 11, 16 (1985).

139. See LAW, STATE, AND SOCIETY (Bob Fryer et. al. eds. 2018).

140. ALLAN HUTCHINSON, *TOWARD AN INFORMAL ACCOUNT OF LEGAL INTERPRETATION* 123 (2016).

141. Trevor Purvis & Alan Hunt, *Discourse, Ideology, Discourse, Ideology, Discourse, Ideology . . .*, 44 BRIT. J. SOC. 473 (1993).



Third, the Third Critique is also consistent with the first two in that it has at least a partial connection to the empiricist tradition. To be sure, proponents of the Third Critique have at times argued for a “post-empiricist”¹⁴² approach to legal ideology. But that’s the point. Even while complicating the premises of what empirical study can really accomplish, socio-legal studies—even in its postmodern manifestation—aspire to make good on the basic promise of empirical social science, even while cognizant of that tradition’s deepest limitations. Indeed, just as empiricism in the hands of ELS scholars is very different from empiricism in the hands of functionalists like Ehrlich and Pound, so too is it different yet again in the hands of the socio-legal people that we survey below—many of whom fundamentally disagree about the essence of the empirical project.¹⁴³ And yet, despite all the differences, all three Critiques share a basic commitment to some form of empiricism as ideology’s *bête noire*.

As noted earlier, the concept of ideology underwent a considerable amount of shrinking as it made the passage from End of Ideology functionalism into ELS. Once conceived as a grand masterplan and a totalizing vision, ideology reduced to the status of individual partisan bias and personal agenda. On the one side was the ideology of policy preference, and on the other was, simply, the black box of Law. The principal task for ideology-critique was to identify how the former invaded the latter, and the

142. For discussion, see e.g., Boaventura de Sousa Santos, *Room for Maneuver: Paradox, program, or Pandora’s Box?* 14 L. & SOC. INQ. 149 (1989); Hendrik Hartog, *The End(s) of Critical Empiricism*, 14 L. & SOC. INQ. 53 (1989).

143. See generally, Mark Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. LAW. SOC. SCI. 555 (2010).

task was to figure out how to measure the effects of that invasion. The Third Critique, however, assumes that ideological misconceptions are organic. Ideology needn't be the product of nefarious manipulation or the unspeak, and when ideology is at its most effective, conscious and foregrounded manipulation is only a small piece of the story. Indeed, on this view of things, the question of agency in the struggle against ideological distortion turns out to be less a function of any one person's individual actions or states of mind, and more a matter of a backgrounded collective consciousness. Ideology, from the perspective of the socio-legal mode of critique, finds its true ground in collective experience, and less in the type of language manipulation discussed above. It is, on this view, only at the level of a society-wide collective consciousness that ideology can be contested and resisted.

A. The Marxist Baseline

The shift from the individual to the collective marks a significant departure in the evolution of the critique of legal ideology,¹⁴⁴ and the theoretical tradition underpinning this view goes back to Hegel, Herder, Schiller, and other philosophers of the Spirit. The essential theme, as Philip Allott puts it, is that of a “social psychology” in which every “society generates a social consciousness, a public mind, which is distinct from the private mind [and] the consciousness of actual human individuals.”¹⁴⁵ If we assume that ideologies are collective delusions, then we can only understand ideological capture in reference to the respective social body, to the way the history of that social body *as a collectivity* has unfolded, and the way the material givens of its current existence *as a collectivity* are organized. Only by bringing about a radical and comprehensive change of these material givens, and thus changing the actual composition of the social body itself, might we clear the ideological air. Far from being just an instrument or a form of manipulation practiced by skilled, self-determining agents, in this Third Critique, the concept of ideology presents itself as a “sleep of reason.”¹⁴⁶ With its potential to envelop society *tout court*, the masses remain ignorant of the divide between the true realities of their lives and the illusory dreamworld of ideology. It is the task of the critical project

144. We ask that the reader treat our usages of terms like “evolution” with great heaps of salt. As we have said, we are not claiming that there is anything like a historical continuity or causal set of linkages between the four critiques surveyed here.

145. See PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 291 (2002).

146. The reference here is to one of Francisco Goya's most famous drawings, “The sleep of reason begets monsters.” The picture, which depicts a sleeping artist surrounded by a pack of ominously swirling bats and owls, has long served as the archetypal metaphor for the Enlightenment-style rationalist negation of prejudice and superstition and the belief in the emancipatory power of critical awakening. For a typical illustration, see Suzanna Sherry, *The Sleep of Reason*, 84 *GEO. L. J.* 453 (1996). For a more complex interpretation of the concept (and the sentiment behind it), see Alexander Nehamas, *The Sleep of Reason Produces Monsters*, 74 *REPRESENTATIONS* 37 (2001).

to expose this dreamworld for what it is, and to chart a way out.

Two basic theoretical innovations therefore separate the general outlook of the socio-legal critique from its functionalist and ELS cousins. The first innovation is the idea of the *collective consciousness*. The presumption here is that social groups tend to develop their own “public minds,” which means they also develop a propensity for some form of “group consciousness.” The second innovation is the idea of the *indispensability of mass-scale radical action*. If ideology is the sleep of reason spreading across the collective consciousness, we must awaken the *collective* agent, not just some of its individual members. Of course, to awaken a whole society from an induced slumber is no walk in the park. Individual-level solutions that work at the level of individual consciousness won’t do it, but a programmatic theory for social transformation just might.

In most introductory texts on social theory, the standard example of such a program is the classical Marxist tradition.¹⁴⁷ Indeed it is Marxism, with its insistence on separating the economic base (*basis*) from the legal, political, and cultural superstructure (*überbau*), that on the whole provides the most familiar reference points and tropes around which the broader universe of postmodern social-legal scholarship revolves: false consciousness, alienation, reification, fetishism, “the incongruence between the realm of ideas and the economic reality,” “the ruling worldview is the worldview of the ruling class,” “ideas are nothing but an expression of material relationships,” “it is not the consciousness of men that determines their existence, but their social existence that determines their consciousness,” etc.¹⁴⁸

Scholars working in the tradition of the Third Critique may well substitute economic relations of production with material structures of racism, patriarchy, or colonial conquest and subjugation—the model remains essentially the same.¹⁴⁹ The ideological mechanism is not just another form of distortive discourse or the importation of one’s personal agendas into the legal process. Ideology is an integral part of the broader social fabric in which we live, an inevitable consequence of humanity’s socialization, of our coming to live together with one another. Wherever we find social groups, we find ideology in the tendency towards struggle, relations of

147. See, e.g., ALEX CALLINICOS, *SOCIAL THEORY: A HISTORICAL INTRODUCTION* 82-4 (2007).

148. See, e.g., MARX, *supra* note 35, at 20-21. See also GEORG LUKACS, *HISTORY AND CLASS CONSCIOUSNESS* 83-110 (1971); KARL MARX AND FREDERICK ENGELS, *THE GERMAN IDEOLOGY: PART ONE* 42-68 (C.J. Arthur ed. 1970); G. V. PLEKHANOV, *IN DEFENSE OF MATERIALISM* 193-202 (1947).

149. See, e.g., SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (2015); DENISE THOMPSON, *RADICAL FEMINISM TODAY* (2001); Elizabeth Flynn, *Composing as a Woman*, 39 *COLLEGE COMP. & COMM.* 423 (1988); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (rev. ed. 1982); EDWARD SAID, *ORIENTALISM* (1979); Roxane Dunbar, *Female Liberation as the Basis for Social Revolution*, in *SISTERHOOD IS POWERFUL* 477 (Robin Morgan ed. 1970); *Redstockings Manifesto*, in *SISTERHOOD IS POWERFUL*, *supra* at 533; FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1963); SIMONE DE BEAUVOIR, *THE SECOND SEX* (1949).

domination, and certain forms of collective consciousness. Every ideology is a product of the underlying material conditions of the social collectivity in question, and the corresponding relations of domination. Any attempt to change ideology must start with changing these relations of domination. And since these relations are always material, any attempt to change ideology must inevitably begin by addressing the question of material social change.

An understanding of ideology in this sense requires study of not only the corresponding system of values and beliefs—the worldview at the center of the respective collective consciousness—but also the dialectical relationship between this system of values and beliefs and *the underlying social materiality*. The focus of the critical inquiry falls on the background system of power relations by which these frameworks are produced, but also on the process of co-production or mutual constitution between these background systems and the ideational frameworks which give them cover.

From this perspective on ideological formation and power, “unmasking” a given discourse as “ideologically biased” is hardly the ballgame. Indeed, without changes in the underlying system of material social relations, unmasking ideology only does so much. This raises the question of strategy, for how can the underlying system of material social relations be changed? One classical answer from the Marxist tradition was Leninism: liberation can only come “from without,” thanks to the leadership of the “vanguard party.”¹⁵⁰ This meant empowering a select group of radical activists who, through their revolutionary leadership, would shake up society so vigorously that the proverbial sleeping masses would be forced to finally arise. Another classical answer came from the various Frankfurt School-inspired movements, such as the New Left and democratic socialists.¹⁵¹ Rather than focus on a vanguard party, the Left needed to organize something along the lines of a continual consciousness raising campaign. This would induce a process of regular grassroots discussions, shared experiences, and localized activism “from below.” What was needed was an increase in popular awareness about the existing system of domination and injustice, which in turn could strengthen the sense of solidarity across the different sectors of the society, enabling those sleepy masses to get on with it already. Perhaps unsurprisingly, it is the latter model of social change that has proved more popular among academic intelligentsias. Indeed, the general political attitude of the socio-legal critique has been unmistakably Frankfurtist: for the socialist revolution to stand any chance of success, the

150. See, most famously, 5 V. I. LENIN, *What Is to Be Done? Burning Questions of Our Movement*, in COLLECTED WORKS 347 (1977). See also Alan Shandro, *Lenin and Marxism: Class Struggle, The Theory of Politics and the Politics of Theory*, in TWENTIETH-CENTURY MARXISM: A GLOBAL INTRODUCTION, *supra* note 18, at 15.

151. See generally DICK HOWARD, *THE MARXIAN LEGACY: THE SEARCH FOR THE NEW LEFT* (2019); HERBERT MARCUSE, *THE NEW LEFT AND THE 1960S* (Douglas Kellner ed. 2005).

idea of its necessity must be consciously realized by the liberated masses.¹⁵²

Compared to the first two Critiques, with their broad characterization of ideology as politically-motivated-lying, what we are seeing here in the foundations of the Third Critique is a reduction in importance attributed to the classical liberal idea of personal agency, along with those broader themes of intentional manipulation and instrumentalism. To be sure, ideology in the terrain of the Third Critique is deeply associated with phenomena like legitimation, mystification, and obfuscation. But these processes are now understood to be much more global in scope than when they were initially developed by Marx, and so beyond the immediate control of any one individual. For what holds true for ideology, holds true also for liberation: what is needed to put an end to any given regime of mystification, obfuscation, and legitimation is an organized process of resistance spread over a protracted period of time, not just a few individual bursts of brilliant rhetoric.

No less importantly, the Marxist tradition also adopts a much more complex and nuanced theory of language. Rather than viewing it as a mere medium of ideology, the Marxist tradition tends to consider language itself an inevitable target and product of the broader ideological process which both exceeds it and remains analytically prior to it. The reign of bourgeois ideology, argue Marxist theorists, does not just misrepresent to the working class the true reality of its oppression. It prevents workers from even finding the right words and categories in which to articulate their lived experience and history of this oppression.¹⁵³ To use a vocabulary is to already accept that vocabulary's evaluative assumptions and the power structures by which they are generated. And yet, even as language is ideologically corruptible, the Marxist tradition still reaffirmed a belief in truth and the possibility of a clear-eyed description of it. Which leads one to ask, how is it possible for us to know for sure that what we know – about ourselves, our ideas, and the world around us – is objectively true if even the most fundamental categories of our thought are susceptible to ideological influence?

The answer, of course, was dialectics. By relating our consciousness to the whole of society, writes Georg Lukacs, “it becomes possible to infer the thoughts and feelings which [we] would have in a particular situation if [we] were able to assess it [in a way] appropriate to [our] objective situation.”¹⁵⁴

152. See HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* 44 (2002).

153. See LUKACS, *supra* note 148, at 49-50, 89-90; LOUIS ALTHUSSER, *ESSAYS IN SELF-CRITICISM* 55 (1976). A similar understanding of the essential non-neutrality of language is found in much contemporary feminist discourse. The very terms in which we are meant to process our experiences and understand ourselves and others around us, argues feminist theory, are a product of centuries-long systems of patriarchal domination. Words and categories that purportedly represent qualities associated with one gender have been consistently infused with positive connotations, while those representing others have gone in the opposite direction. See DE BEAUVOIR, *supra* note 149, at 260-9; Bonnie Kreps, *Radical Feminism I*, in *RADICAL FEMINISM* 234 (Anne Koedt et al. eds. 1973).

154. LUKACS, *supra* note 148, at 51.

Note the logic of the underlying argument: Classical Marxism is drawn to the hermeneutics of suspicion, and portrays ideology as a decidedly distortive and mystificatory process. But it also presumes the existence of a discoverable truth-horizon. Hence, the idea that ideological consciousness is necessarily a form of *false consciousness*. Hence, also, the general emphasis on the importance of identifying, elaborating, and perfecting the various emancipatory knowledge strategies to be used in the cause of *consciousness-raising*.

In the classical Marxist tradition, the most effective knowledge strategy is that of “dialectical materialism.”¹⁵⁵ Like empiricism and positivist social science in the liberal tradition, for the Marxist dialectical materialism gives the analyst that old touch of magic. It enables its users not only to escape the prison-house of ideological superstition, but also to pierce beneath the deceptive appearances even of their own personal experiences. Consider, for example, the parallels between Lukacs’s apologia for the dialectical method and the earlier quoted passage from Galbraith about the “forbidding” character of economic and social forms:

the actual make-up of social phenomena is not immediately apparent [because of] the conditions of existence of capitalist society. It seems obvious to the people who live in capitalist society, indeed it strikes them as ‘natural’, to stick with these forms and to strive to fathom the more hidden interconnections . . . through which these phenomena interconnect in reality.¹⁵⁶

But whereas the bourgeoisie can afford to ignore these “hidden interconnections” and thus remain permanently “enmeshed” in the immediacy of its life experiences, for the proletariat it is “a matter of life and death.”¹⁵⁷ To break the ideological hold, we must encounter the entire totality of social life as a whole. And the only way to do that is by the lights of dialectical materialism.¹⁵⁸ That said, what makes ideological consciousness *false* is not so much the fact that what the reigning ideology teaches us to believe as real and true are actually illusions. It is rather that ideology produces an image of the world that systematically disorients and demobilizes the effort to revolutionize the status quo. As Denise Thompson explains, whether any particular ideological pronouncement seems true or false is not really the issue: what matters is “whether the meanings which structure people’s lives . . . can be used to challenge or undermine domination.”¹⁵⁹ Or, as Eagleton puts it:

155. See V. ADORATSKY, *DIALECTICAL MATERIALISM: THE THEORETICAL FOUNDATION OF MARXISM-LENINISM* (1977); LOUIS ALTHUSSER, *FOR MARX* 161-218 (1969).

156. GEORG LUKACS, *A DEFENCE OF HISTORY AND CLASS CONSCIOUSNESS* 79-80 (2000).

157. LUKACS, *supra* note 148, at 164-5.

158. *Id.* at 169-70.

159. THOMPSON, *supra* note 149, at 29.

the falsehood at stake here is a matter of self-deception, not of getting the world wrong. There is no reason to suppose that the surface belief necessarily involves empirical falsity, or is in any sense “unreal.” Someone may really love animals, while being unaware that his benign authority over them compensates for a lack of power within the labor process.¹⁶⁰

The reason why this point deserves our attention is twofold. In the first place, it highlights how ideology functions as a mechanism of power by way of *rationalization*. When ideology rationalizes our lived experiences to us, it not only infuses them with “systematic meanings,” but also makes them “palatable or acceptable, real and unchallengeable.”¹⁶¹ Second is the idea that we know only two basic modes of existence: “sleeping and waking, dreaming and [reality].”¹⁶² As the English psychoanalyst Adam Phillips explains, the more we can make sense of the former, the more somehow we can learn something important about ourselves.¹⁶³

B. Law, Society, and the Critique of Ideology

In the mid-1980s, scholars like Roger Cotterrell and Alan Hunt were serving up law and society frameworks derived from many of these Marxist and post-Marxist themes.¹⁶⁴ In *The Sociology of Law*, Cotterrell examined how law fashioned certain power dynamics in society, arriving at the conclusion that “[l]egal ideology can be thought of not as legal doctrine itself but as the forms of social consciousness reflected in and expressed through legal doctrine.”¹⁶⁵ That is to say, the workings of legal ideology express themselves less in the rules of law that are created in the positive legal order than in the way people come to think about authority and equality in social life. The ideology of law is a system of field-specific

160. EAGLETON, *supra* note 128, at 89.

161. THOMPSON, *supra* note 149, at 22.

162. ADAM PHILLIPS, *SIDE EFFECTS* 109 (2006).

163. *Id.* at 113. The fundamental premise behind the concept of psychoanalysis, notes Freud, is the idea that all our dreams are essentially a reaction to some underlying physical stimuli acting upon us during our sleep. SIGMUND FREUD, *INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS* 64 (n.d.) [1917]. It is the unique power of the analyst to understand the logic of this reaction and to decode on that basis the “hidden reality” behind our dreams. Note the basic parallels between the Marxist idea of ideology-critique and the Freudian concept of psychoanalysis. What the analysis and the dream are to Freud, society and its ideology are to Marxism. The critic is the analyst and every act of critique aims to decode what specific material stimuli may have triggered the ideological sleep in question. Note also the essential rationalism and determinism of the underlying theoretical sensibilities. Both the Freudian concept of dreams and the classical Marxist concept of ideology as false consciousness implicitly presume not only the existence of some “true reality” behind the dream / ideology but also the possibility of uncovering this reality through the exercise of rational inquiry and analytical rigor. Furthermore, just as dreams in Freud are not just random illusions but a “mode of reaction of the mind to stimuli acting upon it during sleep,” so too ideologies, in classical Marxism, are not at all arbitrary either in form or in content, since their structure and logic are always determined by the respective economic and social realities. *Id.*

164. Cotterrell, *supra* note 42, at 141.

165. *Id.* at 122.

collective consciousness that functions to limit the bounds of what legal subjects and decision-makers perceive to be reasonable disagreements about how to organize society. The reason for this, explains Cotterrell, lies in the fact that ideology “provides the [basic] framework of thought within which individuals and social groups interpret the nature of the conflicts in which they are involved and recognize and understand the interests which they seek to promote.”¹⁶⁶

A central feature of this ideological framework is the idea that a just society is predicated on a law of individual rights.¹⁶⁷ Indeed, “the legal person or legal subject — the being recognized by the law as the locus of rights and duties — is . . . the foundation, in a sense, of all legal ideology.”¹⁶⁸ The reality behind this, of course, is that such a “being” is nothing more than an abstract construct. But in deciding to ground the entirety of law’s imaginary in this construct, a bourgeois legal system not only actively reifies the individual, converting it in the process into a political fetish but also uses this fetish to reconstitute institutions and practices in ways that disempower and demobilize those forces that otherwise might seek to challenge the political and economic status quo. Law is not just “as a policy instrument acting on society” from without, but as a site of social constitution—the mechanism of its dialectical becoming—a reality that exists both as a fact and as a belief, “as normative ideas embedded in social practices.”¹⁶⁹

The endorsement of the classical Marxist tradition took an even stronger turn in Hunt’s work. The first thing that needs to be noted about the Marxist critique of ideology, observed Hunt, was that through its insight into the dialectics between consciousness and becoming, Marxism held the promise of “advanc[ing] the explanatory power of social theory in its application to the analysis of law.”¹⁷⁰ Like with Cotterrell, Hunt’s argument led him eventually to the idea that any truly realistic inquiry into law’s role in society should learn to see “law not merely as an external mechanism of regulation but as a constituent of the way in which social relations are lived and experienced.”¹⁷¹ What comes from this argument, however, is an even more explicit endorsement of a “materialist” methodology: rather than targeting “the smooth surface of legal reasoning and judicial utterance,” the

166. *Id.* at 121.

167. *Id.* at 125.

168. *Id.* at 130-131.

169. Roger Cotterrell, *Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies*, 29 J. L. & SOC’Y 632, 640 (2002).

170. Hunt, *supra* note 138, at 11.

171. *Id.* at 15 (“This approach radically changes the role accorded ideology in social life. Ideology is perceived not as a form of consciousness, which is the conventional view, but as a constituent of the unconscious in which social relations are lived. Once this possibility is appreciated, we have in ideology a new and powerful tool for exploring the relationship between ‘the Law,’ legal subjects, and social relations.”).

object of legal ideology-critique should be the analysis of those social, economic, and political struggles that reside behind and are obscured by those appearances.¹⁷² Note the implied distinction between discursive frameworks and practice: though the two are closely related, it is in the space of these background legal practices, where the subjects of law experience it as a lived social reality, that law's ideology really exerts its influence on society.¹⁷³ A study of the discursive output of courts and legislatures can give us a good idea of how the legal system ultimately "wants" its subjects to experience themselves at the level of abstract ideal. But it is in studying the everyday legal practices that we can encounter the true materiality of the law—that is to say, law's real impact on real people and real relations.¹⁷⁴ If we are to properly avoid "idealistic theories of ideological determination," Hunt concludes, socio-legal critique must aim to uncover those social practices "suffused" by legal ideologies.¹⁷⁵

Of course, the thrust of this critique was often understood as simply suggesting that law was just cover for politics, and the ultimate aim was to dig out this hidden politics, to get an empirical handle on what was "really going on" beneath all the abstract constructs and discursive misrepresentations.¹⁷⁶ Seen from this angle, the main defining feature of what was becoming the Third Critique, as Austin Sarat and Susan Silbey once put it, was that it would "refuse to be deceived."¹⁷⁷ And yet what made the work of scholars like Cotterrell and Hunt so noteworthy, and so "postmodern," was that there was also something very different about the way it understood the idea of "deception." Unlike earlier iterations of the law and society movement, Cotterrell, Hunt, and those scholars—like Sarat and Silbey—who came together under the banner of the Amherst Seminar on Legal Ideology and Legal Process, rejected theoretical frameworks in which "Law" and "Politics"—or Law and Society for that matter—would be seen as separate and mutually autonomous spheres. It was a mistake, according to this approach, to view these domains as monolithic, homogenous blocks.¹⁷⁸ Both Law and Society were fictions, while laws and

172. *Id.* at 16.

173. *Id.* at 15-16.

174. *Id.* at 26.

175. *Id.*

176. David Trubek & Jon Esser, *Critical Empiricism in American Legal Studies: Paradox, Program, or Pandora's Box*, 14 L. & SOC. INQ. 3, 10 (1989).

177. Susan Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 L. & SOC. REV. 165, 166 (1987). Among others, Sarat and Silbey explained in the introduction to a symposium issue on Law and Ideology that research moving in the law and society version of the second critique had certain intellectual prerequisites: (1) linkages between consciousness and social relations; (2) understanding law as social practice; (3) law as a medium of Foucauldian power dynamics; (4) particularized historical contingency and complexity. 22 L. & SOC. REV. 629 (1988).

178. See also Hunt, *supra* note 138, at 28. Still, Hunt did rely on a distinction between internal contradictions plaguing law and external contradictions in society. *Id.* at 29. The idea was that they needed to be studied together. *Id.* at 31.

social relations were real enough; the trick in moving forward was to emphasize “particularity and specificity,” to celebrate the idiosyncratic, the complex, the local universes of law and politics and economics and culture in their necessary blendings.¹⁷⁹ To make good on the ideological critique of power, Sarat and Silbey concluded,

[t]he risk has to be taken and the courage has to be mustered to immerse ourselves in the study of social transactions and social processes. If we take as our subject the constitutive effect of law we cannot be content with literary theory applied to legal doctrine. We must instead study families, schools, work places, social movements, and yes, even professional associations to present a broad picture in which law may seem at first glance virtually invisible . . . We would then understand law not as something removed from social life, occasionally operating upon and struggling to regulate and shape social forms, but as fused with and thus inseparable from all the activities of living and knowing.¹⁸⁰

Work on the socio-legal critique of ideology continued through the ‘80s and into the 1990s, much of it hovering in and around what Bruno Latour called the hybrid and Pierre Schlag would later call the dedifferentiation problem: the hunt for and analysis of the everyday mixtures of the legal and the social.¹⁸¹ Despite the concessions made in the face of the complex networks of law and politics, the socio-legal tradition practiced by the likes of Hunt, Silbey, and Sarat still believed in the epistemic potential of social sciences to cure ideology. As David Trubek suggested, these scholars

assume that social scientists are able to use standard social science methods to provide valid descriptions of the historical and contingent practices the new paradigm identifies. Moreover, the very discovery of historicity and contingency makes “social science” all the more important to law’s understanding of itself. Since, in this approach, the true meaning and impact of law lies in complex and contingent practices often of exceedingly low visibility, the work of social scientists . . . becomes essential if we are to understand what is really going on.¹⁸²

Silbey, however, warned against taking Trubek’s criticism too seriously. Law and society scholars, she counseled, needed to stop using the categories of law as categories of social analysis:

[w]e were using our subject’s language as the tools for our analysis and in the course finding ourselves unable to answer the questions our

179. Silbey & Sarat, *Critical Traditions*, *supra* note 177, at 173.

180. *Id.*

181. Susan Silbey & Patricia Ewick, *The Architecture of Authority: The Place of Law in the Space of Science*, in *The Place of Law*, in *THE PLACE OF LAW* (Austin Sarat et. al. eds., 2003).

182. Trubek & Esser, *Critical Empiricism*, *supra* note 176, at 25, 34.

research generated. New theoretical materials and research methods were necessary. These involved more intense study of local cultures, native texts, and interpretive hermeneutical techniques for inhabiting and representing everyday worlds to construct better accounts of how law works.¹⁸³

From here on out, Silbey argued, the post-positivist, post-empiricist socio-legal critique needed to search out “alternative understandings and accounts of social relations, alternative constructions forged from divergent experiences and competing visions.”¹⁸⁴

As the work of the Amherst Seminar pushed its way toward the twenty-first century, legal ideology continued to mean the ideology of legal practice as manifested in law’s external, social life. To be sure, scholars like John Brigham, Christine Harrington, Barbara Yngvesson, Austin Sarat, and Susan Silbey argued for a far more complicated take on the sociologist’s role in producing empirical work. Their approach, all agreed, was no mere duplication of what the political scientists were doing in their studies of law and ideology. As Sarat explained, “[p]articipants in the Seminar are struggling to do empirical work in a world stripped of a self-confident belief in the distinction between subjects and objects and between ways of representing the world and the world that is represented. We recognize that even in such a world we still need standards for evaluating what we read and what we learn.”¹⁸⁵ That is, if Sarat and his associates felt that it was impossible to make claims about the “true” nature of law’s ideological manifestations because of the utterly complex relation between the scientist and the object, this did not mean that sociologists had nothing useful to say. As Sarat and Sibley put it, “surely the import of contemporary theory is not that there is no ‘there’ out there but rather that our ability to know what is there is limited.”¹⁸⁶ Fair enough. For as so many postmodern thinkers were arguing at the time, the capacity to represent in the mind what was happening in the world was illusion, plain and simple.¹⁸⁷

For the proponents of the socio-legal critique, however, it was all so very complicated. As Silbey explained,

[w]hile critique seeks to explore social practices and to identify the structures of subordination in order to engage them for liberatory purposes, it must not, however, submerge fractured identities and multiple experiences in an effort to create a unitary account of social life. Rather, I argue that the authority of accounts produced by

183. Susan Silbey, *Loyalty and Betrayal: Cotterrell’s Discovery and Reproduction of Legal Ideology*, 16 L. & SOC. INQ. 809, 817 (1991).

184. *Id.*

185. Austin Sarat, *Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-Empiricist Sociology of Law*, 15 L. & SOC. INQ. 155, 160-161 (1990).

186. Silbey & Sarat, *Critical Traditions*, *supra* note 177, at 168.

187. *See, e.g.* RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

sociology will depend on the ability to construct reports that sustain multiple perspectives; at the time same time, sociology's contribution to social critique will also depend on its ability to locate those accounts within historical and political analyses that provide the context that gives them purpose and meaning.¹⁸⁸

In the pursuit of a legal ideology, postmodern socio-legal scholarship ended up delivering an account of just about everything. The ideology of legal practice was also the ideology of cultural practice, since "legality refers to 'the meanings, sources of authority, and cultural practices that are recognized as legal, regardless of who employs them or for what ends.'"¹⁸⁹ Legal ideology, as a result, had to be understood as virtually omnipresent, dispersed in the everyday habits of legal professionals as much as their clients, legal academics as much as the lay public. To find its traces one had to look "not only in courtrooms, prisons, and law offices, but [also] in hospitals, bedrooms, schoolrooms, in theaters, and films and novels."¹⁹⁰

Having begun as an exercise in adapting the Marxian traditions of false consciousness to the study of the positive legal system, the Third Critique expanded its scope of attention to cover "the relations of identity and consciousness, social construction and constitutive labyrinths, an indeterminacy marked by historicity, and the unfolding of power in its myriad forms and sites."¹⁹¹ Of course, the analysis of these cultural labyrinths was expected to complement, not water down, the analysis of domination and subordination.¹⁹² But, when all was said and done, the question inevitably arose: in what sense could the theoretical project that emerged out of all this still be described accurately as a study of *legal ideologies*?¹⁹³

As the project matured, Silbey and Ewick commented that ideology was neither just a "grand set of ideas that in its seamless coherence precludes all competing ideas,"¹⁹⁴ nor just a proxy for an individual's perspective on particular policy choices.

Construed as a process, ideology shapes social life, not because it prevents thinking . . . but because it actually invites thinking. Ideology derives from and reflects back upon shared experiences, particularly those of power; it is inextricably tied to practical consciousness.

188. Silbey, *Loyalty*, *supra* note 183, at 814-815.

189. Susan Silbey, *Everyday Life and the Constitution of Legality*, in *THE BLACKWELL GUIDE TO THE SOCIOLOGY OF CULTURE* 336 (Mark Jacobs & Nancy Hanrahan, eds., 2005).

190. Carroll Seron & Susan Silbey, *Profession, Science and Culture*, in *THE BLACKWELL GUIDE TO LAW AND SOCIETY* 50 (Austin Sarat ed., 2004).

191. *Id.* at 51.

192. *Id.*

193. See generally, Aletta Norval, *Poststructuralist Conceptions of Ideology*, in *THE OXFORD HANDBOOK OF POLITICAL IDEOLOGIES* (Michael Freeden & Marc Steers, eds., 2013).

194. Patricia Ewick & Susan Silbey, *Common Knowledge and Ideological Critique: The Significance of Knowing that the Haves Come Out Ahead*, 33 L. & SOC. REV. 1025, 1036 (1999).

Defined as a form of sense making that embeds power, ideology has to be lived, worked out, and worked on. It has to be invoked and applied and challenged. People have to use it to make sense of their lives. It is only through that sense making that people produce not only those lives but the specific structures and contests for power within which they live. The internal contradictions, oppositions, and gaps are not weaknesses in the ideological cloth. On the contrary, an ideology is sustainable only through such internal contradictions insofar as they become the basis for the invocations, reworkings, applications, and transpositions through which ideologies are enacted in everyday life.¹⁹⁵

To be sure, back in the 1980s Hunt had already anticipated and applauded the pluralism that would come to attend the socio-legal analysis of legal ideology. Nevertheless, as Hunt and Trevor Purvis argued in 1993, the concept of ideology was already getting swallowed up by the more prevalent concept of discourse.¹⁹⁶ By the first decades of the new century, in the context of the socio-legal critique, the triumph of discourse over ideology was all but complete.¹⁹⁷ The search for “ideology,” at least as the term was understood by leftists in the ‘70s and ‘80s, was out of fashion.¹⁹⁸

Before turning to the Fourth Critique, let us restate. Like the first two Critiques, the Third Critique of postmodern socio-legal studies relies on a distinction between an internal Law and an externalized Society, keeping in mind that the distinction has become extraordinarily complicated. Nevertheless, as complicated as the distinction is, it remains. To understand the “reality” of “Law”—and yes, we now requires scare quotes—Law must be placed in its social context. As a result, what socio-legal scholars and empirical legal studies people have in common here is precisely an effort to measure ideology as it manifests “beyond” the “pure” domain of jurisprudence. Or, to put that another way, there is a deep consensus between all three Critiques about sophisticated empirical knowledge (whether “post” or not) as the cure for ideology in law. Another point of agreement between the three Critiques concerns the location of ideology. In each case, the “mandarin materials” of legal argumentation are always a red herring. Legal doctrines and legal reasoning—this is most certainly *not* where the action’s at. To be sure, legal rules are important enough, but they are only the very tip of the ideological iceberg. And the techniques of legal reasoning—of what ideological import is that? For purveyors of the first three Critiques, it was next to nothing. For the Fourth Critique discussed below, however, the patterns of judicial reasoning are themselves a legitimating ideology. As Duncan Kennedy would suggest, echoing

195. *Id.* at 1036-1037.

196. Purvis & Hunt, *supra* note 141.

197. TEUN VAN DIJK, IDEOLOGY AND DISCOURSE: A MULTIDISCIPLINARY INTRODUCTION (2000).

198. *See generally*, ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK (2015).

Althusser and in contrast with the socio-legal scholars, patterns of legal justification “form one of the ideological state apparatuses.”¹⁹⁹

V. FOURTH CRITIQUE: LEGAL STRUCTURALISM AND THE CRITIQUE OF LEGAL THOUGHT

The Fourth Critique is that of legal structuralism, an approach primarily associated with early U.S. critical legal studies (“CLS”).²⁰⁰ Critical legal studies (which, to be sure, is a broader family of ideas than legal structuralism) is typically pinned to the idea of legal indeterminacy and a handful of slogans like “rights are bad,” “legal reasoning is a sham,” and “law is politics.”²⁰¹ Like so many bumper stickers, however, these phrases are of little use, borrowed in turn from the broader catalogue of the legal realist tradition,²⁰² or from the classical Marxist critique of the reifying effects of bourgeois individualism.²⁰³ Nor does the confluence of these ideas emerge as particularly coherent or intelligible as a statement of what CLS might have been all about. For if law is indeterminate, why is law also necessarily political? If all legal reasoning is vulnerable to relentless abuse, why would the particular domain of “rights talk” get so much of the bad press?

Indeed, given these apparent hints of realism and Marxism one could be forgiven for presuming that legal structuralism might provide little more than a continuation of each of the other three Critiques. Like functionalism, this Fourth Critique uncovers political ideas inscribed both within the conventional legal discourse and in the socio-economic context “behind” it. Like ELS, the structuralist critique acknowledges the importance of personal politics in judicial decision-making, as well as the need to expose the bad faith of partisan projects pursued by legal elites in the medium of legal reasoning. Like socio-legal studies, legal structuralism recognizes the mutually constitutive dynamic between law and society and the irreducibly collective character of ideological consciousness. That said, and as we discuss below, the Fourth Critique is a different cut.

199. KENNEDY, *supra* note 36, at 282.

200. Or, as Mark Tushnet once called it, “critical legal theory (without modifiers).” Mark Tushnet, *Critical Legal Theory (without Modifiers) in the United States*, 13 J. POL. PHIL. 99 (2005). On the intellectual genealogy of the CLS tradition, see Akbar Rasulov, *CLS and Marxism: A History of an Affair*, 5 TRANSNATIONAL LEGAL THEORY 622 (2014); DESAUTELS-STEIN, *supra* note 47, at 35-70. Legal structuralism also enjoys meaningful connections with feminist legal scholarship and critical race theory. See, e.g., HALLEY, *supra* note 43; Olsen, *supra* note 43; Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 J.L. & SOC’Y 351 (2000); IAN HANEY LOPEZ, *WHITE BY LAW* (1996).

201. See, e.g. LLOYD’S INTRODUCTION TO JURISPRUDENCE 935-950 (M.D.A. Freeman ed., 6th ed. 1994); J.G. RIDDALL, *JURISPRUDENCE* 254-69 (2005). See also Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 L. & SOC. INQ. 779 (1992).

202. Llewellyn’s work on the canons of statutes readily comes to mind. See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-535 (1960).

203. See, e.g. EVGENY PASHUKANIS, *SELECTED WRITINGS ON MARXISM AND LAW* 54-61, 77-89 (1980).

A. Althusser and Saussure

The most defining trait of legal structuralism is neither a commitment to the idea of legal indeterminacy, nor a thesis that law is politics. Rather, it is the recruitment of the structuralist conception of *ideology as a semiotic system*. The logic behind this concept of ideology is displayed in the following comment from the French Marxist philosopher Louis Althusser, in his 1965 essay “Marxism and Humanism”:

It is customary to suggest that ideology belongs to the region of “consciousness.” We must not be misled by this appellation which is still contaminated by the idealist problematic that preceded Marx. In truth, ideology has very little to do with “consciousness” [but] is profoundly *unconscious*. [It] is . . . a system of representations, but in the majority of cases these representations have nothing to do with “consciousness”: they are usually images and occasionally concepts, but it is above all as *structures* that they impose on the vast majority of men [who] live their actions . . . in ideology, by and through ideology. [Every] “lived” relation between men and the world, including History . . . passes through ideology . . . This is the sense in which Marx said that *it is in the ideology . . . that men become conscious of their place in the world and in history*, as it is within this ideological unconsciousness that men succeed in altering their “lived” relations between them and the world and acquiring that *new form of specific unconsciousness called “consciousness”*.²⁰⁴

Note the four stages in Althusser’s argument: (i) Ideology is not so much a form of collective consciousness (as suggested in the Third Critique), as it is a form of collective *unconsciousness*; (ii) ideology “governs” by structuring a subject’s ability to process her lived reality, but not only by delivering to its subjects certain specific beliefs, presumptions, and values; (iii) whatever we can think and know about the world, history, and our place in either, we can only think and know “within ideology”—there simply is no non-ideological way of processing lived experience; (iv) consciousness itself—and this includes “raised consciousness” and “enlightened consciousness” too—is also a species of ideology.

Two points which we wish to glean from this opening: (i) the inevitably *partisan* character of knowledge²⁰⁵ and (ii) the relation between Saussurean semiology and ideology. Both ideas are vital to legal structuralism. First, Althusser’s model of ideology, similar to what we have seen in the first three Critiques, is sympathetic to the argument that all ideology is essentially a projection of bias. That is, ideology always has a motivational function, inducing people to support certain causes over others, reject

204. ALTHUSSER, *supra* note 155, at 232-33.

205. *See, e.g.*, LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 64-68 (Ben Brewster, trans., NYU Press 2001).

certain outcomes, and adopt other behaviors or attitudes. Althusser's explanation differs, however, in that it decouples its concept of ideology from the concept of "truth," insisting on the absolute impossibility of "impartial" or "objective" knowledge. By arguing that all forms of consciousness are inescapably ideological, Althusser claims there can be no consciousness structure that is not always-already biased, or, as Althusser's student Michel Foucault would later say, knowledge is never innocent of the will to dominance.²⁰⁶ Althusser also observed that there was little separating "false" from "true" consciousness, and the idea of the grand "sleep of reason," so central to classical Marxism, was just wrong. All consciousness is ideological, even the Marxist one.²⁰⁷ There are no knowledge systems that are free of ideology. All ideologies, by definition, are distortive—not in the sense that they misrepresent some hidden "real truth" about the underlying material realities of social life, but in the way that they construct actual lived experiences.²⁰⁸ There is no way to break out of ideology—not so much because every aspect of social life is deeply politicized, but because it is impossible to find any kind of *meaning* or *intelligibility* outside the plane of ideology. Some years later, another student of Althusser's, Jacques Derrida, would repackage the latter insight as the slogan "*il n'y a pas de hors-texte*,"²⁰⁹ meaning "there is no extra-textual domain accessible to us as human subjects."²¹⁰ But the essential point was already there with Althusser: ideology is the only world we can *live* in. If we wish to make sense of our experiences, we have no choice but to make use of one or another ideological framework.

Along with Marx, one of Althusser's central reference points in "Marxism and Humanism" was the high structuralist tradition of Claude Lévi-Strauss and Jacques Lacan.²¹¹ The latter in particular was a powerful background influence, for Lacan had made his name in the broader French intellectual scene. Lacan proposed two revolutionary theses,²¹² the first of which was the idea that the Freudian unconscious was ontologically

206. MICHEL FOUCAULT, *POWER/KNOWLEDGE* 131-33 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980).

207. Marxist science, being the worldview of the proletariat struggling for universal emancipation, aspires, in the last instance, towards equipping the working class with the necessary analytical tools and theoretical resources to effect the transition to a classless society (communism). And yet even in the classless society, Althusser notes, the role of ideology remains 'indispensable.' ALTHUSSER, *supra* note 155, at 235-36.

208. ALTHUSSER, *supra* note 205, at 165.

209. JACQUES DERRIDA, *OF GRAMMATOLOGY* 158 (1997).

210. Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L REV.* 1147, 1182 n.99 (2001).

211. For more on the structuralist tradition, see TERENCE HAWKES, *STRUCTURALISM AND SEMIOTICS* (2003); FRANÇOIS DOSSE, *HISTORY OF STRUCTURALISM* (1998); JONATHAN CULLER, *STRUCTURALIST POETICS* (1975).

212. Lacan's rise to fame came in no small part thanks to Althusser. See DOSSE, *supra* note 211, at 291-92.

“transindividual.”²¹³ Rather than an emanation of the personal features and characteristics of the particular subject in question, the unconscious was actually a product of a greater “Symbolic Order,” by which Lacan essentially meant all “those . . . rules which govern . . . human interchange” from simple behavioral conventions to the more complex practices of kinship and marriage.²¹⁴ The second claim was the idea that the Freudian unconscious, in addition to being trans-individual, was also “structured . . . like a language” in the sense that it operated according to “the same laws as those discovered in the study of actual languages.”²¹⁵ As a long-term devotee of Levi-Strauss, Lacan associated this linguistic study with the Saussurean structuralist tradition.²¹⁶

The continuity between Lacan’s concept of the unconscious and Althusser’s theory of ideology would have been unmistakable to most of Althusser’s readers. Like Lacan’s unconscious, Althusser’s ideology is defined as the product of socially imposed *conventions and material practices*,²¹⁷ as opposed to consciously articulated discourses (unspeak) or mental representations (ideas). Like Lacan’s conception of the unconscious, Althusser’s conception of ideology governs subjects as much through its structuring effects as through its normative content. Like Lacan’s unconscious, Althusser’s ideology is assumed to be beyond the reach of its subjects—not just because they are not sufficiently “awake” or “empowered” to become conscious of ideological influence, but also because we only develop social consciousness through our immersion in ideology. Just as Lacan’s theory identified the principal function of the unconscious as “regulat[ing] the formation of every subject,”²¹⁸ so in Althusser’s account the most important thing about ideology is its interpellatory or subject-productive power. “[A]ll ideology has the function . . . of ‘constituting’ concrete individuals as subjects.”²¹⁹ It performs this function by “hailing”—or interpellating—them through discursive practices and social rituals, inducing them to move into and assume precisely those subject-positions that the ideology in question requires them to.²²⁰ Only to the extent to which we remain within *some* ideological field do we retain the ability to become socially meaningful

213. “The unconscious is that part of the concrete discourse, in so far as it is transindividual, that is not at the disposal of the subject in re-establishing the continuity of his conscious discourse.” JACQUES LACAN, *ÉCRITS* 37 (2001). The original essay was published in 1956.

214. John Gasperoni, *The Unconscious Is Structured Like a Language*, 9 *QUI PARLE* 77, 80-81 (1996).

215. LACAN, *supra* note 213, at 179. The original essay was published in 1961.

216. On Lacan’s relationship with the Saussurean tradition and Levi-Strauss as its chief contemporary exponent, see DOSSE, *supra* note 211, at 105-18.

217. All ideology has a material origin and a material existence. ALTHUSSER, *supra* note 205, at 165-69.

218. Gasperoni, *supra* note 215, at 80.

219. ALTHUSSER, *supra* note 205, at 171.

220. *Id.* at 173-75.

subjects. The ideology of interpellation may be more conciliatory towards capitalism or more critical of it, more skeptical about legal formalism or more favorable. Whatever the case, whether we side *with* the established status quo or rise *against* it, we are already subjected to an ideological “programming,” and the actual extent of critical self-reflectiveness and personal agency we feel we can exercise in this process is also, ultimately, an effect of the particular programming we received.

The late structuralist tradition was characterized far less by the traditional hermeneutics of suspicion than by what its critics and proponents variously characterized as a culture of “surface reading,”²²¹ a back-door return to “idealism and relativism,”²²² “pessimistic or shamefaced libertarian[ism],”²²³ and an attitude of defeatism “leading to critical paralysis.”²²⁴ Ideology, it declared, was not only continuous and omnipresent, but also insidious and inescapable, mundane and ubiquitous. It operated at a level far below both the individual psyche and the collective consciousness. It was distortive and politically charged. And whether or not you liked the taste, you just had to swallow. Of course, there is always room for maneuver within an ideology. But the takeaway here is that ideology was the horizon of all meaning, all consciousness—even thought itself. It might be possible to separate and resist the cruder segments of the ideological reality, but short of going brain-dead, one simply could not resist ideology *tout court*.²²⁵

Althusser predicted no possibility of an ideologically “uncontaminated” knowledge that might emerge on the empirical horizon of meaning. Nor was there any space for non-ideological subjectivity or identitarian categories that were not always-already *ideological* and *ideologized*. Every subjective persona one could assume was always going to be a product of (some kind of) ideological interpellation. Rebels, mavericks, dropouts, and outlaws could only exist and only be thinkable within those parameters that were defined for them by some ideological framework or another. “The system

221. Toril Moi, “*Nothing is Hidden*”: *From Confusion to Clarity*, in *CRITIQUE AND POST-CRTIQUE*, *supra* note 33, at 31, 33.

222. GREGORY ELLIOTT, *ALTHUSSER: THE DETOUR OF THEORY* 307 (2006).

223. EAGLETON, *supra* note 6, at 14.

224. JACQUELINE RHODES, *RADICAL FEMINISM, WRITING, AND CRITICAL AGENCY* 7 (2005).

225. “The popular stories told by people like John Mackey and Bill Gates,” wrote Nicole Aschoff, are integral to capitalism, forming the basis of its spirits and providing a vehicle for ideology. . . . By offering safe, market-friendly solutions to society’s problem, [they] reinforce the logic and structures of accumulation. [These] stories set the terms of debate and the field of possibility, dominating the plane of ideas and swallowing up stories that challenge the status quo. [B]ut this doesn’t mean that people always believe [them] or are duped by their message.” NICOLE ASCHOFF, *THE NEW PROPHETS OF CAPITALISM* 11-12 (2015). It might be possible to see through the biased narratives, the spin, the unspeak, the misrepresentations, and in the event, to call them out, to challenge, to resist. But none of that can unwind the ideological knot. “Ideology is much more subtle [than the simple proliferation of these narratives]. It is not . . . something we can discover and remove from our field of vision . . . Ideology is the world itself, inhabiting and structuring all the spaces in which we live and think. *Id.* at 12.

[could] be disrupted, but not dismantled.”²²⁶ Only piecemeal resistance was possible. “The future,” it followed, was simply “the present infinitely repeated”: the same *a la carte* menu just with a broader set of options.²²⁷

Much of what we have summarized from Althusser, thus far, is incompatible with the basic commitments of the First and Second Critiques. It would be far less challenging, however, for certain proponents of the Third Critique. Most notably, scholars like Silbey would find little in the all-pervasive quality of Althusser’s ideology to disagree with. However, it is with the turn to ideology as a semiotic structure that the Third and Fourth Critiques most noticeably part ways. As will be recalled from above, the second main idea in Althusser’s conception of ideology, and that Lacan foregrounded in his discussion of the unconscious, was the idea that ideologies are “sign systems” in the sense first elaborated by Ferdinand de Saussure.

Saussure was a Swiss linguist whose posthumously published *Course in General Linguistics* is widely considered today to be the founding text of modern semiotics,²²⁸ and at the heart of Saussure’s general argument lay three relatively complex ideas.²²⁹ The first was that signification gains meaning through *systems of differences*: the capacity of any given construct, image, act, or symbol to communicate meaning is predicated on the possibility of it being reliably *differentiated* from all other similar constructs, images, acts, and symbols. This requires the presence of a certain pre-existing *system* in the context of which these constructs can be ordered and organized. The name we may give to this system could be paradigm, *langue*, or code. The actual labels matter less than the idea that this system brings all of these different signifying elements into a single, internally integrated whole, and in the last instance, the system provides the ultimate guarantee of their intelligibility as meaning-carrying signifiers.

Saussure’s second move followed from the first. In the abstract, these relationships of connection-through-differentiation that link the different signifiers into a single system can be reduced, at the level of their descriptive representation, to something that, in logical terms, looks very much like a *formal structure*. A structure is a *system of logical rules* (if a,

226. EAGLETON, *supra* note 6, at 51.

227. *Id.* at 7. Note this last point: the substitution of a directional sense of history with one where history is viewed as little more than a *recombination of options* may seem at first a relatively minor aspect of the late structuralist tradition, but it was, in fact, one of its most important defining features. The idea of movement as the process of “shifting” and “rearranging” a finite combinatory went straight to the very foundations of the Saussurean paradigm. See Justin Desautels-Stein, *After the End of Legal Thought*, in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* (Justin Desautels-Stein & Christopher Tomlins, eds., 2017).

228. FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (1983).

229. For a general overview and introduction to Saussure’s theory and its legacy for the structuralist tradition, going down to Derrida and deconstructionists, see DOSSE, *supra* note 211, at 43-51; HAWKES, *supra* note 211, at 8-16; JONATHAN CULLER, *THE PURSUIT OF SIGNS* 20-48 (2001). See generally, FREDRIC JAMESON, *THE PRISON-HOUSE OF LANGUAGE* (1972).

then b . . .) that, like Ehrlich's living law, manifests itself in practice only through its functional effects and exists ontologically only as it is practiced. The simplest structures recognizable from a Saussurean standpoint are the basic binary oppositions that permeate most known human cultures: raw/cooked, fresh/decayed, male/female, and the like.

A more complex example is a grammatical structure. This concept is used in the Saussurean tradition both in the more common-sense meaning of rules governing the use of language, and in the more abstract sense of operative codes behind what the Soviet semiologist Juri Lotman called "secondary modelling systems."²³⁰ Literature, music, dress, photography, ballet, diplomatic protocol—wherever we can find a transmission of implicit or unspoken messages that go beyond the immediate content of the respective language exchanges, we may find a corresponding operative code or grammar.²³¹

Bring the first and the second ideas together and what emerges is the third idea, the Saussurean theory of meaning. Meaning, in this view, is always understood to be "structural and relational rather than referential."²³² "No sign makes sense on its own but only in relation to other signs."²³³ Primacy in analysis is given to the study of the relations between the respective signifiers, not to their "inherent" qualities. Or in other words, the final precondition of meaning production is the working ability of the agents to combine and recombine the available semiotic materials. When we communicate with one another, we don't "speak our minds" or express ourselves in a Platonic sovereign fashion. Rather, we send each other coded signals by using *commonly agreed upon* signifiers, and the way we infuse meaning into these signals is by arranging the signifiers into appropriate *combinations*. Think of this as the equivalent of using notes and rests in music notation or arranging letters and punctuation signs in alphabet-based writing systems.

Note the caveat that all of this "commonly agreed upon." According to Saussure, signification is conventional as well as structural. Take, for example, the particular shapes of letters in a given language. They must be commonly recognizable if they are to have a power of signification. That is, the combinatory in question must be sufficiently flexible and adaptable if it is to transmit the kind of message the writer intends. At the same time, it must also be sufficiently stable in order for the intended signification to

230. "A primary modelling system is a code which cannot be traced back to other codes: human language is an example. A secondary modelling system is a code which uses the elements of the primary system in some special way. Among the secondary systems Lotman places art, religion, myth and a variety of social mores and rituals." Ewa Thompson, *Russian Structuralist Theory*, 49 BOOKS ABROAD 232, 233 (1975).

231. See SAUSSURE, *supra* note 228, at 16-17.

232. DANIEL CHANDLER, SEMIOTICS: THE BASICS 18 (2007).

233. *Id.* at 18-19.

become achievable.

To sum up, we have several ideas at the base of what will become the Fourth Critique. (1) identity as an effect of ideology, (2) subject production through discursive and material interpellation, (3) the ability to exercise agency as a product of ideological programming, (4) meaning as differentiation, (5) secondary modelling systems, and (6) the combinatory. If we bring them together, the general outline of late structuralist (or poststructuralist, depending on your emphases) thought comes into view.²³⁴ It was a way of thinking about consciousness and social reality that, starting from the early 1970s, gradually displaced the Marxist-Freudian program from its central position in critical theory.²³⁵ It was also what supplied the Fourth Critique with its basic mode of operation.

B. The Structure of Legal Thought

From the vantage of legal structuralism, law was not only a distinct social form or a body of normative constructs. It was a semiotic system, governed

234. See COLIN DAVIS, *AFTER POSTSTRUCTURALISM* (2003); CATHERINE BELSEY, *POSTSTRUCTURALISM* (2002); Maria Golebiewska, *Edmund Husserl's Semantics and the Critical Theses of Late Structuralism*, 1 *EIDOS* 30 (2019).

235. Taking Althusser's adaptation of Lacan to the next level, the late structuralist/poststructuralist tradition over time dispensed with the old Marxist and Freudian vocabularies almost entirely. Receiving an important boost in the mid- and late 1970s from Foucault, it drew over the course of the 1980s on a wide range of influences reaching from Wittgenstein's idea of "meaning as use" and Derrida's concept of deconstruction to Julia Kristeva's theory of intertextuality and Stanley Fish's theory of interpretive communities, before culminating eventually, around the end of the Cold War in Judith Butler's work on gender performativity and the various neo- and post-Marxist versions of critical discourse analysis developed by the likes of Fredric Jameson, Goran Therborn, Ernesto Laclau and Chantal Mouffe, and, later, Slavoj Zizek. Foucault's importance in this context, of course, comes not only from the fact that he was Althusser's one-time student. There exists, in fact, a direct line of continuity between Foucault's theory of disciplinary power and Althusser's theory of ideology. See Walter Montag, "The Soul is the Prison of the Body": *Althusser and Foucault, 1970-1975*, in *DEPOSITIONS: ALTHUSSER, BALIBAR, MACHEREY AND THE LABOR OF READING* 53 (Jacques Lezra ed., 1996). See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 43 (1953). The concept of deconstruction is notoriously elusive. A good starting point in Derrida's own work can be found in JACQUES DERRIDA, *DISSEMINATION* 4-6 (1981). For other scholars' introduction to the concept, see, e.g., Jonathan Culler, *In Defence of Overinterpretation*, in *INTERPRETATION AND OVERINTERPRETATION* 109, 120-3 (Stefan Collini ed., 1992); Christopher Norris, *Limited Think: How Not to Read Derrida*, 20 *DIACRITICS* 16 (1990); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 49-51 (1990). See also JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); TORIL MOI (ED.), *THE KRISTEVA READER* 35-61 (1986). See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 147-73 (1980); Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 *THEATRE JOURNAL* 519 (1988). For Butler's exploration of the connections between her work and Althusser's, see also Judith Butler, *Conscience Doth Make Subjects of Us All*, in *DEPOSITIONS: ALTHUSSER, BALIBAR, MACHEREY AND THE LABOR OF READING*, supra, at 6. See ERNESTO LACLAU AND CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY* (1985); Ernesto Laclau and Chantal Mouffe, *Post-Marxism without Apologies*, 166 *NEW LEFT REV.* 79 (1987). Laclau and Mouffe's version of discourse analysis evolved later into the so-called Essex School, for a typical introduction to which see Jules Townshend, *Discourse Theory and Political Analysis: A New Paradigm from the Essex School?*, 5 *BRIT. J. POL. & INT. REL.* 129 (2003); GÖRAN THERBORN, *FROM MARXISM TO POST-MARXISM* (2008); GÖRAN THERBORN, *THE IDEOLOGY OF POWER AND THE POWER OF IDEOLOGY* (1980). See also *DISCOURSE THEORY AND POLITICAL ANALYSIS* (David Howarth et al. eds., 2000); SLAVOJ ZIZEK, *THE PARALLAX VIEW* (2006); SLAVOJ ZIZEK, *THE SUBLIME OBJECT OF IDEOLOGY* (1989).

by its own operative grammar-code, possessed of its own combinatory that allowed the articulation of a potentially endless number of competing interpellatory and legitimational projects. The “content” of the grammar and the lexicon impose limits on the sorts of personal politics and agendas one could successfully bring into law. But these limits were no more constraining than those of any physical medium:

you can't do absolutely anything you want with a pile of bricks, and what you can do depends on how many you have, as well as on your other circumstances. [But] the medium doesn't tell you what to do with it—that you *must* make the bricks into a doghouse rather than into a garden wall.²³⁶

At the same time, just because the jurist's lexicon is relatively indeterminate, it does not follow that the jurist can make any argument she likes. Structural indeterminacy is not the same thing as random chaos. Precisely because the structure leaves jurists discretionary space, there is often the option to bring into our arguments a personal agenda or political philosophy without stepping outside the boundaries of what would be considered professionally admissible. “The judge,” as Duncan Kennedy explained, “is neither free nor bound.”²³⁷ She is not a mechanical automaton applying a law that somehow precedes her. Nor is she a disembodied mind floating free of society. Every day she becomes a jurist, she does so as someone who “ha[s], as part of [her] life as [she has] lived it up to this moment, a set of intentions, a life-project as a judge, that will orient [her] among the many possible” interpretative strategies she could develop in relation to any given question.²³⁸

It is here that the two Althusserian themes resurface. First, there is a reemphasized focus on the idea of personal agency, coupled with the suggestion that agency is limited within the context of the legal system and that these limits are, in fact, exactly what gives this system its specific identity. Second, there is the concomitant argument that not only it is within the jurist's legal consciousness that the process of ideology *lato sensu* takes place, but that it is also there that the possibility of ideological action narrowly so construed is found. The limits of our professional consciousness is what allow us to find the room for our personal politics. Ideology is what interpellates us into jurists: judges, lawyers, legal academics, whatever the case may be. Ideology is also the personal politics, the worldviews, and the philosophies that we bring with us and implement, within the constraints that the law's grammar and lexicon give us, within the medium of legal reasoning.

236. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 526 (1986).

237. *Id.* at 522.

238. *Id.* at 521.

In his foundational work in the Fourth Critique, Duncan Kennedy has theorized the dialogue between the Althusserian and the Mannheimian concepts of ideology: ideology as the horizon of all meaning versus ideology as a distinct legitimational project pursued by a particular cultural elite or intelligentsia.²³⁹ In the present context, another way of summarizing this distinction would be to call it the dialogue between the Lacanian version of the Freudian unconscious and the functionalist and/or ELS version of ideology as politicization of law. As Kennedy explained it, among the main motivations behind legal structuralism's recasting of the idea of ideology as a two-level phenomenon was the desire

to reveal the large role played by the legal system [in the production of the hierarchies and alienations of capitalism]; to deligitimate the outcomes achieved through the legal system by exposing them as political when they masquerade as neutral; to show that they are in some sense unjust and their injustice contributes to the larger injustice of the society as a whole; to be thereby, a radicalizing force on those who read and accept the analysis; and to suggest ways that a radicalizing project should approach the task of making the system less unjust through political action.²⁴⁰

To return to some of the ideas already canvassed above, but placing them now in this structuralist context, first among the legal structure's ideological formations is reification.²⁴¹ As Lukacs described it, reification is a strategy in which some larger social totality or unity is artificially broken up and displaced.²⁴² Reification can take place in any number of contexts, but if we return to our Hayekian example from earlier, the "unity" would encompass the jurist on the one hand, and the process of legal reasoning on the other. For Hayek, legal reasoning is almost always detached from the will of the

239. KENNEDY, *supra* note 36, 41-2, 54-6. See also *id.* at 408, n.64. For the Mannheimian concept of ideology, see generally KARL MANNHEIM, *IDEOLOGY AND UTOPIA* (1979). Karl Klare provided an early articulation as well in his critique of the essential structure of labor law. Klare argued that it was grounded in the traditional liberal binaries of public/private, mandatory/permissive, political/economic, state order/civil society that are, ultimately, combined in such a way as to "induc[e] workers to participate in their own domination by managers and those whom managers serve." At the same time, within this structure there can also be found space for a far more concretized, less abstract-level ideological dynamics: arguments and reform proposals that aim to entrench and legitimate or to unmask and destabilize the specific political equilibria achieved by the ruling political and legal elites. This second, narrower kind of ideology may be "articulated by . . . liberal theorists and [their] judicial sponsors" or by critical labor law scholars and historians. Its object may be to "denude industrial conflict . . . of political or class-based content and recast [it] as the struggle . . . over issues of economic distribution," or to show how this whole "frame of reference [is] untenable" and to "argue that collective bargaining law . . . aims to legitimate . . . unnecessary and destructive hierarchy and domination in the workplace." The main thing to bear in mind, ultimately, is that it is only because and within the parameters of the structural possibilities created by the former kind of ideological process that the latter kind of ideological practice becomes conceivable. Karl Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 *INDUS. REL. L. J.* 450, 461 (1981).

240. KENNEDY, *supra* note 36, at 280.

241. See Peter Gabel, *Reification in Legal Reasoning*, in *RESEARCH IN LAW AND SOCIOLOGY* (Stephen Spitzer ed., 1980).

242. See generally, LUKACS, *supra* note 148.

jurist, or at least, it is so detached if we have a healthy Rule of Law.²⁴³ In Hayek's vision of the Rule of Law, the jurist is little more than a vehicle for a law that precedes him. The jurist's means of argumentative production are alienated or estranged from his individual will, who may very well desire particular outcomes, but he resists these impulses in the effort to merely discover and implement a legal order that is fundamentally autonomous from juridical will. This estrangement between the jurist on the one side and his argumentative means on the other is an example of reification: the arguments are transformed into *things* over which the jurist is meant to have little or no control. From the perspective of the Fourth Critique, however, these "things" that have become alienated from the jurist's will are best understood as a unity of legal argument: the being as jurist and the practices of legal argument are a totality, and to separate the two is to make an object or a fetish out of the Rule of Law, instead of understanding the Rule of Law to rather form a network of relations between human beings.

Fair enough, but why care if the separation of the (internal) human judge from the (external) impersonal Rule of Law reflects an ideological reification? The problem is that reification masks a basic contradiction, a version of which is the following. Remember that Hayek's main purpose was to justify a particularly bourgeois form of liberal autonomy. The justification proceeds by distinguishing the capricious terrain of subjective politics from a natural order premised on a freedom-enabling legal order. If the very forms of legal analysis, however, are sourced in the individual *will* of the judge and not in some impersonal, generalized *object*, this distinction between capricious politics and impersonal rule dissolves. And once dissolved, the contradiction surfaces between the need to service a meaningful idea of human freedom and the need to maintain a meaningful sense of political order. It is through a process of reification, in which we fetishize "the Rule of Law" and thereby externalize it from the subjective will of the jurist, that the contradiction between the demands of freedom and order is concealed. In a similar vein, Nicos Poulantzas explained that "ideology has the precise function of hiding the real contradictions and of reconstituting on an imaginary level a relatively coherent discourse which serves as the horizon of the agents' experience."²⁴⁴ This is exactly what is happening when legal ideology projects a natural harmony between the demands of individual freedom and coercive order.

Reification, however, only does so much. Yes, reification masks a contradiction by alienating the argument from the jurist, but if we want to conceal the contradiction and *legitimate* the illusion of harmony to boot, we

243. SLAVOJ ZIZEK, *Introduction*, in MAPPING IDEOLOGY 7 (1994) ("Herein lies one of the tasks of the postmodern critique of ideology: to designate the elements within an existing social order which . . . point towards the system's antagonistic character, and thus 'estrangle' is to the self-evidence of its established identity.").

244. See NICOS POULANTZAS, POLITICAL POWER AND SOCIAL CLASSES 207 (1973).

need more.²⁴⁵ Legitimation refers to a process in which a dominant class persuades a subordinated class to give its consent to a systemic form of subordination. Ideology is therefore more than a means for masking social contradictions, but also a condition for the functioning and reproduction of the system of class domination.²⁴⁶ The means of persuasion involve a process of ideological enlargement, whereby the specific material interests of a dominant class expand into political, intellectual, moral, and spiritual interests.²⁴⁷ That is, subordinated classes eventually consent to a social position of domination because they believe that what they are consenting to is not domination at all, but rather an intellectually superior and morally desirable system of ideas and practices. As Claude Lefort suggested in this regard, “[t]he text of bourgeois ideology is written in capital letters: Humanity, Progress, Science, Property, the Family.”²⁴⁸ In this development of a common consensus about society’s most basic and legitimate arrangements, the dominant class achieves *hegemony* over the subordinated classes. What may have at a prior moment appeared as the contingent interests of a very particular class, now transforms into an articulation of *universal* ideals designed for the common good. This is the masquerade of the universal, and the meaning behind the well-known remark attributed to Pierre-Joseph Proudhon, that whoever argues in the name of humanity is a cheat.²⁴⁹

It is true that in this passageway between legitimation and hegemony that the subordinated classes consent to a system that subordinates them, but at least in the work of theorists like Antonio Gramsci, this consent is no form of false consciousness. The subordinated classes do not legitimate the hegemon because they are mistaken about the actual world in which they live. They understand it just fine. The critical edge of a legitimating hegemony is precisely that the subordinated understand that they are subordinated, and yet they abide by and even promote the pedagogy of the social frame anyway. Ideology, for thinkers in this Gramscian tradition, is no chimerical form of upside-down thinking. As Chantal Mouffe explained, “ideology has a material existence and that far from consisting in an

245. Jorge Lorrain writes that “[a]s the conditions under which productive practice is carried out are always the conditions of the rule of a definite class, the ideological hiding of contradictions necessarily serves the interests of that class.” JORGE LORRAIN, *THE CONCEPT OF IDEOLOGY* 47 (1979). See also Zizek, *SUBLIME*, *supra* note 235, at 8 (“We are in ideological space proper the moment this content . . . is functional with regard to some relation of social domination (‘power’, ‘exploitation’) in an inherently non-transparent way: the very logic of legitimating the relation of domination must remain concealed if it is to be effective.”).

246. It plays this role by hiding the true relations between the classes, where social relations appear “harmonious.” See ROLAND BARTHES, *MYTHOLOGIES* 255 (Richard Howard & Annette Lavers, trans., 2013); LORRAIN, *supra* note 245, at 47.

247. ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (1971).

248. CLAUDE LEFORT, *THE POLITICAL FORMS OF MODERN SOCIETY: BUREAUCRACY, DEMOCRACY, TOTALITARIANISM* (1986); JOHN THOMPSON, *STUDIES IN THE THEORY OF IDEOLOGY* 27 (1984).

249. JACQUES DERRIDA, *THE BEAST AND THE SOVEREIGN*, VOL. 1, 72 (2009).

ensemble of spiritual realities, it is always materialized in practices.”²⁵⁰

A distinct but related feature of a universalizing legitimation is the strategy of *naturalization*.²⁵¹ This is an ideological strategy that once again begins with a central contradiction or divide, such as the divide Hayek strikes between a natural domain of customary norms and the positive sphere of arbitrary legislation and regulation. If our goal is to justify some particular set of norms, such as property and contract, we can naturalize those norms by what is often called mimesis: the process in which a common law court or a legislature reflects or imitates the natural-historical. That is, if we can successfully persuade that some positive rule or argument mirrors the rule or argument that we could discover in something like a “state of nature,” we have “naturalized” that rule or argument. Naturalizing a rule of argument, however, does much more than give the agent a claim for good origins—origins, it ought to be said, which can never be verified given their location in “time immemorial.” More powerfully, naturalization produces what Roberto Unger calls the “dictatorship of no alternatives.”²⁵² A dictatorship of no alternatives is a dictatorship in which the powers of institutional imagination are reduced and the ability to see beyond the frame of our present arrangements is darkened. We become not only accustomed to the notion that social inequality is normal, but that social inequality can only be transformed in the most evolutionary of ways. In the light of a naturalizing ideology, our faith is always in the hope that History or the Market or some other “natural” force might bring the change we desire. Our faith is never in ourselves. Eagleton summarizes the naturalizing strategy:

Social reality is redefined by the ideology to become co-extensive with itself, in a way which occludes the truth that the reality in fact generated the ideology. Instead, the two appear to be spontaneously bred together, as indissociable as a sleeve and its lining. The result, politically speaking, is an apparently vicious circle: the ideology could only be transformed if the reality was such as to allow it to become objectified; but the ideology processes the reality in ways which forestall this possibility. The two are thus mutually self-confirming. On this view, a ruling ideology does not so much combat alternative ideas as thrust them beyond the very bounds of the thinkable.²⁵³

In the Fourth Critique, the passage from reification to legitimation and its attendant strategies returns us to Kennedy’s conception of the structure of legal consciousness.²⁵⁴ Following the Saussurean tradition, Kennedy posits

250. Chantal Mouffe, “Hegemony and Ideology in Gramsci,” in *GRAMSCI AND MARXIST THEORY* 186 (Chantal Mouffe, ed., 1979).

251. See DESAUTELS-STEIN, *supra* note 17, at 262-291; ROBERTO UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY*, Vol. 1 (2004).

252. ROBERTO UNGER, *THE LEFT ALTERNATIVE* 1 (2009).

253. EAGLETON, *supra* note 128, at 58.

254. Kennedy describes in detail how the CLS mode of ideology-critique differs from the Marxist socio-

that the essential logic of *legal consciousness*—or what after Lacan and Althusser might call the *legal unconscious*—comes from the fact that it is structured as a language-system. In this semiotic context, a jurist operates in a structure of legal thought. The structure of legal thought, in turn, is assembled in terms of a basic tension that governs the forms of legal argument. These forms fill out a lexicon of available moves. That basic tension functions as the “*langue*” of the structure, or its governing grammar. The indeterminate space of the lexicon, on the other hand, is “*parole*,” the particular speech acts, utterances, claims, and decisions. It was this structural relation between “*langue*” and “*parole*” that founded the early CLS understanding of a jurist’s legal consciousness; it was also this structural relation that was the site of ideology: reification-legitimation-naturalization. As Kennedy explained,

this [mode of structural critique of doctrine and judicial reasoning] was easy to understand as left analysis. On the model of traditional ideology-critique, determination by law’s autonomous or by democratic legislative will—or the derivation of law from a few universally accepted ideals or natural rights—is revealed as mystification. Determination by something at once more human and less savory is revealed. And there is an explicit or implicit appeal to ‘people’ to take advantage of this revelation of freedom and oppression to change things for the better.²⁵⁵

As we have seen in the first three Critiques, the cure for ideology is a turn to “the real,” even if the “real” is too complicated for an empirical assessment of what is truly happening. Ideology, in these senses, is a dense fog, and social science a bracing wind. Thus, we might similarly expect the Fourth Critique to investigate the political foundations of the legal structure, the empirically verified social determinants. This, however, is the move more appropriately associated with the socio-legal critique canvassed above, even in its poststructuralist variations. In the legal structuralist critique, the question of how or whether the legal structure is empirically connected with an “external” or “outside” is largely abandoned, for there simply is no “scientific alternative to life as an ideologist.”²⁵⁶

A good illustration of where this line of argument ended up leading some legal structuralists—and the sharp contrast it created between them and the socio-legal studies tradition—could be seen, for example, in Janet Halley’s *Split Decisions: How and Why to Take a Break from Feminism*²⁵⁷ or Pierre Schlag’s *Laying Down the Law*.²⁵⁸ The overarching picture of scholarly

legal mode in his A CRITIQUE OF ADJUDICATION, *supra* note 36, at 290-296.

255. *Id.* at 285.

256. *Id.* at 288-291. See also Alan Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L. J. 1229 (1981).

257. See HALLEY, *supra* note 43.

258. See PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN*

(and lawyerly) agency that emerges from Halley's discussion of the legal-feminist tradition, and Schlag's discussion of the process of legal reasoning more generally, not only stands miles apart from Hunt's and Silbey's appeals to the authority and theoretical promises of social sciences or Marxist dialectical analysis. It also channels the Derridean *il n'y a pas de hors-texte* argument in the most uncompromising fashion possible. There is no way, Halley notes, that anyone pursuing a legal feminist project could do so without immediately getting caught up in a whole architecture of pre-existing ideological structures, since outside these ideological structures the project of *legal* feminism is simply unintelligible. The only solution, if one is not especially enthused by this fact, would be to walk away from the project of legal feminism altogether—to lay it down, as Schlag puts it. This is to quit the game, to take a break from it. There is something to be said, after all, for the possibility that any “continued participation in the practice of normative justification”—a practice which legal scholars inevitably engage in, if only by virtue of practicing their craft—will, in the end, “have the effect of reinforcing the legitimacy of the [very] system” one is fighting against. So why not, as Jack Schlegel has asked, “simply fold up [the] tent and steal into the night”?²⁵⁹

A good Foucauldian, of course, would note that on some meta level, we cannot take a break, or walk away, or any such thing. Quitting the game is still playing the game, just by other means. After all, getting some of the players to quit at a certain time is precisely how some games are supposed to be played. The abstract academic subjects that take the decision to “lay down the law” or to “take a break” from this or that form of legal politics may experience the moment of this decision as a form of personal self-determination. But even by exercising this kind of self-determination they only reinforce the effectivity of that broader ideological formation which had interpellated them into precisely that (and not some other) kind of rebellious subject position. As we have seen, one may quit a particular strand of the ideological superstructure, but one cannot quit all ideology *tout court*.

And yet at the same time that the Fourth Critique decisively abandoned the classical liberal project of moving beyond ideology, it retained, however unselfconsciously, another classical liberal assumption: the distinction between the discursive project of the “internal critique” of legal reasoning and doctrine and the “external” socio-economic reality in which law played an “important” role. Similarly, while the CLS critique abandoned the effort to empirically verify the legal structure's existence in the social world, this did not mean that as an analytical category “the real” was jettisoned

LEGAL MIND (1996).

259. John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We to Do?*, 57 U. MIAMI L. REV. 955, 958-9 (2003).

altogether. For as Kennedy explained, “[t]he internal structures of the models and their sequencing were asserted to be good descriptions of the reality of textual structure.”²⁶⁰ Furthermore, noting the ideological dimensions of legal reasoning did not suggest a turn to “judicial ideology,” as demanded by the empirico-legal scholars. Rather, “liberalism and conservatism, understood as discursive systems, as ideologies, are inside rather than outside legal discourse itself; legal and political versions of liberalism and conservatism are mutually constitutive.”²⁶¹ Additionally, Kennedy argued,

although ‘outside’ factors influence adjudication, they do not impose on it an outside ‘logic.’ The first reason for this is, as just stated, that they do not determine the rules judges make, in any ordinary sense of the word ‘determine.’ The second reason is . . . that neither the economic base nor patriarchy nor racial supremacy has any more internal coherence, any more ‘logic,’ than the process of legal reasoning from the extant materials.²⁶²

As we have suggested, the target of ideology in this Fourth Critique is not the grand and totalizing target attacked by the functionalists, nor is it the reduced and personal political outlook measured by the ELS scholars. And while there are many intellectual linkages with the socio-legal scholars, the legal structuralist critique targets an ideology of legal consciousness in a very different way from that pursued in the socio-legal evaluation of “everyday” legal practices. The target in the legal structuralist mode of ideology-critique is something much closer to the Althusserian idea of signification unconscious: *the structure of the legal argument*, and, in particular, the contradictory grammar of legal reasoning, the largely indeterminate lexicon of operative legal categories, and the combination of strategies for navigating the relations between the two.

C. A Law School Hypo

Briefly, and to help envision the practical effect of this type of ideology-critique, imagine a student entering law school with a typically center-left ambition for social justice. Like so many of her classmates, she hopes to fight inequality with an education in and eventual mastery over the legal system. If the three years of law school are successful by the school’s standards, she will retain every bit of her initial ambition for social justice. With luck, she will feel even more empowered than when she began. And how has this empowerment transpired? Has it taken place through a greater familiarity with the rules of law? The rules of property, tort, contract, the

260. KENNEDY, *supra* note 36, at 286.

261. *Id.* at 289.

262. *Id.*

constitution, and so much else? No doubt, at the end of her legal education the student will have a working knowledge of legal rules that she did not have at the start. But it isn't a familiarity with the rules of law that are the source of her empowerment—or at least, they aren't the greater source. What is empowering is her indoctrination into a view or understanding of the rule of law, *even if she doesn't know it*. If it was merely the rules of law that might do the trick, law schools would best turn themselves into extended bar review courses (which, of course, many believe to be the right direction). If we understand law schools as sites of empowerment, an encounter with bare rules simply will not do, for it is the broader sense in which we encounter the rules that is critical for a legal pedagogy to succeed.

To train a student in a kind of thinking about the rule of law is to immerse that student in an ideological world of its own. The law school is a space for a very specific training that lionizes a practice of argument and champions a vision of the proper relation between law and politics. Of course, it's just wrong to suggest that the rules of law are irrelevant to this ideological process of reification and legitimation, because they surely do have a part to play. But in the structure of legal thought—the structure of legal argument—we might say that the rules of law taught in law school courses constitute the substance of law's lexical foreground. The rules of law are those conscious, rationalized pieces of the language that we regularly encounter on the surface, combining in various ways as the situation and the jurist suggest. In contrast, it is the techniques of legal reasoning, the practices of legal argument, the grammatical patterns governing the lexicon—an understanding of what to *do* with the rules and how to distinguish “recognizable” forms of reasoning from “activist” or “ideological” claims to power—that constitutes a vision of the rule of law as background ideology, the ideology of the code itself.

As our social-justice-oriented law student swims in the legal structure's background ideology, she increasingly comes to identify both her normative directives and the boundaries within which her projects for social justice ought to take place. These directives and boundaries emerge primarily as the artifacts of formalist ideology, mixed together with post-realist ideology. In terms of these formalist artifacts, she has likely accepted Hayek's ideological division between the jurist on the one side and the jurist's modes of reasoning on the other. This is the reification of law itself, alienating the means of argumentative production from the human jurist. The manifestation of alienation is most striking when law school graduates repeatedly proclaim the judge as umpire, calling balls and strikes. It is no less pronounced, however, among even those more “realistic” jurists who concede to the discretionary nature of adjudication, but nevertheless fret about the intrusions of judicial activism.

As a result of this quotidian type of law school reification, in which the

person of the jurist and the jurist's work have been pulled apart, our law student's impulse for social justice is typically channeled into two sorts of direction. The first is rule reform. After all, as the argumentative means of production slide into the background, it is the domain of doctrine that comes forward—the true and proper source of social inequality and, therefore, the proper target for change. Change the rule, you will change society. There is a double-division at work here. On the one side, there is the division between jurist and the jurist's means of argumentative production. On the other side, there is a division between the rules of law and the practices of argument. Pushed into the foreground are the jurist on the one side and the rule of law on the other. Both divisions unite in their joint suppression of argumentative production as a semiotic (and ideological) structure. As the rules of law push into the foreground, everything else ends up externalized from law and packaged in what comes to be called “judicial ideology.” And as unsavory as a judicial ideology is, there isn't really much of anything the law graduate can do about it. It is “natural” that jurists will have opinions that infect their proper adjudications, and, while it is unfortunate, “judicial ideology” isn't a target for social justice. This is just the “way that it is, and the way it has very likely always been.”

We can already see much of what the first two Critiques have traditionally targeted for the good works of empirical legal science. With the law student's focus on rules, she tends to ignore the important social contexts in which these rules take shape. She has failed to see how law's life isn't logic, but lived experience, social function, real purpose. Functionalism therefore counsels a second direction for social justice and legal change. In addition to work on rule reform (recall this is where the student began), our law student should come to see how social justice might best be served through changes to the political and social contexts which generate law's rules in the first place. That is, whereas formalism guides the student to the black letter rules, functionalism directs the student away from the law altogether, and into the socio-political world which is law's *a priori*. In either case, however, this entire process of estranging the practices of argument from the jurist and the rules of law, and then enfolding those practices into the black box of judicial ideology, legitimates a vision of the proper avenue for social justice. Working for justice, in the light of this legal ideology, either means making the rules of law more just, or making politics more just. What has been pushed off the table altogether, is the idea that social justice might target the very practices of legal argument—the domain of legal thought, or the legal unconscious. From the perspective of formalism, functionalism, or empirical legal studies, these “structures” are just “philosophy” or “random” or, as the political scientists suggest, plain old nonsense.

We might ask why it is that the first two Critiques dominate this ideology of empowerment, and why the postmodern version of socio-legal studies,

much less that of legal structuralism, are relatively alien. There is much to say here, with respect to the way in which poststructuralism and a reactionary retro-liberalism together helped push legal structuralism out of the scene. And then, the way in which American pragmatism engulfed the whole thing.²⁶³ But what seems clear enough is this: Law schools are efficient in the training of jurists as agents of ideology-critique. Law students see ideology in the rules themselves, and seek their reform. Law students see ideology in the singular focus on rules, and seek legal change by closing the distance between law and politics. Law students see ideology in the separation between judicial decision-making and legal doctrine, and seek to measure and expose ideological influence by widening the distance between law and politics. What is less visible is the sense of legal ideology made manifest in the Third and Fourth Critiques. What is the ideology of law as an everyday practice? What is the ideology of law as a structure of legal argument? The answer from the law school: We don't really know, and we don't actually care. We are pragmatists, after all.

CONCLUSION

This Article anticipates a number of questions about which we have said next to nothing. How, for example, has the sedimentation of the Four Critiques blocked our collective abilities to see beyond them, if indeed there is anything to see? How have the Critiques contributed to our current sense of overwhelming crisis, if they have at all? What might the critique of legal ideology become? Rather than offer some answers, which we concede would certainly have been more satisfying, we have instead tried to elaborate a common platform from which such answers might become more intelligible. If we want to know what the critique of legal ideology might become, we need to know first what the critique of legal ideology has been. We need to know something of the overall structure of the history of ideology-critique in the legal context.

And what has it been? The Four Critiques of legal functionalism, empirical legal studies, socio-legal studies, and legal structuralism, are premised on a series of analytical differences, each of which operates as a variable. We have summarized these differences in the appendix below. The first and the most important of these is a Critique's ontological model for "ideology." How does a Critique position the importance and value for understanding legal ideology? What dangers does ideology pose to legal practice, legal scholarship, legal analysis, etc.? Each of the Four Critiques has its own range of answers to these questions. On the whole, however, and now looking forward to the next step in our critical program, it might be helpful to coalesce the ontologies of the Four Critiques into two.

263. DESAUTELS-STEIN, *supra* note 17, at 197-298.

The Third and Fourth Critiques belonging to socio-legal studies and legal structuralism draw much of their inspiration from distinctly non-liberal sources: traces of Foucauldian thought, quite a bit of Bourdieusian sociology, deconstruction, various shades of Marxism, second-wave feminism, various spins on Saussure, and phenomenology. Correspondingly, these Critiques construe ideology not just as a set of distorting ideas and conceptual frameworks, but as fields of practices, material relations, and semiotic structures. Inasmuch as ideology thus became something that was lived and exercised by the different segments of the legal community or something that predicated the basic intelligibility of legal practice and legal thought, the whole idea of “freeing” law from ideology inevitably becomes, more or less, the wrong way to think about the problem. In contrast, the first two Critiques belonging to legal functionalism and empirical legal studies each operate from a simpler conception of ideology—one that resonates with the way this term is typically used in the classical liberal tradition and that essentially portrays ideology as distortion. These Critiques sustain a certain belief in the idea of good “legal science” (as opposed to the “bad” science of legal formalism), that is to say, the possibility of “freeing” the enterprise of legal scholarship from the lies of legal ideology. Each of the first two Critiques are fundamentally motivated by a desire to get at what is “really going on.” Realism is their foundation.

This “realist” approach to legal ideology, with its history in legal functionalism and empirical legal studies, has almost entirely lost its edge. And in losing its edge, it has achieved a kind of status quo dominance. Indeed, it is the rise and influence of movements like empirical legal studies and, more specifically, law and economics, that has helped motivate the counter-movement of a group of scholars operating under the moniker of LPE (Law and Political Economy). As we conclude this essay, it is worth dwelling on LPE for a moment, both for what it ostensibly offers as an antidote to the contemporary power of the realist view of legal ideology, and what it does not.

As explained in a recent article attempting to provide LPE with a mission statement,²⁶⁴ the authors criticize legal education for its maintenance of a pedagogical “conversation shaped by the depoliticization and naturalization of market-mediated inequalities.”²⁶⁵ The explanatory motor for this is what they call the “Twentieth Century Synthesis,” which appears to be a dialectical rebranding of the classic liberal public-private distinction targeted a hundred years ago by the realists and functionalists.²⁶⁶ On the one

264. Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis*, 129 *YALE L.J.* 1784 (2020).

265. *Id.* at 1790.

266. Although, as far as we can tell, the “synthesis” here is not meant in a dialectical sense.

side of this “synthesis” are the private law fields, areas of law generally thought to be “about the market.”²⁶⁷ In these areas, such as property, contract, intellectual property, antitrust, and the like, law and economics predominates as the operative mindset for thinking about rules, and how to best reform the rules. Questions about “distribution, power, and democracy,” are sidelined in favor of efficient wealth maximization. On the other side are the public law fields, but “centrally constitutional law.”²⁶⁸ In this public law domain, the authors suggest, it isn’t that law and economics directly holds the field so much as “key liberal values” like “freedom, equality, and state neutrality” have become increasingly diminished.²⁶⁹ Freedom comes to mean individual participation in the marketplace of ideas (and commerce), equality comes to mean whatever economic inequality isn’t, and governmental intervention comes to mean capture by interest groups.²⁷⁰ In this public and “political” space, “economic power [is] hard to find and correct.”²⁷¹ The “synthesis” here lies in the general acceptance that this neoliberal version of the public-private distinction is “just the way it is.”

The LPE authors argue that this neoliberal vision is a distortion, and that in reality, this isn’t the way it is at all. Indeed, this presentation of an apolitical and economic side of law, coupled with a political but marginalized side of law, is due for a reality check. The fulcrum for change, they explain, is a return to legal realism. The authors rightly point to the functionalist mindset that arose in the wake of legal realism, as we discussed above in the context of the First Critique. The authors also rightly explain how law and economics scholars are among the many heirs to the functionalist tradition²⁷²—and indeed, while we said only a little about the emergence of law and economics, it is worth noting again the strong connections between law and economics and empirical legal studies. What went wrong, according to the LPE narrative, is that in the transition from functionalism to law and economics, what was lost was “the concern with economic life’s character as a site of struggle amid unequal power. It gave up the urgency of both criticizing coercion and inequality and asking how they might be justified, if at all.”²⁷³ From antitrust to intellectual property to environmental law to corporate law and even to civil procedure, the effect of the law and economics movement has been the valorization of rules focused on the elimination of externalities, transaction costs, and market failures, and the prioritization of allocative efficiency. And while these rules

267. Britton-Purdy et al., *supra* note 264.

268. *Id.*

269. *Id.* at 1806.

270. *Id.* at 1807.

271. *Id.* at 1794.

272. *Id.* at 1796.

273. *Id.*

are so often seen as neutral, and just “good science,” the authors argue that they rather express a “particular view of power and legitimacy, one that viewed market ordering as tending to diffuse and neutralize power and as earning legitimacy by producing both a wealthy society and an appropriately constrained state.”²⁷⁴ The problem, from this perspective, is neither realism nor functionalism. The problem is the way in which these ideas were steadily domesticated.

The answer from LPE scholars is a return to a baseline running through the first two Critiques, and more marginally, through the Third Critique as well: the legal realist critique of the public-private distinction. From the functionalist critique of a Hayekian formalism, to the ELS critique of political ideology, to the socio-legal critique of mutual causation and everyday practice, twentieth-century ideology-critique has always been concerned with the way in which the political hides in its ostensibly apolitical domains. Indeed, and as evident in the work of the Fourth Critique, arguments asserting the autonomy of the market from law are prime targets for ideology-critique, since the market *is* a legal concept.²⁷⁵ Indeed, as the authors rightly point out, “this reorientation would inquire into how law creates, reproduces, and projects political-economic power, for whom, and with what results.”²⁷⁶ The result is a path back to legal realism and the critique of rules.²⁷⁷ Or, if not addition to rule reform, the path is away from law and to the intersections of political and market power.²⁷⁸

The LPE authors do say that in addition to rule reform and attention to forms of political power operating “outside” the legal domain,²⁷⁹ it is important to take a structural or systemic approach to the relation between law and political economy. This means “a shift in our view of inclusion from the individual to the structural level, looking not just at individualized experience but rather at how law and policy construct systematic forms of hierarchy and domination through a market that is always embedded in social relations. This is one of the key insights of critical legal thought and literature from both feminists and scholars of critical race theory.”²⁸⁰

While this view of structure is rather popular today, don’t mistake it for the sort of structuralism grounding the Fourth Critique—it is best understood as a return to functionalism. It is a nostalgic look back to the embeddedness of law and politics in social context, the postwar welfare

274. *Id.* at 1806.

275. Justin Desautels-Stein, *The Market as a Legal Concept*, 60 *BUFF. L. REV.* 387 (2012).

276. Britton-Purdy et al., *supra* note 264, at 1820.

277. *Id.* at 1821.

278. *Id.* at 1822.

279. *Id.* at 1815. Of course, the authors are keen to suggest a mutually causal role here, in the fashion of the Third Critique.

280. *Id.* at 1823.

state and social democracy, and indeed, the authors explicitly concede the provenance.²⁸¹ Following Hale, they encourage skepticism about a separation between a public field of coercion and a private field of consensual bargaining.²⁸² Next, and after blurring that classic liberal (and neoliberal) distinction, we should ask whether and how law creates systems and hierarchies of privilege which intersect with the ways in which society classifies people into particular identities. “An approach that puts inequality at the center would need to ask how ‘status’—meaning the differentiation of citizens according to categories—persists and is reproduced in the age of contract.”²⁸³ This “structural” approach, with its sensitivities to the mutually constitutive roles of law and politics (and here we see nods in the direction of the Third Critique), would require an empirical analysis that might yield a “rough matrix on which to consider the distributional consequences of law.”²⁸⁴ And just as importantly, the authors explain, reform necessitates a transformation of our political institutions and sensibilities, from greater commitments to voting rights and the elimination of the electoral college to the strengthening of labor unions and the media infrastructure.²⁸⁵

At the end of their essay, the authors conclude that if the LPE approach is going to succeed, it will have to go “beyond mere critique.”²⁸⁶ In a sense, this concluding sentiment is both curious and unsurprising. It is curious because one would think that, having spent so many pages attempting to criticize the dominance of law and economics, the authors wouldn’t really regard the critique as “merely” anything. Critique is *essential*, isn’t it? Well, maybe not, and this is why this conclusion is also not that surprising after all. What is the nature of that critique which LPE *actually* offers of the “Twentieth Century Synthesis”? How far does it move beyond the terrain of the ideology-critique developed by legal functionalists and empiricists? Is it just more of the same, only “better”?

The problem is not only that in its lesser manifestations the LPE program offers a certain degree of sanctioned ignorance vis-a-vis the lessons and legacies of post-realist legal scholarship, especially those parts of it that were not produced “from the right.” Its advocacy for restoring a progressive legal project—a project that we share much enthusiasm for—is premised upon an understanding of the legal form and of that form’s broader relationship with society that at best merely mirrors critical projects that are now a hundred years old. What is more, in its neglect of the general analysis of law’s functional indeterminacy (an idea developed in the Third Critique) and the structuring effects of legal consciousness (an idea developed in the

281. *Id.* at 1824.

282. *Id.* at 1825.

283. *Id.*

284. *Id.* at 1826.

285. *Id.* at 1829-1830.

286. *Id.* at 1834.

Fourth), the LPE project runs the risk of rolling back the clock in a way that would startle even some of the more apolitically centrist realists (like, for example, the Llewellyn of the “canons on statutes” period). And lest the mere fact of LPE’s showing readiness to resume the use of categories like “distribution” and “political economy” in its discourse blinds us to the persistent triviality of the actual insights it generates under these rubrics, one may be well-advised to recall that an obsessive fetishization of abstract disembodied ideas—be it “logical rigour,” “efficiency,” or “distribution”²⁸⁷—far more often than not is, in fact, a sign precisely of that kind of formalist sensibility that so worried the likes of Cohen and Ehrlich.

We mentioned above that the Four Critiques seem to reduce to two ontologies. The Critiques belonging to legal functionalism and empirical legal studies compulsively orbit around the notion of “realism” as the cure for ideology. As things stand, it is difficult to see how the LPE project, at least in its present configuration, will be able to offer a radically different theoretical program, which raises inevitably the question of how far in contemporary Anglo-American legal discourse the trope of “returning to realism” may itself have become a rhetorical device deployed in the service of legal ideology. Characteristically, as we saw earlier, neither the Third nor the Fourth Critiques in this context would usually fail to signal their principled preference for a decidedly “antirealist” theoretical outlook. In the Third Critique, the assumption of an antirealist orientation, in the form of dialectical thought, is commonly assumed to be an integral element of any critical practice. In the Fourth Critique, antirealism in the form of phenomenology constitutes an indispensable precondition of the very possibility of critical inquiry. A curious pattern, to be sure, but if, as this argument seems to imply, realism as an engine of ideology-critique has somehow been transformed over time into a vehicle of ideology production, what reason is there to think that antirealism in both its dialectical and phenomenological configurations is not going to do the same or that, indeed, it has not already done so? Our postmodern sensibilities counsel that to ignore this possibility is at the very least unwise. But what is then the solution? Which way should we turn?

Whatever the answer to that may be, our instinct at this preliminary stage is to say that what should come next must be a reawakening of our collective interest in the critique of legal ideology. After all, consider the present moment. On the one hand, the specter of crisis seems everywhere triumphant. And on the other, the loudest voices about ideology in law belong to those who offer its most restricted conceptions. Ironically, it is this heir to the “End of Ideology” program that has arisen as the North Star for those concerned about the political capture and distortion of the

²⁸⁷ Paulo Barrozo, *Critical Legal Thought: The Case for a Jurisprudence of Distribution*, 92 U. COLO. L. REV. _ (2021).

judiciary. And at the same time, the techniques and tools of Marxism, structuralism, and poststructuralism have fallen right off the map. This combination of events, in which the foundational elements of critical theory have taken second place to End of Ideology realism on the one side while on the other crises of the mind are ascendant, makes us wonder.

Is the right way to think about the problem through a resurrection of the Third and Fourth Critiques, a redeployment in the age of Trump, Covid, and the “existential dilemmas” of social media? As we said at the start, nostalgia isn’t the key. Rather, what we hope to see on the horizon is a transformation of the broader genre of ideology-critique—a transformation that makes good on the promise of critical theory, but not the promise of a Marx, Saussure, Foucault, or Derrida. A promise we haven’t made yet, but a promise—we hope—coming soon. If we return to the questions with which this Article began, and ask of the crises that afflict both society and our very ability to criticize, we suggested that a deep look at the ideology of law was the starting point. Why? Here we betray our own partisanship in the very building of this map. Our intuition is that, if we are to know what the critique of legal ideology might become, we must first know what it has been. This intuition, of course, is a staple in the structuralist ethos.

That said, we also remain aware of the challenges that afflict the critical legal project, or at the very least that form of it which we described under the rubric of the Fourth Critique. Not only does the CLS tradition seem to have failed to move beyond the unhelpful binarism of the internal/external distinction, its broader theoretical enterprise also appears inchoate. Some of it, undoubtedly, is a product of institutional politics: no scholarly movement in the history of Anglo-American legal thought has come under as vicious and sustained an attack at its politico-economic and institutional base as critical legal studies. But there was something else there too. Well before its version of structuralist semiotics had exhausted its analytical potential, the CLS tradition began to slide down the slippery slope of poststructuralist disenchantment. Just what the project of legal ideology-critique based around a legal structuralist sensibility might have become, had it entered a fruitful phase of combination with critical race theory, feminism, and postcolonial studies, remains an open question.

If the Four Critiques have all hit different dead-ends, and if these dead-ends work to both mystify and radicalize the “hermeneutic of suspicion” that governs our contemporary conjuncture, how can the power of critique be reclaimed? Is there a *fifth* tradition of ideology-critique? A sixth or a seventh? Let us hope so.

APPENDIX: FOUR CRITIQUES OF LEGAL IDEOLOGY

	<i>Functionalism</i>	<i>Empirical Legal Studies</i>	<i>Postmodern Socio-Legal Studies</i>	<i>Legal Structuralism</i>
<i>General model</i>	Ideology as Manipulation: ideology is about mystification, biases, and prejudices inscribed within the traditional legal method	Ideology as Manipulation: ideology is about mystification, biases, and prejudices perpetuated under the pretense of regular legal practice and analysis	Ideology as a False Consciousness with a minor note of Ideology as the Horizon of Meaning: ideology is about those material practices that give rise to a “sleep of reason,” and it is in this “sleep” that most people find meaning	Ideology as the Horizon of Meaning: ideology is about semiotics, discourse, and bad faith and its impact on our ability to imagine, reason, and communicate is all-pervasive and unending
<i>Basic concept of ideology</i>	Ideology is a grand master-plan of societal organization, such as, e.g., <i>laissez faire</i> , inscribed within the legal materials (rules and doctrines) by scholarly and judicial discourses	Ideology is the personal agendas, biases, and political projects of activist legal decision-makers or legal scholars who pursue piecemeal reforms or want to politicize the law in concrete micro-level contexts	Ideology is the false consciousness that (a) is created and enacted through the totality of various alienated practices of different legal communities (judges, academics, corporate counsel, etc.) and (b) represents the product of the underlying material realities and social conditions of these communities (gender and race relations, division of labor, income structure, etc.)	Ideology is the structure of the shared legal unconscious that underpins the very possibility of there being legal practice and legal thought, plus the totality of all the different political and professional projects whose pursuit is enabled and encouraged by the shape of this structure, that are carried out within the different legal communities

	<i>Functionalism</i>	<i>Empirical Legal Studies</i>	<i>Postmodern Socio-Legal Studies</i>	<i>Legal Structuralism</i>
<i>Principal interdisciplinary influences</i>	Sociological positivism and liberal political theory	Quantitative social sciences and statistics	Critical social theory, Freud, second-wave feminism, critical race theory, Foucault, cultural studies	Structuralism, phenomenology, existentialism, Foucault, and elements of deconstruction
<i>Relationship with Marxism</i>	Non-existent: any engagement with Marxism is avoided	Non-existent: Marxism is ignored	Extensive: serious engagement with Marxist classics, Althusser, Lukács, and elements of the Frankfurt School	<i>Bricolage</i> : a mishmash of borrowings from different strands of Western Marxism and the New Left
<i>The spatial arrangement of ideology</i>	Ideology is on the “inside” of law: it is what lawyers find waiting for them within the legal system and the traditional legal discourse (and should avoid)	Ideology is on the “outside” of law: it is what lawyers bring with themselves to their job (but shouldn’t)	Ideology is both on the “inside” and on the “outside”: it is what lawyers find waiting for them both within the legal system and in the broader social reality beyond it (and cannot escape but can recognize the influence of)	Ideology is both on the “inside” and on the “outside”: it is what ensures the intelligibility of legal thought and informs the operative categories of legal imagination, it is also what lawyers bring to their job (and are only indirectly aware of)

	<i>Functionalism</i>	<i>Empirical Legal Studies</i>	<i>Postmodern Socio-Legal Studies</i>	<i>Legal Structuralism</i>
<i>The dangers of ideology: what is at stake in piercing the bubble</i>	A misrecognition of law's real potential and the role it can play in society that leads to a completely unnecessary failure to respond to the legitimate needs and interests of different social groups	An overestimation of the general impartiality of legal decision-making that leads to a false sense of confidence in the general ability of the legal system to resist cooptation by special interests	A profound lack of appreciation for the lived realities of the legal system, and in particular the formative role of the everyday practices of the legal profession, that leads to a culture of personal and collective self-estrangement and alienation both within the legal system and the broader social reality beyond it	A continuing obfuscation of the structural regularities governing the workings of the legal system and legal thought that leads to a simultaneous over- and under-estimation of law's indeterminacy (predictability of concrete legal outcomes) and its redemptive capacity (instrumentalization for progressive causes)

	<i>Functionalism</i>	<i>Empirical Legal Studies</i>	<i>Postmodern Socio-Legal Studies</i>	<i>Legal Structuralism</i>
<i>The promise of critique</i>	Placing legal reasoning and legal institutions in their proper social context can help the <i>legal system</i> become less ideological by enabling <i>legal thought</i> to become more “honest” and “well-informed”	Uncovering what lawyers actually do through the application of various empirical methodologies can help minimize the opportunities for the hijacking of the <i>legal process</i> by special interests and enable the emergence of a more rigorous <i>legal knowledge</i> and the construction of a more efficient and transparent <i>legal system</i>	Shedding light on the complex, historically contingent dynamics of the mutual constitution and dialectics of law and society can free and embolden the <i>legal mind</i> to start reimagining the limitations of the <i>legal form</i> and the <i>legal thought</i> and, through that, reform the politics of the <i>legal system</i>	Recognizing the structural unavoidability of ideology can liberate <i>legal thought</i> from the bad faith and futile pursuits of formalism, functionalism, and empiricism and the holistic vagueness of post-empirical law and society scholarship, while also helping it develop a better understanding of the different ways in which the various individual elements of the <i>legal system</i> and the <i>legal discourse</i> are involved in and enable the exercise of power, in the hope that such an understanding could then help the cause of progressive politics in the broader society and the <i>legal profession</i> and <i>legal academia</i>

	<i>Functionalism</i>	<i>Empirical Legal Studies</i>	<i>Postmodern Socio-Legal Studies</i>	<i>Legal Structuralism</i>
<i>Difference between bad legal scholarship and good legal scholarship</i>	<p>Bad scholarship is inward- and backward-looking and believes in formalist reasoning</p> <p>Good scholarship is interdisciplinary, functionalist, empirically grounded, and thus scientific. It seeks to equip the legal profession with a clear-eyed view of law's actual "living" reality</p>	<p>Bad scholarship is ignorant of data and empirical tools and is sloppy in its understanding of law's social context</p> <p>Good scholarship is objective and empirically grounded and thus scientific. It seeks to equip everyone, but especially policy-makers, with a reliable and accurate picture of what the legal system truly is</p>	<p>Bad scholarship is ignorant of the broader social and cultural reality surrounding law, including its distributive and interpellatory impacts</p> <p>Good scholarship recognizes the importance of collective consciousness and seeks to portray the law in its full social complexity. It seeks to contribute to a more egalitarian and just world, if need be, through ambitious legal reforms</p>	<p>Bad scholarship believes in some form of legal science and thus remain in denial about the ubiquity of ideology in legal thought</p> <p>Good scholarship uncovers the ubiquity of ideology in legal thought and debunks the unrealistic expectations and delusions of legal science, even if that means completely undermining the belief in the emancipatory power of 'the law'</p>
<i>Prospects for ideology-free view of the legal system</i>	Strong	Very strong	Moderate in principle, non-existent in practice	Zero