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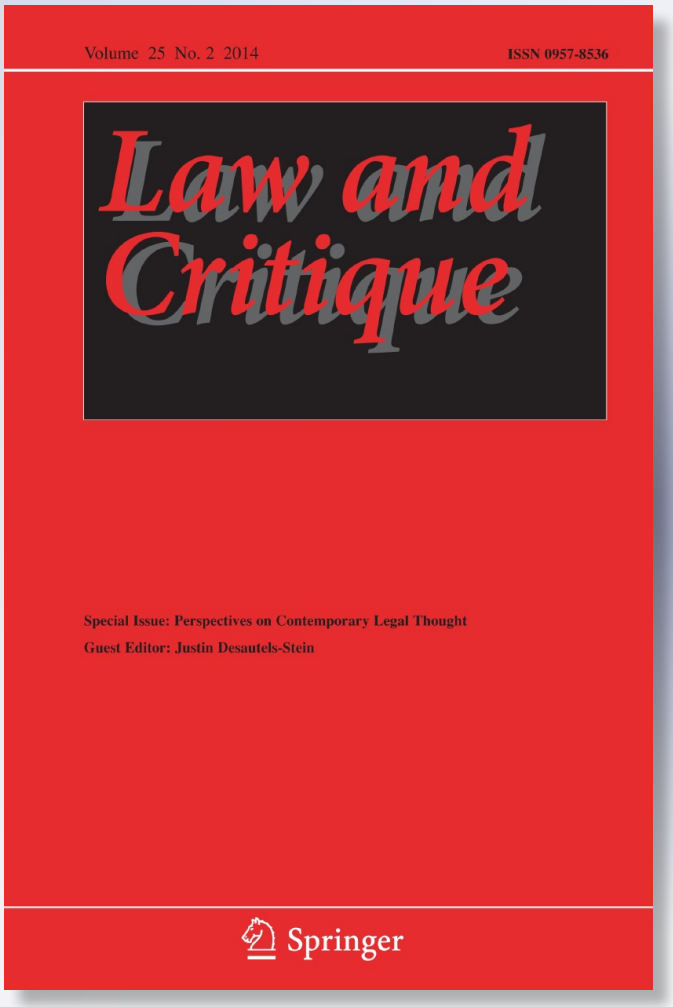

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The Hermeneutic of Suspicion in Contemporary American Legal Thought

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Abstract This article explores the 'hermeneutic of suspicion' that seems to drive contemporary American jurists to interpret their opponents' arguments to be ideologically motivated wrong answers to legal questions. The first part situates the hermeneutic in the history of the critique of legal reasoning, in public and private law, particularly the critique that claims that 'no right answer is possible' to many high-stakes questions of legal interpretation. The second part locates the hermeneutic in the long running processes of juridification, judicialization and constitutionalization that characterize law in modern society. The last part interprets the hermeneutic as 'projective identification', in the sense of Freud's analysis of jealousy, with the jurist solving the problem of role conflict by firmly externalizing the inevitable ideological element in doing justice onto his opponent while preserving the legalist element in doing justice for himself.

Keywords Constitutionalization · Hermeneutic of suspicion · Judicialization · Juridification · Legal theory

Introduction

This article develops the idea that contemporary elite jurists pursue, vis-à-vis one another, a 'hermeneutic of suspicion', meaning that they work to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology (Kennedy 1997, 2012). The rise of the hermeneutic of suspicion corresponds to a set of transformations of law-in-society, and of the relationships between elites in the legal universe and those in the political, economic and social universes. Embracing

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the hermeneutic is a superficially plausible approach to understanding what your colleagues are doing in any particular case and in general. I would say that it is more plausible than either radically skeptical approaches to the claims of jurists or apologetic projects aiming to restore faith against the skeptics. But I will argue that the hermeneutic is seriously flawed in its presuppositions about how ideology works in law. I argue that ideology's principal influence is on the directions of legal work rather than on legal error. Finally I suggest the hermeneutic as one of a variety of mechanisms through which jurists deal with an inner condition of role conflict.

This is an essay on contemporary American legal thought and legal institutions, but my interpretation of these American developments is heavily influenced by my prior work trying to develop an account of transnational legal consciousness evolving through three stages: Classical Legal Thought (1850–1930), Social Legal Thought (1890–1968), and what was, when I developed the theory, Contemporary Legal Thought (1945–2000) (Kennedy 2006). Up to World War II (WWII), in my account, the US was a massive importer of European legal thought, and an innovator, but with negligible impact elsewhere, except for Latin America. After WWII, the US stopped importing or even relating to legal developments abroad, except to try to influence them in our various imperial ventures. At the same time, the rest of the world fell under various kinds of American legal hegemony. For this reason, my account of contemporary American legal thought has no reference to foreign developments, although German and French legal thinkers have strongly influenced my analysis. It might nonetheless be interesting in legal contexts where importation from the US is a welcome or unwelcome necessity. I am afraid that what I write here will be much less intelligible and so less interesting to readers who have not read at least a little of this earlier work, but I will try as I go along to give as much quick background as possible.

Part One: Types of Legal Reasoning and Their Critique in Contemporary Legal Thought

The hermeneutic involves the practice of internal critique of one's opponent's argument, as a preliminary to alleging its illegitimate ideological motivation. The charge is of a mistake in legal reasoning. It is brought to bear in a different way according to the type of reasoning involved. This part surveys those types, and the types of critique to which they lend themselves.

Types of Legal Reasoning

When thinking about the contemporary mode of transnational legal consciousness, it is easy to see a great deal of continuity with the past, with the modes characteristic of Classical Legal Thought (CLT) and the Social.

Inductive/Deductive Method

The long lived technique of literalism (interpretation is correctly applying to the facts the definitions of the individual terms contained in the relevant norm) is

obviously still in use. Some form of reasoning from precedent, although it may be called something else, is also still common. But when unselfconscious rule application has to give way to interpretation, judges often turn neither to literal meaning nor to precedent but to one form or another of what is variously called inductive/deductive, or 'conceptual' or 'meaning-based' reasoning. Although classical jurists used many different reasoning techniques, it is accurate to say that they were particularly drawn to the variants of this mode.[1]

The simplest form is that in which there is a single applicable norm, but it seems that there are two possible interpretations and these will lead to opposite outcomes given the agreed facts of the case. This is the case of ambiguity. The judge chooses one or the other on the ground that it is implicit, logically entailed, or follows from the meaning not of individual words but of the norm taken as a whole. The key here is that no other considerations than that meaning go into the reasoning, and in particular the judge considers neither the purpose behind the rule, nor the consequences of choosing one interpretation rather than another. Though often described as deductive, this is a very loose form of logical derivation, far from the stronger sense in which rule application is deductive. It is not: 'if he killed the victim intentionally, he is guilty of murder; he killed the victim intentionally; therefore he is guilty of murder'. Rather: 'The purpose of the contract is the realization of the will of the parties and therefore the standard measure of damages must be the expectancy.'

A second form of 'deductive' reasoning, moving up a level of abstraction, occurs when the jurist thinks there is a gap with respect to the issue raised by the case, or a conflict between two norms each of which is arguably applicable. The jurist moves from the relatively concrete norms that are in conflict, or out of the narrow domain that is normatively empty, up to a higher level of abstraction, from rule to principle, for example, or from detailed rule to general rule, or from right to fundamental right. Then he derives the solution by reasoning downward, filling the gap or resolving the conflict in favor of one rule or the other or by a compromise, according to what is 'required' by the meaning of the more abstract norm.

A third, more complex and controversial way to deal with gaps and conflicts involves, first, the 'induction' ['abduction' may be a more technically correct description (Brewer 1996)] of a new general norm from a set of more particular ones. The justification of the new norm is that it is 'logically' necessary that it exist if we are to make sense of the particulars as part of a larger coherent whole. Because we work with a presumption of coherence, the more general principle must be considered a part of the positive law in force.

The more general principle explains the particulars, but once we recognize it as 'valid', it also can be the basis for the derivation of new 'valid' sub-rules to fill the gap or resolve the conflict, through the more simple process of deductive derivation from the meaning of the norm that I described above.

[1] Weber is still useful to understand meaning-based interpretation (Weber 1954). On the plurality of modes in CLT, in other words, how it was not, by any means, all induction/deduction all the time, see Duncan Kennedy (2004).

This is called in the civil law system the 'method of construction' (Geny 1899, Grey 1983). Note that both simple 'deduction' and 'construction' can be performed using code or constitutional provisions as particulars, or the holdings (or even the outcomes) of cases as particulars. The technique is shared by common law and civil law systems. That it is controversial does not mean that it is infrequent. Note that the method of construction can provide an argument for judges or legislators to change an existing rule that is unquestionably valid, in the sense of enacted or established explicitly as the holding of a case. If the established rule is arguably inconsistent with the more abstract constructed principle (based on the logical implications of many other particular rules in force), then it is arguably 'incorrect' as a matter of legal logic (presupposing the coherence of the whole) and should be revised.

When judges are doing judicial review of legislation or administrative regulations under a constitution that judges have interpreted to contain 'constructed' general principles, these unenacted norms may invalidate the law or regulation in question (Grey 1997). Indeed, the US law of privacy, covering everything from contraception to abortion to homosexual sodomy, is a product of this technique, beginning with the famous, prescient and paradigmatic case of *Griswold v. Connecticut*, decided by the US Supreme Court in 1965 (*Griswold*).

A nineteenth-century Connecticut statute made it a crime to use contraceptive devices to prevent conception, and the general criminal law prohibition of aiding and abetting made the statute enforceable against a clinic that advised couples on how to do this. The State Supreme Court upheld the conviction of the director of the Planned Parenthood League of Connecticut and of a doctor at the Yale Medical School who was director of the clinic. In his majority opinion striking down the conviction for aiding and abetting, Justice Douglas produced this argument, which may stand in a general way for one of the most striking characteristics of legal thought from the Classical period to today.

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by the emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures'. The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people' (*Griswold* 1965, p. 484).

From this very Classical constructive analysis, Douglas concludes that there is a 'zone of privacy created by several fundamental constitutional guarantees', but not reducible to any of them. This kind of construction was a major target of social

critique of CLT, and Douglas's use of it in *Griswold* provoked a veritable storm of futile juristic protest (Ely 1973). Much of the attack was directed at the technical sloppiness of his reasoning and at the imagery of penumbras, and failed to come to grips with the more elaborate arguments to the same conclusion in the concurring opinions. These show convincingly that the method of construction has been characteristic of US constitutional discourse since the mid-nineteenth century (*Griswold* 1965: Goldberg and Harlan concurrences, Goldberg p. 486; Harlan p. 499).

Teleological Legal Reasoning

The great innovation of Social legal thought was the systematic use of teleological reasoning as a legitimate method of legal interpretation, generating a new sub-norm from a single purpose attributed to the principal norm.[2] It is obviously still in wide use. It is closely analogous to the CLT technique of induction/deduction in the following way. In the simple case of ambiguity, there are again two possible interpretations of a general norm that are consistent with the meanings of its individual words, and they lead to opposite results in the case at hand. The judge attributes a purpose to the norm, and then derives the sub-rule from the purpose, rather than from either the words or the meaning of the norm taken as a whole.

Doing teleological reasoning requires consideration of the consequences of adoption of a particular interpretation of the ambiguous norm. One should not choose a particular alternative unless applying it will serve its purpose in fact. Where there are two equally plausible purposive interpretations, it makes sense to see which best serves the purpose in fact. This makes teleological interpretation dramatically different from induction/deduction, at least in form, because the older method made a great point precisely of refusing the consideration of either purposes or effects.

The method of moving to a higher level of abstraction is also common in teleological reasoning. The judge responds to a gap or conflict by moving to one of the general purposes of the legal order, say 'certainty of transaction' or even more abstractly just 'certainty'. Roscoe Pound argued that the paramount purpose of the law of commercial contracts was 'certainty of transaction', and from that derived the conclusion that the law of consideration should be reformed or abolished (Pound 1922).

The analogy to 'construction' in cases of gaps or conflicts is the derivation of a previously unrecognized general purpose by abstraction from the more particular purposes of a number of particular norms, followed by the use of the newly abstracted purpose to generate a more particular norm that will resolve the case at hand. This is what Richard Posner and his followers did with the efficiency norm in the early period of economic analysis of law (Posner 1972).

[2] The classic common law treatment is Cardozo (1921), deeply indebted to Rudolph von Jhering (1913), perhaps after von Savigny (1867) the most influential law book of the nineteenth century. See Kennedy (2010).

Note that the purposes of the particular norms from which the jurist abstracts are likely to be less clearly defined than the rules and principles used in the inductive/deductive method. But the reasonings of judges in cases decided teleologically provide a fertile source, as does scholarly writing. The set of potential purposes is also limited, since to be identified as an explanation and as a source of future rule elaboration, a purpose has to be 'social'.

Teleological reasoning in the social was controversial. Those identified with CLT identified 'law' with induction/deduction, and were unwilling to see teleological reasoning as ever appropriate. For those who did accept it, there was a dispute as to whether it was only available in the absence of a convincing inductive/deductive answer. If so, then teleology could never overrule inductive/deductive method, no matter how wrong or absurd the result was, looked at from the point of view of purpose. Judges like Cardozo in the US argued that if the mismatch was great enough, social purpose would justify the jurist in rejecting the conceptual solution (Cardozo 1921).

Policy Analysis or Conflicting Considerations

It seems to be generally agreed that the development of 'policy analysis', 'balancing', 'proportionality', or, in my own phrase, 'conflicting considerations analysis', is a major innovation of contemporary juristic practice (Kennedy 1997, 2000, 2011). Here the gap or conflict or ambiguity in the system of norms is resolved by a process of 'weighing', which can involve any and all types of legal values, concepts, norms or instrumental purposes. So rights and powers can be weighed with fairness and equality and efficiency and the separation of powers and security of transaction and legal flexibility to produce … the answer, which is a new norm or sub-norm.

Of course, in spite of this very long but not exhaustive list, not absolutely anything can be a consideration. The two basic requirements that narrow the possibilities are that a consideration must be at least arguably one that is already internal to the legal order, and that it must be 'universalizable', meaning not 'partisan', and especially not 'ideological'. This is similar to the idea that the purposes of the legal order are 'social' in the sense of shared by all participants – security of transaction is good for everyone, if only in the abstract, whereas securing better electoral chances for liberals is not.

The requirement that the considerations be internal is the basis for a practice of arguing that a particular policy or a particular right must be regarded as part of the order, because responsible for multiple particular norms. Once it is recognized in this way, it can enter the balance in deciding how to fill the gap or resolve the conflict. This represents the survival of the method of construction that is used in inductive and teleological reasoning in the new context of balancing.

The contrast that existed for induction/deduction and teleology, between using conflicting considerations to resolve an ambiguity in a clearly applicable norm, and using them to deal with a gap or conflict, is present in proportionality, but somewhat blurred. While some considerations have an obvious positive presence in legal discourse, others are vaguer: they are values, principles, purposes, policies, that are

not codified or declared as holdings of cases. These vaguer considerations are simply asserted by the jurist as obvious, or argued to be implicit given the recognized particulars, code provisions, cases, regulations, treaty provisions, that are part of the legal corpus to be interpreted. And once they are thus derived by abstraction, they enter and may determine the balance when deciding between one rule interpretation or one gap filler and another.

The most developed form of balancing is the proportionality test developed by the German constitutional court and adopted by the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), with its three prongs of legitimate purpose, least drastic means, and 'true' balancing, which assesses, in the 'indirect effect' context, whether the harm to one party's private right, caused by the exercise of another party's conflicting private right, and permitted by a private law rule, can be justified as 'proportional'.

While in Europe it is common to praise or lament the presence of proportionality tests 'everywhere', it is common in the US to say that balancing is no longer used (Kennedy 2011). It is true that the very elaborate 'balancing debate' in constitutional scholarship (Kennedy 1969) ended with the Warren Court, and that current Supreme Court opinions are written as though it had never been a practice. But it is equally common, and obviously true, to assert that every time 'scrutiny' of different degrees is brought to bear on interference with rights of different degrees of 'fundamentality' there is balancing, though it dare not speak its name.

State court judges (plus Skelly Wright) more or less revolutionized private law after WWII, with balancing as the dominant methodology, and it is far more often acknowledged in private than in public law (Feinman 2004). Justice Scalia concedes that balancing is necessarily the method of the common law, since it lacks statutes and constitutional texts to be originalist about (and he is not a precedent-formalist) (Scalia 1997). But even in private law there was a kind of liberal panic after the successful right-wing assault on liberal judicial activism, so that candid and sophisticated policy discussion has been on the wane for many years.

Once a question of interpretation has been settled by the method of conflicting considerations, it will be treated like any other valid determination within the legal order. It will be a precedent and also a source of dicta for future cases. A basic point often overlooked by critics of balancing is that it can determine outcomes in future cases through the argument a fortiori. If in a new case all the considerations supporting the victorious plaintiff in an earlier case are present but not all those supporting the defendant, and the force of the present items is the same in both cases, then the plaintiff will win again. Balancing is for this reason sometimes understood to be self-limiting: its use to settle novel questions reduces uncertainty rather than multiplying it.

In *Griswold*, interestingly enough, Douglas's strikingly classical 'construction' of the right of marital privacy does not directly decide the case. After declaring that the case involves a constitutional privacy right, he concludes the argument:

> And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law

> cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' (*Griswold* 1965, p. 485).

The more elaborate concurring opinions of Justices Goldberg and White similarly combine the induction (abduction) of a 'fundamental right', followed by the construction of a legislative purpose, culminating in a proportionality test pitting the right against the purpose (*Griswold* 1965). They can treat the outcome as cleanly determined in part because of the unconvincing purposes the state asserts for the statute (e.g. prevent illicit sex by making it riskier). This involves all parties in an almost humorous denial of what everyone understands to be the 'real' but religiously based legislative motive, namely to discourage contraception *per se*. The state cannot argue this purpose because it fails the test of universalizability required for legitimate juristic considerations.

Summary: Three Variants of Three Methods

Methods:

> Conceptualism, Induction/deduction
> Teleology, purposive reasoning
> Policy, proportionality, balancing, conflicting considerations.

These *can be* applied:

> To interpret applicable but ambiguous norms
> To move to a more abstract legally recognized norm to fill a gap or resolve a conflict
> Through the method of construction to introduce new principles, policies or other considerations into the calculus.

The methods can be used in conjunction, so that as illustrated by *Griswold*, an 'inductively' constructed right can be balanced against a governmental power assessed not according to the meaning of the power but according to its purpose.

Types of Critique of Legal Reasoning in Contemporary Legal Thought

One way to critique an instance of legal reasoning is to say that the jurist has made a mistake in applying the reasoning technique, but of a particular kind. He chose the wrong meaning for the ambiguous norm, or the wrong purpose, or misunderstood what policies underlie a multitude of particular norms when he set out to construct a new consideration for balancing. Here the legitimacy of the technique is presupposed, as is the relative determinacy of the method of application, and the possibility of reaching a correct answer, in the terms of the technique, if the jurist does it right.

There is an analogy in the history of the critique of the method of precedent or reasoning from cases or by analogy or casuistry. A mistake in reasoning can yield the wrong answer rather than the right answer, or alternatively the wrong answer where there were multiple possible answers none clearly right (Llewellyn 1930b; Brewer 1996).

This second kind of critique is quite different and the difference is important, even very important. This kind of critique alleges that the technique in question could not give a single correct answer to the question posed, because done rigorously there was more than one possible answer, or no answer at all. The abuse consists in producing an answer, any answer, to a question to which there was no right answer, at least not given the method of legal reasoning employed.

The abuse of Induction/Deduction

The grandfather of such a critique is Geny's chapters on the 'abuse of deduction' in his *Méthode d'interprétation et sources en droit privé positif* (Geny 1899). Geny critiqued both inductive and deductive methods, arguing with many and still telling examples that, with respect to the resolution of ambiguities, the filling of gaps by resort to a higher level of abstraction, and with respect to the method of construction, the jurists of his time had a systematic tendency to defend the gaplessness of the code by inventing falsely or merely apparently inductive or deductive arguments, when 'in fact' the only way to decide was by reference to extra-juristic factors. For him, the key to the extra-juristic was the notion of the needs of society (Geny 1899).

The problem with construction was the 'subjective' character of the constructs. For Geny this was not an argument against construction per se, but rather for doing it with frank recognition of the need for teleological justifications of the outcomes, along with openness to modifying them as changing social conditions might require.

There are much stronger critiques. For example, that there will always and necessarily be alternative constructions that fit the data, but none will fit the data perfectly. Because of contradiction in the data, the coherence generating choice looks arbitrary, unless some criterion other than logical consistency is invoked, and that criterion will be some purposive calculus. This is the position of the pragmatist philosopher John Dewey in a famous jurisprudential intervention (Dewey 1924).

In contemporary legal thought, these critiques are part of the common argumentative currency. In *Griswold*, for example, Justice Stewart's dissenting opinion seems to deny the technique altogether:

> In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Nine, and Fourteenth. But the Court does not say which these Amendments, if any, it thinks is infringed by the Connecticut law. … As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law … It has not even been argued that this is a law 'respecting an establishment of religion' … No soldier has been quartered in any house. There has been no search, and no seizure. (*Griswold* 1965, pp. 527–528)

The problem with construction, as for Geny, is subjectivity. As put by Justice Black, again in *Griswold*:

> 'Privacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures.… The due process argument … is based … on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable or oppressive, or the Court's belief that a particular state law under scrutiny has no 'rational or justifying purpose' or is offensive to a 'sense of fairness and justice.' If these formulas based on 'natural justice,' or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. (*Griswold* 1965, pp. 509; 511–512)

The Abuse of Teleology or 'Social Conceptualism'

Llewellyn leveled a different kind of critique of abuse of method against Jhering, and implicitly against Roscoe Pound, in his article 'Toward a Realistic Jurisprudence: The Next Step' (Llewellyn 1930a). Jhering's *Heaven of Legal Concepts* had actually been the very first abuse of induction/deduction critique, and the main inspiration of Holmes, Heck, Geny and Pound in their more elaborate attempts.

Llewellyn reproached Jhering and Pound not with abusing induction/deduction but, so to speak, with abusing teleology, by ignoring the obvious fact that most legal rules have multiple purposes, which often conflict. As a result, the teleological method may produce different solutions according to how the jurist chooses among them, and how he implicitly weights them when they are in conflict (Idem). A similar critique was developed by Karl Klare, under the name of 'social conceptualism', and aimed at the centrist interpretation of American post-New Deal labor law by jurists like Felix Frankfurter (Klare 1978).

General formulations of these 'abuse' critiques have been few and far between, but I think it fair to say that judges writing dissenting opinions, practicing lawyers and law professors in the elite transnational milieu have long since mastered them as techniques of argument in particular cases. They are used to destroy the opponent's apparently inductive/deductive or teleological argument, not to replace it with a structurally identical conceptual or teleological argument, but to argue, first, that another method has to be brought into play, and, second, that proper use of the new method will show that the advocate's proposed outcome is legally required.

The Critique of the Method of Conflicting Considerations

Rather than arguing that there is a right answer derivable from conceptual or teleological analysis, and that the opponent has simply missed it, the jurist may argue that the only rational way to resolve the interpretive question is to give up the search for a rationally highly determinate answer and move to conflicting considerations analysis.

While it is open to dispute whether the jurist can resort to teleological argument where induction/deduction is possible, it seems to be a basic premise of legal reasoning that absent a valid norm requiring him to do so,[3] the jurist should not resort to balancing unless it has been shown that there is no meaning-based (i.e. inductive/deductive) or teleological solution possible. It is just because conflicting considerations analysis makes no claims of conceptual or teleological necessity, and indeed acknowledges that the jurist is making a choice among alternatives, that it can serve as the method of 'last resort'.

But calling conflicting considerations a last resort is misleading if it suggests that the presence of ambiguities, gaps or conflicts that cannot be resolved by deduction or teleology is a 'fact of the matter' or a 'property of the materials'. On the contrary, the irresolvable ambiguities, gaps and conflicts that force us to balance are constantly the product of legal work by jurists pursuing their particular substantive agendas. When the jurist thinks that he is more likely to win the legal argument by discrediting the easy solutions as abusive and moving to proportionality, he works to make that necessary by generating gaps, conflicts and ambiguities, and multiplying conflicting purposes. At the same time, apparent ambiguities, gaps and conflicts are constantly disappearing as jurists work successfully to persuade their audiences that these are cases where non-abusive deduction or teleology work perfectly well (Kennedy 1986).

Suppose the jurist makes a conflicting considerations argument, either because it was directly mandated by the norm he is applying or because it is a last resort. Now a third critique will be available, that balancing is such a weak form of rationality, so inherently indeterminate, that there is no assurance against it functioning as the vehicle for the subjective, arbitrary extra-juristic preferences of the proponent.

Although this critical formulation is so common in contemporary legal thought that it needs no elaboration here, there is a particular aspect which we need to examine in detail. Although the critique of policy analysis almost always refers to 'subjective' and/or 'arbitrary' judicial preferences, the particular evil referred to is virtually never judicial corruption. And of course the critique is addressed not just to judges, who might be corrupt in the strong sense, but to jurists in general, including the academics who generate a good part of the original legal work both on the Continent and in the US.

It is, I allege, well understood that the subset of forbidden considerations that is the main concern, and which should at all costs be excluded, is that of 'ideological' preferences. In most cases, the critic identifies the problem as ideology in the liberal/conservative sense, or also often, biases associated with identity, with the indirect ideological implications that allegedly follow, for example, from the all white upper middle class male character of the judiciaries of the global North (Kennedy 1997, 2011).

Of course, this critique of covert ideological influence, which will be central to what follows in this paper, is not exclusive to conflicting considerations analysis, indeed far from it.

[3] In some cases, something like conflicting considerations analysis is mandated by the form of a norm, as in 'reasonableness' standards, or equitable doctrines requiring that all the aspects of a party's conduct be taken into account. In others, the norm refers directly to a balancing test or proportionality.

The Accusation of Ideologically Motivated Legal Error

Ideologically Motivated Wrong Answer

The most familiar form of the accusation of ideologically motivated legal error is the claim that there was a right answer, but the jurist disregarded it in order to produce a wrong answer that fit his ideological predispositions. The defining aspect of this form is that the advocate claims not just that his opponent chose the wrong answer for the bad reason of covert ideological preference, but that there was a right answer, which countered the preference, which the opponent was bound by fidelity to law to adopt. The motivated reasoning error can be a wrong deduction, a wrong use of teleology, or a wrong use of balancing, each in the sense of doing wrong what could have been done right.

This 'biased wrong answer' form is still extremely common. It fits well with the sense shared between popular observers of the system and elites with strong ideological commitments that 'the law' (the constitution, justice, human rights, freedom, the nation) is intrinsically on their side, so that when the jurist defines the law against them there is something more than just error, something more like cheating or deception going on.

Ideologically Motivated Abuse of Induction/Deduction

The abuse of induction/deduction argument, at least from the early twentieth century has incorporated the ideology accusation in a different way. The argument is that there was, at least for this question, no right answer available to the question of interpretation through induction/deduction alone. But your opponent has made the mistaken claim that there is a single right answer, and that it favors his side of the controversy. The motivation for the error, according to the abuse of induction/deduction argument, is the conscious or unconscious desire to turn ideological preference into legal necessity, with all the political advantages that transformation produces.

The first use of this argument I am aware of is in Holmes's article 'Privilege, Malice and Intent' (Holmes 1897). Hohfeld (1913; Singer 1982), in his analysis of the House of Lords Trilogy, brilliantly extended and developed it. Walter Wheeler Cook, in an article drawing on both of them, called (in evocation of Holmes) 'Privileges of Labor in the Struggle for Life' (Cook 1918), gave it sharp political bite. The object of the critique was what is now loosely called 'Lochnerism', meaning the US Supreme Court and State Supreme Court practice of striking down progressive social legislation on the grounds of conflict with heavily 'constructed' contract and property rights attached to the completely open phrase 'due process of law'. Sometimes the accusation of ideology was explicit; sometimes it was merely suggested: when the error is revealed (failing to see that there was more than one possible answer using deduction), the motivation is too obvious to need stating (namely, conservative political ideology).

In *Griswold*, when Black accuses the majority of operating with the idea that it is 'vested with power to invalidate all state laws that it considers to be arbitrary,

capricious, unreasonable or oppressive, or the Court's belief that a particular state law under scrutiny has no "rational or justifying purpose" or is offensive to a "sense of fairness and justice"' (*Griswold* 1965) his readers understand that the question of contraception is ideological in the strongest sense. It pits the American Catholic hierarchy and the Catholic Civil Liberties League against the upper middle class liberal Protestant and Jewish elite, represented in this case by Planned Parenthood and a professor at the Yale Medical School, who are parties. They are supported by an amicus brief from the American Civil Liberties Union (ACLU) and an argument by a famous civil libertarian Yale Law School professor. They may be operating 'subjectively', but it is subjectivity in a highly determinate belief structure in conflict with another of the same order.

Ideologically Motivated Abuse of Teleology

The 'ideologically motivated abuse of teleology' argument has the same structure, so we can move on quickly. In developing his 'social conceptualism' critique to account for the labor law decisions of the post-WWII US Supreme Court, Klare identified the error as treating the National Labor Relations Act (NLRA) as having a single coherent center-liberal purpose (Klare 1978). The Court read out of the Act the redistributive and participatory democratic purposes that arguably inspired it. The conscious or unconscious ideological motive for doing this was precisely to further the center liberal agenda shared by a majority of the justices. The result promoted a 'social' version of union power designed to preserve industrial peace through a passivized union bureaucracy, at the expense of any kind of utopian or radical reformist vision.

Ideologically Motivated Abuse of Proportionality

The critique of conflicting considerations reasoning insists that the open textured, unstructured nature of the method will permit the arbitrary or subjective preferences of the judge to be present guiding the whole operation. It will not be necessary to make an error of induction/deduction or of teleology to make the space for bias to control, because the method is defenseless against it from the start. As with each of the other critiques, it is not just any arbitrariness or subjectivity, but that associated with ideology that critics are most likely to charge.

Critiques of conflicting considerations as hopelessly open to ideological manipulation seem surprisingly often to reject the idea that the jurist can ever legitimately do balancing, or at least to claim that its use is fraught with dangers and so should be avoided whenever possible. This position seems to ignore the 'last resort' character of balancing. The advocate will simply respond, 'What is the alternative?'

But the jurist who is critical of the outcome generated by a particular use of balancing technique may answer, occasionally convincingly, that there was a meaning-based or teleological alternative, which the opposing jurist ignored because it did not suit his ideological proclivity. In other words, the charge is ideologically motivated failure to do meaning-based or teleological reasoning, followed by ideologically based abuse of conflicting considerations.

Where there is no plausible strategy of meaning-based or teleological argument for his cause, the critic will generate his own conflicting considerations to reach the 'correct' conclusion, in spite of the apparent pitfalls of the method.

Ideologically Motivated Error and the Separation of Powers

Consequences of Error for the Separation of Powers

The critique of ideologically motivated legal error has two related dimensions. The first might be called simply the 'rule of law' dimension. In any case of legal interpretation, whether in public or private law, the people who will be affected by the outcome, whether or not they are actual parties, may be, though of course may not be, aligned ideologically on one side or the other of the dispute.

When the judge makes an ideologically motivated error, he denies those associated with the losing side the ideologically conceived advantage that they would have derived had the decision gone their way. According to the usual conception of the legal interpretive process, this is a wrong. The judge should have decided according to law, but has decided according to ideology instead.

In public law cases like *Griswold* in which a judge is considering the validity of an act of another governmental entity, there is a second dimension, because the ideologically motivated error implicates the separation of powers. Suppose that an ideologically motivated error wins the day, and the judge invalidates the act of the coordinate branch of government. Here the critique of the outcome will be that it does two kinds of wrong. One to the private or public interests that benefitted from the governmental action that has been invalidated by the court. And a second wrong to the branch of government that has been told that it cannot do something that a correct interpretation would have permitted.

In such a case, the charge that the error was ideologically motivated goes along with the charge that just because the motive was ideological, the court has 'usurped' the power of another branch, violating the principle of the separation of powers.

Judicial Invalidation of Acts of Other Governmental Entities and 'Deference'

The issue of separation of powers is most clearly present in the public law context when a constitutional court strikes down a validly enacted statute. But it is also present when the administration claims political legitimacy for its exercise of discretion in rule making, and the court overrules it in the name of the rule of law (on grounds of legislative interpretation or constitutionality). It arises in federal (or 'quasi-federal') systems when judges interpret the constitution or treaty to strike down legislative, administrative or judicial acts of member states. And it arises when international judges give legal interpretations of human rights law or international humanitarian law that invalidate laws or administrative acts of national governments.

In all these cases, advocates for the challenged institution may respond that the judges are supporting their claim to power through false legal arguments, and that the motive is political. (Did anti-Semitism motivate the International Court of

Justice judgment against the Israeli wall near the border between the West Bank and Israel proper?)

While it is strongest and most intuitively appealing in these cases of confrontation between institutions, the argument from the separation of powers also has widespread application in questions of interpretation of legislation or judge-made decisional law. In the interpretive context, it is not a question of striking down but of choosing a meaning in a situation of ambiguity, conflict or gap. Here the critique will be that the judge is changing the law, rather than interpreting it, and that changes in the law are for the legislature not the judiciary.

It is a premise of the modern Western-based systems that judges are not to make decisions based on their or anyone else's political theories or preferences or commitments. Legislators and the chief executive have that prerogative, and they alone. Judges are supposed to decide according to a non-political method, which may be understood in a wide variety of different ways (for example as based on induction/deduction or teleology or balancing), but with the absolute minimum meaning that ideological considerations are excluded.

In other words, the charge of abuse of method with ideological motivation is the charge that the judges are exercising powers that do not belong to them under the established system of separation of powers, including the boundary between national and transnational jurisdiction.

Here is Justice Black's version of this argument from *Griswold*, addressed to the majority's operation of constructing a right of privacy by derivation from specific constitutional clauses and then attaching it to the general formula of due process:

> While I completely subscribe to the holding of *Marbury v. Madison* and subsequent cases that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct'. Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or what not to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination (*Griswold* 1965, p. 513).

It is not a question of usurping a subject matter jurisdiction, but rather a methodological one. If there is no properly legal case against the action of the coordinate branch, the argument goes, the court should 'defer' to the other power, whether legislature, administrative agency, state as opposed to federal power, or the national sovereign. In other words, if there is no right answer, so that the appearance of legal necessity can be maintained only by abuse of method, and the conflict is over the validity of the act of a coordinate branch, then the 'right answer' is that the judge must not invalidate the disputed action.

But note the flipside of this argument. When the judges defer, declaring that because they can find no determinate properly legal argument against the action in question, they will be subject to the charge that their separation of powers argument constituted a refusal of justice. There was, perhaps, a legally compelling argument, like the ones offered by the majority and concurring opinions in *Griswold*. Justice Black's refusal to recognize it, in spite of his professed substantive disapproval of the statute he would have upheld in the case, was covertly motivated, perhaps by his fear of the way the method of construction was a main support of Lochnerism. He was willing in this interpretation to sacrifice the legitimate family planning rights of married couples to his New Deal regulatory agenda (*Griswold* 1965, p. 507).

The Hermeneutic of Suspicion and its Twin

The charge of abuse of method with ideological intent (conscious or unconscious) is so common in contemporary legal culture that it seems fair to say that contemporary legal consciousness is inhabited by a 'hermeneutic of suspicion' toward claims of legal necessity. Suspicion involves, first, the operation of criticizing judgments that claim to be conceptually or teleologically required, or required by balancing, alleging either simple mistake, or abuse of induction/deduction or of teleology or of proportionality (by claiming a right answer when the method in question was indeterminate in the circumstances).

After demonstrating the wrongness of the answer (either because there was a different right answer or because there was no single right answer), there is the suggestion of ideological motivation and the demand for a different answer, based conceptually or teleologically or on last resort balancing. There is no admission that this answer will be subject to a suspicion-hermeneutic exactly analogous to the one just critiqued. But every sophisticated jurist is acutely aware of this possibility, and of the impossibility of knowing for sure when suspicion will conquer certainty.

In developing the notion of a hermeneutic of suspicion as something common to Freud, Nietzsche and Marx, Paul Ricoeur insisted that it is part of a matched pair, or has a twin, called 'hermeneutics as the restoration of meaning'.

> The contrary of suspicion, I will say bluntly, is faith. What faith? No longer, to be sure, the first faith of the simple soul, but rather the second faith of one who has engaged in hermeneutics, faith that has undergone criticism, post-critical faith (Ricoeur 1970, p. 28).

Ricoeur uses interpretation in contemporary studies of religious consciousness as exemplary of the two hermeneutics, and treats the second mode as 'post-critical' because it does not simply affirm the truth of the sacred that lies behind and animates the texts in question. In the legal world, the hermeneutic of restoration that is the twin of suspicion as I have been developing it here is also post-critical, chastened by the vicissitudes of faith from the Lochner to the Warren Courts.

The hermeneutic of the restoration of legal meaning animates the method of construction in induction/deduction, or the positing of overarching purposes of the legal order in teleological reasoning. It is a disposition, like the disposition of its twin to doubt and unmask, a tendency, in this case to search for and find values

immanent in the body of legal materials, to believe in those values, and to deploy the techniques of legal argument to develop and apply them to shape the legal order through time.

The next section tries to account for the contemporary prevalence of the hermeneutic of suspicion, but keeping it always in tense relationship with its opposite. As I mentioned in the Introduction, I sympathize with the hermeneutic of suspicion (and not with its twin), but reject its insistence on legal wrong answers as the locus of legal sin. To my mind ideology is mainly present through professionally legitimate legal work on the legal materials that exploits or generates or eliminates open texture. In the third part, I will try to account phenomenologically for the legalism or neo-formalism of the contemporary version of the hermeneutic.

Part Two: The Law/Politics Boundary in Contemporary Legal Thought

How to account for the peculiar susceptibility of modern legal consciousness to the prosecution and denial of the accusation of ideologically motivated error in legal reasoning? Suspicion is a psychological propensity or tendency or disposition. How to explain it? The hermeneutic is a contemporary phenomenon. Although it has its origin in the critique of Lochnerism, in that phase it was a critique of a serious deviation from good practice, rather than an expectation about everyday practice across the whole domain of law.

At a very abstract level, its rise makes sense to me because I see it as an important aspect of a Weberian 'disenchantment narrative' that begins with religion, moves on to natural rights and eventually reaches law, the last bastion (Duncan Kennedy 2004). But world historical narratives are not self-realizing. Has something changed in contemporary law, either in the way it is practiced or in our awareness or understanding of it, that would help explain this disenchantment, not another, now rather than at some other time?

The long term development of what might be called extreme skeptical legal theory, both academic and as part of the legal consciousness of the bar, is certainly part of the story. An extreme skeptical view had already emerged at the end of the nineteenth century as part of the attack on Lochnerism (although something like it had long been a part of populist lay legal consciousness). It was one tendency (but not the only one) among the legal realists, best exemplified by Cohen (1935) and one (but not the only one) among the 'crits' in their 1980s heyday (e.g. Peller 1985). In this view induction/deduction and single purpose teleology are always abusive, and proportionality tests are 'inherently' political. They mean that no matter what the configuration of the legal materials there is never a single right answer.

The practice of the hermeneutic in its contemporary form deploys the critical techniques developed by skeptical legal theory, but strongly rejects the extreme skeptical conclusion. This is implicit in the affirmation that there is a correct legal answer we should adopt in this particular case (the answer may be 'deference'), once we understand the ideologically motivated legal error of the other side.

As an alternative to these approaches, I suggest in this Part that the intensity of the hermeneutic is intelligible as a response to the changing relations between, on

the one hand, ideological intelligentsias working for and against the transformation of economic and social life, and, on the other, the corps of jurists. This interaction produced three striking developments that provide the context for the hermeneutic.

First, the juridification of social life through the rise of the regulatory/administrative state, theorized and implemented by jurists who had developed social legal thought as a critique of the theory and practice of Classical Legal Thought. Second, the judicialization of that juridified regime, as part of the reaction against the social after WWII. Third, its constitutionalization, beginning in the 1960s, as an aspect of a shift of power not just to the judiciary but within it and within the professional corps of jurists. An important sub-plot is the emergence of 'believers' pursuing sometimes frankly ideological and sometimes strictly internal professional projects aimed in Ricoeur's vocabulary at the restoration of meaning.

The Juridified Universe: Horizontal Spread of Administration

From CLT to the Social

The oft-remarked 'juridification of social life' is obviously complex to say the least (Edelman and Galanter 2001; Teubner 1987). I hope that for our purposes a very reductive summary will be enough, a summary that emphasizes the place of the process of juridification in the progression from CLT to the Social to contemporary legal thought.

When people talk about juridification, the previous regime with which they are contrasting the current situation is CLT, modified by the social. The CLT regime was characterized by the existence of large pockets, or areas, where private parties, administrators, legislators and national governments had discretion to set rules and make determinations. Discretion meant that there was no institutional actor charged with applying minimum criteria of validity to their decisions. The principal areas were the exercise of patriarchal power in the family, state custody, and international relations.

Economic life had been commodified (land, labor and capital—cf. Polanyi 1944). The ensuing market economy was fully juridified in the sense that it was governed by a judicially enforced regime of private law based on autonomy of the will. But there was little legislative or administrative regulation or oversight of the terms of the contracts that were the legal form of virtually all market relationships.

The social regime had as principal objective to fill in the empty spaces and regulate the contracts (Donzelot 1984; Kennedy 2006). The vehicles were legislation and administration. The key to understanding the social regime is that the typical techniques were (1) the 'separation out of social law' (Wieacker 1995) by creation of regulatory regimes, typically with inspectorates, through techniques like licensing, enforced by low-level criminal or civil penalties without private rights of action; (2) the creation of bureaucracies to administer the regimes of social insurance (accidents, unemployment, health care) and welfare; and (3) the 'move to institutions', meaning the development of new organizational forms (Kennedy 1987). This third is the least familiar: in the market it included labor unions, professional associations with regulatory powers, large public and semi-public

housing projects, public service corporations running utilities; in the law of custody, juvenile facilities, orphanages, vast prison expansion, mental hospitals voluntary and involuntary, run by psychiatrists; in international law, beginning with the League of Nations, the proliferation of organizations from the International Labour Organization (ILO) to the refugee regime.

All these developments involved new 'staff', expanded police forces, social work, lawyer economists in securities regulation agencies, and hosts of inspectors of everything from food and water to building types. The ethos was professional and technical, with the schemes to be devised and also administered by experts, working in the 'public interest' on the basis of natural and social sciences.

The new institutions, the regulatory agencies and the welfare state bureaucracies operated according to a model in which the inmates or residents or beneficiaries of the various social institutions were understood as objects of administration. These inmates, residents or beneficiaries had 'privileges rather than rights', and the 'social' or 'public' interest rather than the individual interest was both the justification of the existence of the programs and the guide to how they should be structured and operated on the ground. The emerging international regime was based on treaties obliging states to one another with no rights at all for persons (as for example, the minority protection regime).

What is important here is that although law, in the form of statutes and regulations and treaties is pervasive, indeed all-pervasive, judges definitely are not: juridification without judges. [Exception for the turn-of-the-century progressive romance with new courts for social problems (Willrich 2003).] It is true that in all the relevant countries, administration was formally subject to the jurisdiction of courts, specialized or not, so the new regimes were formally within the conventional notion of the rule of law. But it was a rule of law that deliberately granted maximum discretion to the administrators. If courts wanted to do more than very passively and distantly oversee, they had to do battle with the ethos of the time, which regarded them as the historic enemies of the social project, and their power as a threat to its successful execution.

And like judges, rights and particularly individual rights were not only not central to the legal theorization of the social, they were positively anathema. It was all about social needs, social purposes, groups, classes, functions, and against the 'individualism' of CLT. If there must be rights, they were social rights (e.g. the social Catholic 'right to family life') understood as guides to legislation.

Politics in the Juridified Universe

The juridification of much of social life, in the sense of its subjection to legislation and administration in the name of the public interest, meant that it was politicized in a new way. The issue was no longer the abstract one of whether to 'intervene in' or 'reform' the more or less laissez-faire late-nineteenth century regime. Nor was it the more concrete one of whether to favor a particular new regime of say, labor law. The social regime once in place, the issue was how it would evolve in practice, how major or minor changes in it would unfold, against the background of the major ideological confrontations that had brought it into existence.

The old ideological formations, say free market conservatism or progressivism, or consumerism or unionism or social Catholicism or civil libertarianism, or in Western Europe socialism and communism, constantly found that new battles, within the regime rather than over its existence, required them to take positions on small issues and to develop strategies for the long term on large issues. The outcomes of micro and macro questions of adaptation to change would determine whether a given regime would develop or atrophy or unwind, whether liberal innovations would serve conservative ends and vice versa, and so forth.

After the Second World War, new ideological formations came onto the scene, with strong agendas for the reform or repeal or radicalization of the social regimes established over the previous decades. In a very general way, these include neo-liberalism on the right,[4] and a more diffuse progressive liberal rights agenda on the left. The neo-liberals favored massive deregulation of the economy, while the liberals wanted only marginal adjustments (airline industry price regulation and the Interstate Commerce Commission were happily sacrificed). The liberals favored an ambitious program to transform ineffectual social regulatory regimes for the market, the family, the state and the new social institutions by the creation of individual rights of action. The neo-liberals opposed all of these efforts with passion.

There were however areas of consensus, at least up to the turn of the century. From the beginning, they shared a civil libertarian critique of the forms of power that had emerged in the new public and private organizations and regulatory and welfare bureaucracies. On the other hand, in the beginning the neo-liberals allied with social conservatives against the ambitious liberal program of rights for blacks. But as the liberals expanded it to include identity-based groups that the Social tendency had been happy to exclude (first women, but expanding to the wide array now familiar), a new configuration emerged.

The liberals pushed both new interventions and deregulation in the domain of sexual practices and indeed cultural control in general. They combined the demand for a radical expansion of protection against private violence and discrimination on the basis of gender, with decriminalization of contraception, abortion, adultery, fornication, homosexuality and pornography. The neo-liberals, heirs of the liberal republicans who joined Douglas in *Griswold*, became part of this project when the doctrine of colorblindness allowed them to give it an anti-black spin. They split from their right-wing social conservative allies, who found themselves suddenly allied with the radical feminist backlash against the liberalized gender regime. The result was a modernist/traditionalist opposition that cross-cut the left/right divide.

'Judicialization' of the Juridified Universe

After the Second World War, the socially oriented legislators and administrators, with their jurist allies, continued to build their juridified universe into the 1960s [up to the famous fiscal crisis of the (welfare) state (O'Connor 1973)]. But during the post-war phase of the social, accelerating through the 1970s and after, judges began to play a more and more important role in the definition of the rules and practices of

[4] Candidates for three basic right-wing critiques of the social: Hayek (1944), Coase (1960), Lasch (1977).

social law broadly conceived. As contemporary legal thought began to differentiate more and more from social legal thought, it was characterized by an across-the-board increase in the modalities of judicial intervention in the various juridified domains (Chayes 1976).

This phenomenon, like many others in the history of the transformations of legal consciousness, is difficult to explain in any straightforward causal way.

It is certainly useful to advert to Ugo Mattei's theory of American 'exaggeration' of British strong judging and at the same time of German devotion to legal science based in legal education (Mattei 2002). According to him, these traits combine with post-realist technical mastery, and the sophistication forced by a multi-jurisdictional but also hierarchized federal system, to produce a judiciary (particularly the federal judiciary) that is capable, albeit in a 'reactive' way, of exercising major power at the expense of a relatively 'weak state' (by European standards). This theory, developed, might help if not to explain the judicialization of the juridified social (as the context for the rise of the hermeneutic of suspicion), at least to render it more plausible than it would otherwise be, but leaves the question of why 'all of a sudden' after WWII.

Another way to understand it, I am going to argue, is as the emergence of a new form of interaction between the elites that dominate economic, social and political life, and the 'legal subsystem', as Teubner might have it (Teubner 1988), operated by the professionally specialized 'corps' of the jurists socialized to understand their role as very different from that of the ideological intelligentsias[5] of the larger society. The goal is to understand the judicialization of a juridified social world as a context for the emergence of a generalized hermeneutic of suspicion with regard to the claimed ideological neutrality of juristic activity.

'Outside' Ideological Intelligentsias Drive the Process of Judicialization

As already mentioned, the progressive rights-oriented groups shared with the neoliberals a civil libertarian, proceduralist critique of the juridified social regime, the regime created and controlled by legislators and administrators. They came eventually to share a second agenda. Once black demands for radical change in the race regime had been suppressed, they challenged the social regime in the name of groups (consensus in favor of women) and practices (gay rights) that the regime had quite consciously left out.

The overall targets were the statutory frameworks, the mass of administrative regulations, and the myriad day-to-day administrative practices that constituted the social regime. The challenge was to the ethos of the whole, as well as to the rule structure, to the arbitrariness of the experts, whose claims to professional knowledge had come to seem suspect rather than sacrosanct (medical malpractice is paradigmatic for this) and whose appeal to the public interest over the interests of individuals came to seem hollow or even hypocritical.

[5] For a discussion of the notion of an 'ideological intelligentsia', which is the basis of the discussion in the text, see Kennedy (1997).

In this context, the judges were, practically speaking, the only group of sovereign power holders likely to be of any use to the program of reform. The reformers naturally tried to mobilize them, chiefly by public and then judicial exposure of scandalous administrative abuses, the very techniques that the muckraking social reformers had used against the regime of CLT. They developed varied legal strategies based on litigation, sometimes as a supplement to strategies of legislative or regulatory change, but also free standing, and independent of the political fluctuations of legislative and executive power. If there was one thing they had in common across a very wide sweep of proposals it was the transformation of social protections into individual entitlements (Reich 1964).

One move was to demand micro-level judicial supervision of what had once been practically unreviewable, for example by mass appeal of routine administrative orders terminating welfare payments. Another was class action litigation designed to get judges to more or less take over dysfunctional institutions, from prisons to mental hospitals to public housing projects to labor unions. Yet a third was to press for substantive judicial review of statutes, regulations and informal administrative practices (say of police interrogation or hospital disclaimers of liability). The tools included constitutional law but also the non-constitutional norms of administrative law or just micro- or macro-level statutory interpretation (Chayes 1976).

Politics in the Judicialized Social Universe

In order for there to be a dramatic increase in the role of judges in the politics of the juridified social universe, it was not necessary that all these initiatives, or even very many of them, should succeed. As long as some succeeded, and as long as it was easy to see that there were an indefinite number of others that might plausibly succeed, then the dispersed defenders of the existing administrative institutions and of the ethos of the order as a whole had to be prepared to fight back. Fighting back effectively meant a constant practice of anticipatory defense by modifying the various regimes to make them less vulnerable to legal attack. The result was a kind of managerial juridification, as large organizations of all kinds formalized their internal procedures governing both the treatment of employees and clients and horizontal workplace relations, for example in the domains of discrimination and sexual harassment, that might generate liability for the institution (Fischl 2007).

While it was above all the progressive, individual rights-oriented groups that began the process, judicialization is now a simple fact of life for all tendencies. For contemporary legal consciousness, it is the normal situation for the endless questions of adapting, evolving, reforming, expanding, and contracting all the different regimes and sub-regimes of the juridified universe to end up as legal questions settled in litigation (Kagan 2001).

The judges adjudicate the individual disputes before them using the interpretive techniques we have been discussing (literalism, precedent, induction/deduction, teleology, proportionality), and in so doing they define the rules of the regimes for the future. The rules implicate not only the interests of the parties to the lawsuit, but the much broader interests of all the similarly situated parties constituting the groups in ideological conflict.

Ideologically motivated actors who used to spend their time mainly with legislators and administrators now have to spend more and more trying to persuade judges. They have to develop legal arguments, rather than the familiar overtly political arguments for legislators, or policy arguments for rule-making administrators. They are required by the binding conventions of legal discourse to adopt a peculiar premise. It is that the answer to the big or little question of legal evolution, no matter how clearly it is significant mainly or exclusively for its ideological content, is determined in advance by the 'sources': statutes, administrative regulations, judicial decisions, and constitutional provisions. No matter how implausible, they have to claim to do it all with literalism, precedential reasoning, induction/deduction, teleology and balancing, and that there is no choice but only legal necessity behind their preferred outcome.

Left and right intelligentsias are not just passive recipients of the new political logic of judicialization. As repeat players in the game of litigation, they assess the process from the point of view of how its expansion or contraction will affect their interests. When considering different dynamics, they will have a general estimate of the relative sympathy for the project of the different separated powers, legislative, executive, and judicial.

If on balance and over a fairly long run, the judiciary is likely to be more sympathetic to a given ideological project than the executive or the legislature, it may make sense to try to persuade the judges to increase their intervention in the domain in question. A lot depends on whether the advocates think that the legal materials that govern the domain in question are sufficiently open-textured so that there will be many occasions for favorable ideologically oriented interpretation that will dispose significant stakes.

Of course, the opposite conclusion about the judges will lead to a strategy of trying to keep them out, preserving and reinforcing the power and autonomy of the administrators and legislators who have traditionally run all the various institutional complexes of the social. For actors trying to instrumentalize or neutralize the judges as power holders, judicialization and anti-judicialization have become possible strategic 'moves'. There is now a 'politics of the separation of powers', just as there is a politics to all the substantive regimes the judges are more and more coming to monitor or control outright. One of the factors affecting the extent of judicialization in any given situation will be the relative strength of the outside forces pushing for it and against it.

As Michael Fischl argued, the process underwent an ironic twist when conservative judges responsive to all corporate interests everywhere gained control of a regime previously juridified by liberals trying to protect weak parties, from consumers to workers to women to environmentalists. Along with moving to restore private or administrative autonomy against the judicial onslaught, they de-judicialized by validating consumer and worker contracts for unreviewable compulsory binding arbitration under terms notoriously favorable to the corporate party. In the rare cases where the weak party challenges the contract, however, it will be adjudicated under the liberalized rules of review for contractual fairness brought in by the first wave of liberal judicialization (Fischl 2007).

It seems to me at least plausible that the prevalence in contemporary legal consciousness of the hermeneutic of suspicion is related to the two processes of

juridification and judicialization, driven to a significant degree by 'outside' ideological intelligentsias (operating in politics, the economy or civil society, or all at once). Every area of social life is to one degree or another a locus of ideological conflict, and ideological intelligentsias play a major role in the litigation through which the judges monitor and sometimes actively control the administration of the various regimes. It seems to me almost inevitable that the losers will attribute their losses to the infiltration of ideology across the membrane that supposedly separates legal from political reasoning.

The Liminal Jurist

This description is I think most plausible when we are talking about a particular small but, I would argue, disproportionately important subset of the jurists. As ideological intelligentsias realized that judicial power was crucial to the success or failure, not to speak of the day-to-day guidance of their projects, they developed their own legal specialists. In the beginning were liberals, sometimes the defenders of the social project and sometimes rights-oriented critics of it.

When they go to work for a unionside law firm doing strategic litigation or for the ACLU or the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund, the Environmental Defense Fund, or a gay rights or indigenous peoples' public interest law firm, they understand themselves and are understood by others in the know to be situated exactly at the intersection of 'outside' ideological projects and the 'inside' requirements of legal form. Sometimes they have ideologically defined organized interests as their clients, but sometimes they 'represent' diffuse interests that they amalgamate themselves for their own purposes, for example through class actions. It was a striking development of the 1980s that a more or less mirror image 'conservative legal movement' (Teles 2007) reproduced this structure at the other end of the political spectrum.

Depending on which party is in power, this is the pool from which Presidents draw political appointees to law-related jobs in the federal government (sometimes they stay and become civil servants). Some of them will become judges, and in principle, as they declare at their confirmation hearings, they pass wholly across the line into law understood as the opposite of an ideological project. More become law professors, and pass across the line into scholarly objectivity (!). If you belong to an opposed ideological camp, it seems unsurprising that you would have at the very least a 'suspicion' that these actors have made no such simple transition, and that their pre-existing ideological commitments remain as a source of influence on their judicial or professorial choices.

I would describe one important sub-group among the liminal as 'cause lawyers'. In my experience of them, under the right circumstances they confess that they just 'pretend' to believe that the sources determine right answers in a way that excludes ideology. They consciously manipulate legal discourse in the desired direction, but accept the duty to obey in good faith when there is no legally plausible route to the ideologically correct outcome, hoping that that will not happen in too many or too horrible cases. They see the judge as a legitimately powerful, but also meaningfully constrained political actor, directly contrary to the simplistic version of the

separation of powers offered for example by Hugo Black with his distinction between 'making' and 'interpreting' law.

A quite different equally important sub-group, who I will call 'believers', seem to act on the presupposition that the law itself immanently commands its own transformation to correspond to their particular ideological projects. The universalizing claims of the project are true (all ideologists believe this, by definition), and it so happens that law already contains that truth, at least so far as the work of interpretation is concerned. This notion seems to me to be adopted not by all, but by significant numbers of jurists whose intellectual/political commitment is to law and economics, neoliberalism, religiously based social conservatism, civil liberties, feminism, identity-based anti-discrimination, or human rights.

The method of construction is the essential tool for this group. The idea is that internal analysis of the legal corpus reveals as its governing elements the normative principles (human rights or efficiency, for example) that they themselves believe are valid. Construction can be by induction/deduction or through the location of governing teleological principles. These jurists are the bearers of Ricoeur's 'hermeneutic of the restoration of meaning' (Ricoeur 1970) mentioned at the end of Part One.

It seems likely that liminal characters are a small minority of judges, a larger minority of American law professors and a small minority of the bar. But because they are drivers of legal change, and legal change, rightward as much as leftward, is a highly salient aspect of contemporary political consciousness, they are very visible. There is no more obvious target for the hermeneutic of suspicion.

Liminal Legal Arguments

In the US today, legal argument disposes major and minor ideological stakes through standard argument-bites, along with equally standardized counter-arguments, that look on their face to be mirrors of the arguments used in general non-legal political argument. There are many examples, but the most familiar may be the standardized argumentative repertoire for debating whether to expand or contract freedom of contract, in myriad settings from consumer protection to labor law to family law to corporate law to private international law to treaty law, and recently to Obamacare (Kennedy 1991, 1997).

It is striking that the legacies of CLT and the Social are both omnipresent and transformed (Kennedy 2006). The characteristic CLT mode of argument was based on the will theory, a sharp public/private distinction and the idea that the holders of rights and powers should be 'absolute within their spheres' as defined if possible by inductive/deductive method.

These arguments are with us today, but oddly politicized: the CLT arguments in the economic sphere are generally understood to be conservative, used to support the claims of economic power holders against weak parties in all domains. But in the domain of civil society, family, religion, health, education, culture, the same CLT arguments are liberal: for absolute individual rights both against other individuals and against the state, rights to abortion, minority rights, etc., in the same mode of induction and deduction that characterizes the economic conservative arguments.

The social has undergone a similar politicization combined with internal polarization, in the reverse sense. In the economy the arguments of the social for interdependence, solidarity, planning, regulation and institutional innovation beyond the public/private dichotomy are liberal arguments, and very much on the defensive. In the civil society domains, on the other hand, the social arguments are social conservatism, for protecting the fetus, organic family relationships, the native-born against immigrants, and in general the collective investments and accomplishments that depend on cultural or religious homogeneity and hierarchy.

The standard modes of legal argument of the two historical periods were once non-ideological in the sense that there was a right, a center and a left CLT, and a left, a center and a right Social. These two argumentative modes displaced more or less their predecessors' reliance on directly moral, religious or instrumental argument. When they politicized in this odd polarized way, so that each is liberal in one domain and conservative in the other, they produced a situation in which the surface of supposedly non-ideological argument suggests the very thing it firmly denies.

The liminal jurists, particularly those I described above as believers that their ideology is already immanent in the legal order, have played, I suspect, a very large role in this transformation. Conservative jurists have worked to formulate the propositions of neoliberal or libertarian or utilitarian opposition to economic regulation as legal arguments. Likewise liberals reformulated their law reform program in the legal and often quite technical language of human rights (David Kennedy 2004; Moyn 2010). Once this has happened, the jurist who is merely dealing with the cases in the legal argumentative terms given him by the discourse sounds so much like a politician that it is hard to believe that he believes in his own claim of legal necessity.

The situation might be less dire were it not for the progress, or devolution, of legal reasoning from induction/deduction to teleology to balancing in the movement from CLT to the Social to contemporary legal thought. This development parallels the sequence of juridification, judicialization and constitutionalization that we have been tracing. As large and small ideological stakes came more and more to be disposed by judges, the task of distinguishing legal from political argument became both more important and more difficult. At the same time, the legal techniques available became more vulnerable to internal critique.

The rise of proportionality after World War II was in part a self-conscious response to the critiques of induction/deduction and teleology. The internally critical destructive part of the hermeneutic of suspicion had undermined 'precritical' faith in legal reason to the point that a new 'last resort' seemed necessary. But balancing as a last resort is, as we saw in Part One above, particularly vulnerable to the charge of easy manipulability for covert ideological purposes.

One might have thought (and some of us did think) that the parallel developments at the institutional and technical argumentative levels would combine to produce a kind of overload. As law and jurists have become ever more salient in politics, their resources for preserving the law/politics boundary that is the basis of their claim to legitimate power have gradually depleted.[6] And I am indeed arguing that this double

[6] This notion is analogous to Weber's idea that capitalism in his time was eroding its own pre-capitalist normative foundations, and so coming to rely more and more on law (Weber 1921–22, pp. 336–337).

development explains (in large part) the intensification of the hermeneutic of suspicion. Yet paradoxically, albeit quite understandably, neo-formalist claims that baldly deny this sociologically 'obvious' fact seem as strong as ever, perhaps stronger.

Constitutionalization of the Judicialized Universe

In this section, I argue that it is important for the hermeneutic of suspicion that within the professional corps of jurists, there is a conflict of projects whose politics is professional, rather than ideological in the sense of the 'outside'. This is the internal conflict between those who favor and those who oppose what it is now common to call constitutionalization. This is an issue not just within national state orders but with respect to the international legal system and, according to a very interesting article of Gunther Teubner (Teubner 2004), the order of transnational non-state organizations of many different kinds. My claim is that the autonomous professional drive to constitutionalize coalesces with the commitment of the believing liminal jurists to the immanent identity of their ideological projects with the best interpretation of the ideals of the legal order. The result is another terrain for the hermeneutic of suspicion.

What is Constitutionalization?

Imagine that juridification and judicialization have proceeded to the point that social life (including government, economy and civil society) are densely regulated, and the regulatory regime is closely supervised in its practical application by judges, who review the work of administrators, checking their use of both fact and law. Second, imagine that judges constantly make decisions about how the regime should evolve through judicial interpretation of this regulatory mass in cases of ambiguity, conflict or gap.

Constitutionalization is any movement in the direction of an ideal typical end point, which has been well described by Matthias Kumm in his article 'Who is Afraid of the Total Constitution' (Kumm 2006), claiming to describe the contemporary German legal system:

> Under the guardianship of the Federal Constitutional Court the German Basic Law had, over the course of the second half of the twentieth century, developed to become what Schmitt might well have referred to as a total constitution. If a total state is a state in which everything is up for grabs politically, a total constitution inverts the relationship between law and politics in important respects. … The constitution serves as a guide and imposes substantive constraints on the resolution of any and every political question. The validity of any and every political decision is subject to potential challenge before a constitutional court that, under the guise of adjudicating constitutional rights provisions, will decide whether such an act is supported by good reasons. The legislative parliamentary state is transformed into a constitutional juristocracy. (Kumm 2006, p. 343)

Political decisions, in this analytic, include the definition of all the rules of private law. In other words, following Schmitt, Kumm assumes that private law,

once understood as the product of legal science working on universally shared ethical premises, is now just another terrain of ideologically motivated struggle.

A key function of constitutional rights is to provide the basis for claims against public authorities to intervene on behalf of rights claimants in response to threats from third parties. These third parties can be terrorists threatening to kill a hostage, nuclear power plant operators imposing dangers on neighboring residents, creditor banks enforcing a contract against a debtor, employers firing an employee, or landlords threatening to evict a tenant. The public authorities to whom these claims are addressed can be the legislator … the executive … or the judiciary (Kumm 2006, p. 344).

In the American context, we might be quick to add the constitutionalization of custody, from police interrogation methods, to jail and prison conditions, to involuntary commitment in mental hospitals and juvenile facilities, and more recently to the law of foster care. For the welfare bureaucracies, the procedural requirements for the termination of benefits, like the requirements for establishing eligibility, go the same route. Across the board, the prohibition of discrimination on multiple identity bases subjects the decisions of the managers of every substantial social institution to the potential of a lawsuit. In these lawsuits the constitution will be routinely invoked as decisive of the scope and content of protection for the plaintiff and autonomy for the defendant. The trend has been going on for so long and so strongly that it is now a matter of course.

For Kumm, constitutionalization has a major positive side because it subjects politics to a test of 'good reasons', by which I take him to mean a relaxed Dworkinian idea of principled decision that does not categorically exclude policy argument. A much darker view, in which the relations of force between law and politics are more balanced, with politics threatening to 'corrupt' law, or at least force it to 'adapt' to an alien rationality, is proposed by Teubner:

> In its relationship to politics, judicial constitutional review of legislation has presented the model that, so far, exists only rudimentarily in relation to other sub-systems. In what respect does the law have to adjust to the intrinsic rationality of the other sub-systems, and to what extent must influences that corrupt the law be warded off? The constitutional review of political legislation has developed extensive review techniques that neutralize party-political decisions, translate result-oriented 'policies' into universal legal principles, fit political decisions into legal doctrine in accordance with legal criteria of consistency, and, in the worst case, pronounce legislative acts to be unconstitutional. On the other hand, constitutional law has liberated the intrinsic logic of politics by 'politicising' the law itself: teleological interpretation, policy orientation, balancing of interests, impact assessment and result-orientation are indicators for an adaptation of law to the rationality of politics (Teubner 2004).

The Difference Between Judicializing and Constitutionalizing

What has been constitutionalizing in these contexts, and in others too numerous to mention, is the law that judicialization brought to the juridified social regime that succeeded CLT. Constitutionalization is a big change, although we are talking about

an elite project that is constantly opposed by other elites, and there is nothing either uniform or inevitable about it.

As a result of judicialization, the judges are present through a large range of different techniques, including statutory interpretation and insistence on strict compliance with procedural or evidentiary requirements. Constitutional law was at first one of this diverse set of tools, although in the US it was a bigger part of the story than anywhere else. Jurists thought of it as a list of specific or general requirements: procedural due process, the protection against self-incrimination, the requirement of minimal rational basis for government regulations that impinge on the economic autonomy of private actors, the prohibition of religious 'establishment', and so forth.

These requirements were sufficiently minimal so that they were invoked only episodically, and they were not understood by the early reformers of the social as themselves constituting a coherent regime that could be brought to bear systematically on any dispute about any rule. The self-conscious minimalism of their approach was part of the reaction against the 'believing' activist courts of the Progressive era, which had appeared to have a coherent general laissez-faire position that informed an interpretation of the federal constitution as an ideologically coherent document inconsistent with progressive reforms.

The refusal of induction/deduction for this reason is implicit in Stewart's pointing out ironically in *Griswold* that the prohibition of contraception is not the quartering of soldiers, nor yet seizure of one's papers without a warrant, (Griswold 1965, pp. 527–528) and explicit when Black accuses Douglas of reviving Lochner (*Griswold* 1965, pp. 520–523). The alternative more activist approach (typified by the *Griswold* majority) was to preserve at a very abstract level a constitutional prohibition against government action that violated a 'fundamental' substantive due process idea variously identified with natural justice, etc. This was supposedly a last resort and an extreme measure for extreme cases. The claim that a rigorous legal positivism had led German jurists to complicity in Nazism was in the background, as the activist judges' implicit answer to the charge of Lochnerism. (*Griswold* 1965)

Constitutionalization as a Non-ideological Issue Internal to Legal Thought

Constitutionalization is first of all the process that leads from this kind of merely judicialized universe in the direction of the end point described by Kumm. My sense is that it has two dimensions, which we might call vertical and horizontal, and describe in Kelsenian terminology.

Two Dimensions of Constitutionalization In the Kelsen version of the legal pyramid, each level exercises powers defined by the level above. The constitution defines the legislative power, and the law defines the sphere of the judges who define the spheres of private parties and of administrators who also define the spheres of private parties. Constitutionalization means a norm authorizing a constitutional court to decide with respect to each level of the pyramid whether the definition set by the next higher level was consistent with the constitution. So the

constitutional court, rather than a private law high court or administrative tribunal (council of state) will decide whether legislatively set rules about the circumstances in which landlords can evict fall within the discretion granted the legislature in the constitution, and whether a police chief's internal memorandum on arrest procedures authorized officers to violate suspects' rights.

The point here is juristocracy, and specifically rule by a constitutional court with all other courts as its mere delegates. Although Kumm is mainly focused on this aspect of the process, constitutionalization is, for Americans, of interest for a different reason than that administrative and legislative acts are in principle reviewable by a constitutional court. The process arouses passion, pro and con, when top judges exercise their constitutional authority to narrow the zones of decisional autonomy allocated to other legal actors.

That is the zone where their decisions are granted strong presumptions of validity, or a wide 'margin of appreciation'. We notice constitutionalization as a process when it involves not the expansion of subjection in principle to the constitution, but when over time the judicially imposed constitutional constraint reduces the scope of legislative or administrative or private party choice. Likewise we are interested in resistance to this process because it preserves whatever relations of power existed within the sphere of autonomy defined by the status quo.

An example: in the case of *Lindsey v. Normet* in 1972, the US Supreme Court decided that landlord/tenant law was normal economic regulatory law and therefore subject only to judicial constitutional review for minimum rationality, rather than to a more strict review based on the notion that the interests of tenants were 'fundamental', like those, say, of racial minorities to equal treatment. Landlord/tenant rules had been and continued to be subject to minimum rationality review. But the decision was nonetheless a victory for the anti-constitutionalizing forces, because stricter review would have meant more Supreme Court control of the then highly ideological issue of tenants' rights.

> Appellants argue, however, that a more stringent standard than mere rationality should be applied both to the challenged classification and its stated purpose. They contend that the 'need for decent shelter' and the 'right to retain peaceful possession of one's home' are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest. They invoke those cases holding that certain classifications based on unalterable traits such as race and lineage are inherently suspect and must be justified by some 'overriding statutory purpose'. They also rely on cases where classifications burdening or infringing constitutionally protected rights were required to be justified as 'necessary to promote a compelling governmental interest'.
>
> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the

> terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions (*Lindsey* 1972, p. 74).

Constitutional Activism and Passivism as 'Internal Politics' It is possible to understand the Court's refusal to intensify constitutional scrutiny of landlord/tenant law as an incident in the continued dispute within legal theory, understood as distinct from the ideological disputes of the larger society, between jurists favoring and those opposing constitutionalizing as a general phenomenon. The terms activism and passivism often though not always refer to positions in this dispute.

Those in favor have the view that on balance it would be desirable for the whole order of official force in any given nation and also in the whole world to develop in the direction of a principled and coherent, democratically legitimated articulation of governmental powers and private rights.

The idea is that both the order of powers and the order of rights are allocations of discretion to actors, within limits set by the order. It is not that every rule follows from the principles but that every rule must be consistent with them, fall within the 'margin of appreciation' allowed to the actor in question. The margin can be wide or narrow, according to the working out of the principles in the particular case.

In this view, the order can and should have a rational character making it peculiarly appropriate for judicial enforcement. Without judicial enforcement, the order is always in danger of disintegrating because of the interested parties' divergent interpretations. For this reason, a part of the whole has come to conform to this vision when and only when judges have achieved in fact the power to enforce their understanding of the unitary order of principle.

Passivists have the contrary view, that in many instances a movement toward principled unity under judicial supervision would be a bad thing, because necessarily suppressing differences that should be encouraged. It may be desirable in a particular case to reduce the level of internal coherence and unitary application of the existing order rather than increase it, for example by increasing the deference accorded to some particular governmental actor, or reducing judicial supervision, say, of an area of contract law or of the law of marriage.

In this view, legitimate profound differences, and also conflicts of economic interests, should often be handled by bargaining leading to negotiated agreement or voting or exit, rather than settled by the rational application of principles whose legitimacy supposedly transcends that of the various actors in conflict. In this view, judges are not the right people to settle the deepest kinds of conflicts of interest or of principle, i.e. ideological conflicts.

In the US context, the most striking example of explicit debate along these lines pitted the Southern constitutional theorists advocating states' rights, including rights to nullification and secession if necessary, against the unitary view of the Northern theorists. The Southerners, led by William Rawle (1825), argued that the Supreme Court lacked any legitimate basis for legally compelling the states. In response the federalist theorist Joseph Story asked rhetorically 'No final arbiter?' It seemed clear

to him on the basis of the logic of the document but also the logic of rational government that the court was indeed a final arbiter (Story 1858).

The same structure of argument surrounds the question of whether the federal executive is bound by Supreme Court declarations of unconstitutionality, or rather is entitled as a co-equal branch to reach its own conclusions. It is fascinating to see the same set of issues surface in the EU. Christian Joerges' proposal that the harmonization of European private law should be conceived as a conflict-of-laws problem is another example of sophisticated non-unity theorizing, explicitly critical of Teubner's societal constitutionalism (Joerges 2012).

The activist program in the context of public international law was set out in a sophisticated and explicit way by Hans Kelsen in his Holmes Lectures at Harvard Law School in 1942 (Kelsen 1942; Kennedy 1994). A unitary order has to be constructed by legal interpretation working within the existing order, which is fragmentary and gap filled and permits in theory and in practice a vast amount of action that is inconsistent with minimum ideas about democracy and rights. In other words, the basic tool for the jurist with this approach is the method of construction, whether pursued inductively/deductively, teleologically or through balancing. Kelsen seems a perfect example of a 'post-critical' believer in the restoration of meaning, in Ricoeur's sense.

The opponents of constitutionalization have typically based their objection in part on a skeptical view of judicial reason. Since the project depends on a supreme court as the final arbiter, its claim to transcend politics fails if interpretive technique is open to ideological manipulation. This was a key part of the Southern argument against Marshall's federalism, and then the sociological jurists' and realists' argument against Lochnerism. It was reborn in the fifties and sixties in Felix Frankfurter's and Learned Hand's professedly regretful liberal arguments against Warren Court activism (Hand 1958).

Constitutionalization as a Tool in Ideological Struggle

For ideological intelligentsias, the only question posed by activist constitutionalism as a general trend or in a particular legal domain is whether or not it favors their ideologically defined group interest. The imposition of new constraints on the legislature, executive or private sector is important not for the jurists' reasons of legal theory, but because the domain that is being narrowed is the locus of some balance of power between competing ideological tendencies. When the sphere is narrowed, there will be a new balance of power, favorable or not to each particular ideological tendency. When the sphere is widened, a different new balance emerges, depending on which ideological actors can take advantage of the new possibilities.

For example, *Lindsey v. Normet* was a major defeat for tenants' rights lawyers, and activists on behalf of the poor in general, because it signaled that the Supreme Court was not going to intervene on their behalf in the way it had intervened (up to quite recently) on behalf of minorities. Everyone understood that a high standard of review would have meant that state law rules that favored landlords would be under attack in a way not possible with a minimum rationality test. The mere decision to

increase the rigor of the test would have meant that many of those rules would not survive the change (otherwise why do it?).

In this case, constitutionalization was a strategy of the left liminal legal intelligentsia I described in the last section, and the case was a victory for the newly emerging but already better funded right-wing liminal legal intelligentsia. These liminal actors win victory or suffer defeat not through their directly political activity, but according to whether or not constitutional courts accept their ideological propositions when filtered through the supposedly non-ideological techniques of induction/deduction, teleology and balancing, applied to the text, case law and scholarship of the constitution.

As applied to this situation, the hermeneutic of suspicion suggests that the principled constructions by which constitutionalists expand judicial control over legislative, executive and private discretion are motivated by the conscious or unconscious intention to favor the ideologically conceived interests that will profit by the restriction of the particular discretion at issue.

Suppose a constitutional court is controlled by judges whose ideological sentiments seem to the suspicious observer to be significantly to the right of those prevalent in the legislature and the executive. The left legal intelligentsia will argue against constitutionalizing private law rules favoring property owners, and in defense of legislation changing those rules to grant public access to beaches. The hermeneutic of suspicion suggests that neither right-wing constitutional activism nor left-wing passivism here has anything to do with constitutionalization in the abstract.

I claimed above that liminal legal intellectuals divide roughly into the 'cause lawyers' restrained by the duty of interpretive fidelity, and the more ambitious camp of 'believers' for whom the constitution immanently expresses the salient points of their ideology. Civil libertarians, identity-based antidiscrimination advocates, neoliberals, advocates of the efficiency norm in adjudication, religious social conservatives, and very strikingly human rights lawyers seem to me to fall often (but by no means always) into the latter category. The process of constitutionalization is for them much more than a tactic, more even than a strategy. When they work to interpret the document in line with their ideological projects, they are not instrumentalizing it, but rather 'working it pure' or realizing it.

They use the method of construction, induction upward followed by deduction or sometimes teleology or balancing back down to the level of operative rules. At the end of Part One, I suggested that we might call them 'neo-formalist'. The 'formalism' part is a systematic tendency to abuse induction/deduction to make preferences into legal necessity. It is 'neo' because it is a revival of the methods of late-nineteenth century legal thought, aiming at making the law coherent by bringing out an immanent rationality corresponding to a particular vision of society. Because it is 'postcritical,' it is chastened: incremental, conscious of the dangers of backlash, wary of sounding Lochnerist.[7]

Neo-formalist projects that turn ideology into constitutional law while at the same time turning the constitution into ideology make the perfect object for the

[7] For the private law variant of this tendency, see Goldberg (2012).

hermeneutic of suspicion. It is not only the more skeptical cause lawyers and self-avowed ideological neutrals who wield it against them. The constitutionalizing projects totalize in contradictory ways, for example, neo-liberalism against human rights, and the believers deploy the hermeneutic against one another. They scavenge the critical resources left high on the beach with each flooding and ebbing of the critical tide, from sociological jurisprudence to legal realism to critical legal studies, for use in merciless attacks on their rivals.

Part Three: The Hermeneutic of Suspicion as Projective Identification

Definition: the hermeneutic of suspicion is a tendency or a disposition of participants in legal discourse, as lawyers, judges, professors or social scientists who write about the law. The disposition is to interrogate skeptically claims of legal necessity made to justify decision of a legal issue involving significant ideological stakes. The hermeneutic applies well established legal techniques for critiquing induction/deduction, teleology and balancing to the claim of legal necessity, attempting to show a mistake. If the critic feels he has succeeded, he goes on to allege a conscious or unconscious ideological motivation for the error. It served to give a false argument of legal necessity for an outcome that should have come out differently.

The critic may argue for the opposite outcome, which would have disposed the ideological stakes differently, on the ground that it was simply legally correct. Or on the more complex ground that the case was one for which an ideologically neutral legal solution was not possible, so that the correct outcome was to defer to the legislature or the executive, letting the ideological stakes lie where they fell at that earlier stage.

The wielder of the hermeneutic is accusing the jurist in question of a second error, beside coming up with a wrong answer: that of failing to 'to keep his political views strictly separate from his legal judgment'. The hermeneutic, if we understand it as a widespread propensity or tendency of legal arguers, represents a general sense that jurists are likely to fail to maintain this separation. Advocates for legal positions that dispose significant ideological stakes have to be aware of, and to guard against, the possibility that they will lose not on the legal merits, but because their opponents' ideological preference will influence legal judgment strongly enough to induce a legal error.

To understand the hermeneutic of suspicion as intense skepticism about the opponent along with righteousness about one's own freedom from ideological bias, a complex psychological state, it seems to me we need some account of its psychological basis, as a necessary supplement to explanation through the social structural conditions I have been describing. I think a good way to understand it is through the idea of suspicion as 'projective identification'. This is the process of projecting something in oneself, something one feels is bad or conflict-producing, onto others, and then vigorously condemning it in them. Condemnation of the other is a diverted form of self-condemnation.

The great grandfather of this type of analysis is Freud on jealousy that is neither rationally founded nor psychotic, but merely neurotic, in this passage published in 1922:

> The jealousy of the second layer, the *projected,* is derived in both men and women either from their own actual unfaithfulness in real life or from impulses towards it which have succumbed to repression. It is a matter of everyday experience that fidelity, especially that degree of it required in marriage, is only maintained in the face of continual temptation. Anyone who denies this in himself will nevertheless be impelled so strongly in the direction of infidelity that he will be glad enough to make use of an unconscious mechanism as an alleviation. This relief—more, absolution by his conscience—he achieves when he projects his own impulses to infidelity on to the partner to whom he owes faith. This weighty motive can then make use of the material at hand (perception material) by which the unconscious impulses of the partner are likewise betrayed, and the person can justify himself with the reflection that the other is probably not much better than he is himself. (Freud 1922).

This Part pursues the analogy between the hermeneutic of suspicion and Freud's model of sexual jealousy.

The Jurist Suffers from Role Conflict

I begin with the affirmative side of the hermeneutic; that is, with the critic's assertion that there was a correct legal answer, the critic's own, that his opponent failed to produce because of ideologically motivated error. My argument is that the situation of making and justifying legal judgments is problematic, involving conflicts that are built into the roleof the jurist. It is these conflicts that will motivate projective identification.

(1) The role requires the jurist to find and defend his answer as categorically 'right', in spite of the shakiness, in rational terms, of even the seemingly most well-grounded legal interpretation. (2) The role requires him to argue in good faith for the outcome he thinks legally indicated and at the same time to be a persuasive advocate, with multiple audiences. (3) The role requires the jurist to take positions on legal questions that have no self-evident legal answers, without offering an explanation of how he can do this without bringing in his forbidden ideological convictions (if he has any).

The Shakiness of Right (and Wrong) Answers

The Effect of Necessity The hermeneutic of suspicion operates on the basis of fairly transparent presuppositions about the relationship between law and politics. The idea is that legal reasoning on the basis of the relevant legal materials is sufficiently determinate so that for the high stakes, ideologically charged questions we care about, we can identify mistakes, wrong answers. At the same time, we can

ourselves do legal reasoning correctly to resolve high stakes questions without our own ideologies affecting the result.

I often think that an answer to a legal question is clearly wrong, and jurists often appear to me to be engaged in abuse of deduction or teleology or balancing. This means that I agree with the presupposition of the hermeneutic that legal reasoning is not so completely indeterminate that the only possible explanation of any and all legal outcomes is ideological, or at least extra-juristic. That jurists experience some answers as errors means that the range of interpretive possibilities is limited. I agree with the hermeneutic that errors are sometimes driven by ideology in the sense that the best explanation of the error is that it is motivated rather than random, and that the motive is conscious or unconscious ideological preference.

Moreover, legal reasoning can sometimes do more than limit the field by excluding errors. Sometimes it has the 'effect of necessity' (Kennedy 1986, 1997), meaning that a given actor (or jurists in general) experiences the argument for a particular answer to a question of legal interpretation to be so strong that there is no plausible argument against it. If the actor is a good faith interpreter, and he has run out of time or exhausted the resources available to him for legal research, he is morally bound to accept it or betray the duty of interpretive fidelity. My seventeen-year old granddaughter will be turned away from the polls if she tries to vote in next year's congressional election. I believe that any answer other than this one is an error as to what will happen in fact, and that the fact is explained (of course only in part) by the existence of only one presently plausible right answer to the question of the voting age in congressional elections.

Here begin the buts.

Legal Work and the 'Ontological Instability' (Shakiness) of the Effect of Necessity (Right Answers) The answer that we experience as having the effect of necessity, and therefore representing our duty of fidelity to law, may appear self-evident, or so obvious that it would not be worthwhile to devote time and resources to destabilizing it. These snap judgments represent the bare minimum of legal effort, but they still involve the application of complex knowledge to a new situation. At the other extreme, it may be obvious more or less immediately that a case with high stakes has no clear answer, so that it will be worthwhile for multiple actors to devote large resources over all the time available to stabilizing and destabilizing rival answers.

Wherever it falls on this spectrum, the effect of necessity is the product of work in the legal medium. It involves, albeit perhaps in the most cursory fashion, framing and reframing the argument, bringing to bear different immovable items in different combinations, *in the hope that* we will end up able to affirm the necessity of an answer. There is never a guarantee before the fact that we will be able to make an argument that will have the effect for us.

The effect is an experience of a situation in a particular moment of time. It may be an initial snap judgment, in which case the jurist can work to change it, either by making the effect fall on the side of another outcome, or by working the case into the 'case of first impression' category, in which methods of construction or

teleology or balancing can be brought to bear. The effect may appear for the jurist in midstream, where the effect is itself the at least temporary result of a prior course of work, and there is still time to try to revise that result in one direction or another. The case that is most important for role conflict is the effect when it occurs in 'the final analysis': when time has run out and the jurist has to take a position, and there is no chance to try to work one's way out of or beyond the effect.

Suppose that the jurist ends up with a solution that has the effect of necessity for him. When he puts it forward (as a majority opinion, a dissent or a law review article) he feels that he has been faithful to law. This assurance is tempered by the knowledge that the work outcome was conditioned by the constraints of time and resources with which he worked. If he had not run out of time, lacked research assistance, lacked knowledge of tax law, failed to get into Yale, chosen the wrong mentor at the firm, he might have reached the opposite conclusion about what was legally necessary.

In other words, every legal argument in the deductive or teleological or balancing mode is vulnerable to being undone by a critique that the arguer really and truly did not see coming, because the limits of 'the situation' made that possibility invisible to him. But per contra nothing guarantees that a given attempt to demolish an argument, no matter how determined and ingenious in mobilizing the various critiques of induction/deduction, teleology and balancing, will succeed. The argument for the outcome may appear to all concerned to be immovably solid, even though all legal arguments are 'ontologically' unstable in the way I have described.

As to whether the effect is always an illusion, because no actor is ever 'really' bound, or never an illusion because there is always a right answer even if this answer was not it, I would say neither never nor always. I tend to think that the question whether in any case the effect of necessity was 'true' or 'real' is a bad question, since the effect (which is what matters sociologically) is the product of interaction between legal work and the materials, and it is never possible to know whether with another work strategy, other resources, more skill and time, the arguer could have undone or even reversed the effect. (This is the claim that the 'the truth of law' is like the 'thing in itself', unknowable though not for that reason inexistent).

The Problem of the Audience

So far I have been presenting the jurist as searching for the right answer, meaning the argument that will have for him or her the effect of necessity. But the jurist is always, at least in the social world that concerns us here, arguing to a potentially persuadable audience and against real or hypothetical opponents. This circumstance means that he may experience a conflict between what he actually believes and what he ought to say in order to have maximum effect on the audience. The conflict has many possible forms, but in each case the jurist will undergo the well known phenomenon of cognitive dissonance, and may resolve it by the psychological mechanism of modifying what he believes to correspond to what he needs to believe in order to be effective.

Failure to Persuade Oneself that there is a Right Answer A problem of this type arises when the jurist gets to the end of the time available for legal work with a clear

sense of how he wishes the case would come out, but without having found an argument that has the effect of necessity for him. In this situation, an honest subjective report would be that he is not sure what the legal right answer is or whether in fact there is a legal right answer, although he has a strong opinion based on something other than legal necessity. The pressure against doing anything like that, and to represent oneself as convinced, is likely to be strong. It is familiar that one way to resolve this kind of conflict is to make it disappear by convincing oneself that one is convinced.

Adjusting the Argument to the Audience A second problem arises when I believe that I can counter opponents or persuade the persuadable using reasoning that I myself find unconvincing, or just not the best argument in favor of the position I am putting forward. I may be able to predict that if I put forward what I consider the best available case, the one that produces the effect of necessity for me, I will lose the argument and whatever is at stake therein.

It is always possible for the jurist to ignore his own estimate of how his argument will be received and suicidally present only the one he thinks legally best. If he were the lawyer for a client, this would arguably be a violation of his professional responsibility. If he is a single judge deciding a case, it seems likely that he is obliged professionally to give the reasoning he thinks best, regardless of its likely persuasiveness on appeal. In a multi-judge panel, the judge writing for a majority or a collective dissent is supposed to make the best argument acceptable to the collective, and this may not be the argument that any member would regard as the best.

The role of the professor is interestingly undefined. Some clearly regard their scholarly responsibility to tell the truth as the equivalent of the judge's of candor. Those of the liminal group who understand the legal order as always already instantiating their ideological project may fit this pattern. But those I called cause lawyers produce a well developed genre of scholarly writing in which law journal articles are understood to be a superior form of the brief on appeal.

I do not think it is common for any of these actors, except the cause lawyers, to reason as follows: 'the substantive outcome which I believe is just and also legally required, is important enough so that I should present not my own argument in its favor but an inferior one that I think will be more persuasive'. Instead, it seems likely that in innumerable cases the jurist manages an unconscious adjustment of his argument to the most plausible one, the one that will survive on appeal or get him tenure or onto the *New York Times* Op Ed page. This is the subtle and inherently precarious variant of bad faith in which the actor pretends not just to his audience but also to himself that he is sincerely representing himself.

Path Dependence in Legal Reasoning

So far, the existential delicacy of the jurist's 'situation' does not depend on ideology as a kind of shadow presence at the festivities. The notion of the hermeneutic of suspicion as projection of one's own ideological will to power onto one's opponent

seems to me to derive from yet a third delicacy, namely the dependence of the outcome achieved (whether or not it has the effect of necessity) on the jurist's choice of a work path.

Lawyers, professors and judges trying to produce answers to questions of interpretation have to start somewhere and then go somewhere, along a research path, finding cases, looking for statutory authorities, consulting digests, and scholarly writing. The work might be cursory, intended only to confirm a first impression that there is only one possible legally plausible interpretation. It might be very extensive based on a first and continuing impression that the prior law leaves open apparently plausible but widely divergent solutions. It is important that it might be extensive in the case where the first impression is of settled law, because the lawyer or professor or judge might have the project of reversing the impression and producing the effect of necessity for an interpretation that initially seemed implausible.

Because he has the option of devoting more or less work in more than one direction toward an interpretation that will dispose the stakes, the jurist cannot claim that it was the law that directed him. This is clearest when he takes some desired outcome as given and devotes his labor to establishing its legal necessity (or, in the case of attack, its legal wrongness), rather than deriving the desired outcome from legal reasoning that will not exist until he has produced it. If the work succeeds, then the interpretation is experienced as necessary; if it fails, the interpretation was an error.

The lawyer may have the interpretive outcome set by a client, or by his interpretation of what will best serve the client's interest. The cause lawyer acting without an institutional client will make his own interpretation according to his understanding of the ideological project in question. Judges and professors may (and may not) have the strong intention to interpret free of ideological interest. If so, they aspire to choose a work path to follow in attempting to build the effect of necessity without their personal ideological preferences influencing the choice (Kennedy 1997).

The thing they all have in common is that they have to make some choice of path. For example, if their first impression is that the law is clearly in a particular direction, they still have to decide whether to work to overturn that first impression. This decision will balance some estimate of the resource cost of the work against the probability of success in overturning the first impression and the expected benefit of doing so.

It is obvious in the case of the lawyer for a client, and to my mind just as obvious for professors and judges, that the choice of a work path will often (not necessarily and by no means always) determine where the work ends up, that is what interpretations when time runs out have the effect of necessity, or for that matter lack the effect of necessity.

Path Dependence and Projective Identification

The conventional view of the judge's role is that he is not to base his legal interpretation on his ideological preferences. If the choice of a work path influences

the place where the jurist ends up, and the jurist chooses a starting point and then pursues research strategies and adjusts them in the hope that the interpretation that he can ultimately endorse as fully legal will also be the one that pleases him ideologically, then he has arguably traduced his oath. This is true even though at the end of the day he defends his interpretation through impeccably formally neutral legal reasoning.

And yet the choice to work in the direction that the jurist hoped would reach the ideologically desired outcome is not in itself a legal error or a violation of the rule of law. The law cannot determine the proper direction of work, if we understand the law as that which is required by correct legal argument. By hypothesis, the correct legal argument is that which is experienced as necessary when the time for working on it has expired. The ontological instability point is exactly that it is not a 'fact of nature', nor yet a subjective will o' the wisp, but something phenomenally real but defeasible by a new argument that will be, precisely, more effective. But the choice does clearly violate the norm that banishes ideology from legal reasoning, and it is plausible that there are many jurists who take the norm very seriously.

Different jurists confront the problem of the choice of a work path in different ways. For purposes of understanding the hermeneutic of suspicion, there seems to be an important difference between the liminal jurists, whose project is to mediate between strong ideological convictions and fidelity to law, and the much more numerous corps of jurists whose primary loyalty is unequivocally to legal reason understood as ideologically neutral.

For the liminals, the problem is how to be ideologically neutral when they have understood from the beginning that law is of interest precisely because it constantly disposes large and small ideological stakes. For the second group, the problem is somewhat different. It is how to deal with situations in which they are conscious of having to allocate their time and labor, often when the law seems to have run out but not only then, without becoming ideologues in spite of themselves.

The Liminal Jurists, Realists and Deniers

The 'Realist' Cause Lawyer The cause lawyer who has become a judge or a professor is acutely aware of the ideological stakes in the legal issues within his area of interest. He is identified with a particular ideologically defined position that will often, although by no means always,[8] seem to indicate how, looked at politically, the legal issue should come out. When he was working as a lawyer, it was precisely his job to work on the legal materials to generate strictly legal arguments that would have the effect of necessity on the side of this ideologically preselected interpretation.

Now that he is a professor or a judge, he will still be conscious of ideological stakes and he will still have an ideological preference. He will understand that the

[8] It is important not to treat ideology as determinate in the way that law is not, so that the interpolation of ideology into legal analysis re-grounds it. My ideology has the same problems of gaps, conflicts and ambiguities, not to speak of flat contradictions that the legal order (as I experience it) has. See Kennedy (1997), pp. 50–54, 189–191.

choice of starting point is crucial. He will understand that persuasive performance for his audiences requires him to deny that ideology has any part in his decision.

It seems plausible to me that he will in some significant number of cases choose the starting point that is most likely to get him to the ideologically preferred outcome, and adjust his work path continuously to that end. He will defend the outcome in strictly legalist terms as the correct product of literalism, precedent, induction/deduction, teleology or balancing, just as he would have as a lawyer. It is very important to him, however, that when he has been unable to make a legally plausible argument for his ideologically preferred outcome, he has repeatedly voted, reluctantly but unhesitatingly, against his political convictions.

This type of cause lawyer is a self-conscious ideological actor who understands that what he is doing violates the most common understanding of legitimate juristic behavior. He may see himself as a criminal for the good, or more likely as doing just what jurists ought to do and always have done. He does not feel the need to deny the ontological instability of right answers, or his own occasional uncertainty about the legal right answer, or the influence of audience on the choice of argumentative strategy, and certainly not path dependence.

This hypothetical jurist will assume, on the basis of his own experience, that some number of other jurists likewise disabused of the conventional view are busily choosing starting points and work paths with their ideologically preferred ends in view, denying it for the sake of the audience, but also conscious of the shakiness of right answers and the occasional need to act without even the felt experience of necessity. He is not likely to have a disposition to interpret legal disagreement as caused by his opponent's ideologically motivated legal error, given that they are doing what he does with the same tools, and he does not feel that what he does is evil.

Cause Lawyers and Believers, in Denial The jurist who is of interest for the hermeneutic of suspicion is quite different. He may be a cause lawyer who refuses the 'realist' path or a believer. He pursues an ideologically predetermined work path unconsciously. Or he has a strong desire to act ideologically, but manages to resist by repressing the desire. Or he pursues, in the case of the believer, a path that looks ideological but which he claims to himself is legal, because the constitution or the common law are committed to it independently of his interpretive choices.

His unconsciousness is not at all a matter of ignorance of the potential role of politics in juristic judgment. Quite the contrary. It is because he is aware that it is possible to inflect the conclusion of the reasoning process by the choice of a work path, and that this practice violates the formal definition of the role (and outrages some of his audience), that he denies his own practice (or just his own desire, if he resists).

And into the bargain, he denies the shakiness of his right answers, his own uncertainty (when he feels it), his susceptibility to audience pressure, and the significance of path dependence. He defends his conclusions as correct deployments of literalism, precedent, induction/deduction, teleology and/or balancing. Ideology's got nothing to do with it.

Following the analogy to Freud on jealousy, these actors project their ideological practice or just their desire to sin in this way onto their ideological opponents. In Freud's complex model of neurotic jealousy, the jealous partner uses his repressed knowledge of his own temptation to unfaithfulness as a basis for interpreting his partner. Because everyone has these desires, an alert jealous partner can find the signs of them using his own experience as guide. In other words, he recognizes himself in the other on the basis of desires of his own that he is no longer aware of. But the projection of his own repressed desires onto the other causes him to over-interpret the signs as evidence of actual guilt.

In this interpretation, we understand the hermeneutic of suspicion in the mind of a single jurist as projective identification. He is most likely a liminal jurist, with a past career as a mediator between the language of ideology in the political system and the legal language of the legal subsystem. Among liminal jurists, it seems plausible that the straightforward cause lawyer is less susceptible than the believer, for whom the common law or the constitution always already embodies, say, efficiency or human rights norms.

His strong conscious commitment to the legal rightness of his own solution coheres nicely with an equally strong insistence on the legal wrongness of the opponent. In each case, ontological instability is denied: in the actor's case felt necessity is real necessity, and in the other's case, claimed necessity is mere error.

Suspicion as Contagion

The hermeneutic, to my mind, is a general phenomenon, practiced by far more lawyers and observers of law than fall into the liminal category. In this section, I suggest that there is another category likely to seek the 'alleviation' of projection. These are jurists who combine a strong commitment to judgment without ideology with a sense that they have a duty to do at least some work to make legal outcomes correspond with their personal ideas of justice or fairness. I will call them neutrals.

They set out to perform their duty with a strong sense of the dangers of ideological corruption. The processes of juridification, judicialization and constitutionalization mean that they are individually and as a professional corps engaged every day in disposing the large or small political, social or economic stakes of every significant ideological controversy. They themselves are obviously capable of waging the hermeneutic of suspicion against their fellow jurists.

Liminals, cause lawyers and believers, are prominent in the juristic universe, and it seems only rational to be suspicious of them. The neutrals like everyone else in the juristic community assume that overall jurists' conclusions are to a considerable, not total, extent predictable from knowledge at even the gross level of their ideological affiliations. Neutrals in occasional conversation sometimes seem to feel that most jurists fall into sin, and sometimes that it is an aberration, but they are 'postcritical' and certainly not in denial of the temptations they face.

As they set out to perform neutrality, they live with ontological instability, audience demands and path dependence. The critically driven evolution or devolution of the 'last resort' mode of legal reasoning, from induction/deduction to teleology to balancing, means that they cannot trust the neutrality even of their

own formally impeccable performances. Projective identification for neutrals means projecting not their ideological intentions but their doubts about their own neutrality onto others who all too often, just as in Freud's analysis, show every sign of sinful intent.

The reasons for self-doubt, conscious or unconscious, go beyond the problem of ideology seeping in through these cracks in the legal façade. To my mind by far the most important reason is that the role conflict in the face of path dependence that I sketched for the liminal jurists is just as acute for the neutral.

As they understand it, the role definition of the jurist has two elements: the notion of the rule of law and the notion of justice understood as transcendent in relation to the rule. When the rule of law and substantial justice conflict, they understand and fully accept that they are supposed to choose the rule of law. A fortiori when the rule of law conflicts with their personal ideological preference, they will choose (at least think they are choosing) the rule of law. But whether or not they conflict is partly a function of legal work on the materials, designed to bring out or to suppress ambiguities, conflicts and gaps.

Again, the rule of law cannot tell the jurist in what direction to do this work. It is here that the anti-formal or substantive element in the role definition kicks in. The jurist understands that he is at least permitted and perhaps enjoined to do at least some minimal work on any apparently legally compelled outcome that he regards as unjust.

The problem is that the jurist is very likely to find that he cannot define the justice that is supposed to orient his work, when resolving (or producing) indeterminacies, in terms that will be other than ideological (Kennedy 1997). All universalizing justice projects exist in the world of politics, in which today there is no starting point that is not contested precisely as mere ideology. This is the general hermeneutic of suspicion that Ricoeur traces to Marx, Nietzsche and Freud, and that is the larger context for the particular version in legal consciousness. It means that for the neutral projective identification is an 'alleviation' of inner doubt about the purity of one's own intentions, rather than a way of dealing with strong ideological commitments.

The apparent blurring of the distinction between personal moral judgment, or personal views of substantive justice, or fairness, and ideological judgment means nonetheless that the jurist who is committed to neutrality is in a situation of role conflict of the same type (though possibly less acute) as that facing the liminal jurist. He is enjoined to be faithful to justice as well as to technique, and at the same time to banish his personal ideological preferences from his decision process. But technique requires guidance from justice, when there are, as there are always, alternative work paths he might engage in pursuit of the effect of necessity. Because he senses that his (and everyone else's) view of justice is not distinct from his ideological preferences, it is always possible that his choice of a path, and the result that he found along with it, was ideologically conditioned.

The posture of the projecting jurist seems to me to fall into the category of Sartrean bad faith. This might be called the theory of the 'juriste garcon de café' (jurist as café waiter), by analogy to Sartre's idea that the French café waiter of his time was engaged in a theatrical presentation of himself as a mechanical function of his duties. The Sartrean waiter denies his freedom even to himself, his waiterly

discretion, when he *chooses* to ignore you or splash coffee when banging the cup down on your table. The legalist jurist is doing the same thing, in this way of looking at it, when he denies the role of his ideological predilections in generating the outcome he will justify in the language of legal necessity.

The analogy seemed pleasingly 'far out' when I proposed it in 1997 (Kennedy 1997, pp. 199–212), but since then Posner has little by little adopted most of the tenets of critical legal studies concerning judicial behavior, even going so far as to embrace the 'juriste garcon de café.' Here he is in 2008 critiquing Scalia's argument that it is wrong to derive specific rights (e.g. abortion rights) from constitutional general clauses:

> But the choice of that interpretive rule is not something that can be derived by reasoning from agreed-upon premises. The originalist's pretense that it can be makes originalism an example of bad faith in Sartre's sense—bad faith as the denial of freedom to choose, and so shirking of personal responsibility. Similar examples abound at the liberal end of the ideological spectrum (Posner 2008, p. 104).

It is striking, but not hard to understand, that as Posner has appropriated more and more crit ideas (Posner 1997, 1998, 2008, pp. 40, 174–203), he has waxed increasingly dismissive and sometimes snide in regard to their authors (Posner 1997, 1998, p. 1667, 2008, pp. 213–214).

Are Universalizing Justice Projects Inevitably Ideological? The jurist's denied doubts about the purity in the sense of ideological neutrality of his legal work might be based on a misunderstanding. The claim that all universalizing justice projects are today subject to their own hermeneutic of suspicion, to the accusation that they are ideology disguised as philosophy, religion or political theory, is obviously controversial. If it is just wrong, then it is much less plausible that many judges project their denied ideological impulses onto their adversaries while asserting themselves as staunch legalists.

On the one hand, the consensus of American post-realist legal theory is that there are many questions, and the number is a function of legal work, with large ideological stakes, that cannot be resolved without the jurist bringing his personal beliefs into the equation to direct the work. On the other hand, mainstream legal theory could almost be defined by its quest for a version of personal beliefs that will permit anti-formalism without acceding to the idea that our separation of powers in its constitutionalized condition is the juristocracy described so contentedly by Mathias Kumm.

Dworkin's effort to make this distinction was initially the most explicit (Dworkin 1977, 1982, 1986). It strongly affirmed that legal judgment is political, and equally strongly that it was distinct from ideological or partisan political judgment. The strong distinction between moral/political/legal theory on the one hand, and the ideological or partisan-political on the other, permitted Dworkin to elaborate his version of morally true non-ideological normative legal theory. The content turned out to appeal to categories like dignity, equal concern and respect, equality and responsibility, as the basis for generating highly specific and elaborate prescriptions

for a legally correct regime governing every disputed ideological issue of the day. Dworkin himself seems to have realized that the ideology versus philosophy distinction had broken down, and he seems to me to have become in effect a theorist of American liberalism rather than someone who asserted a possible legal theory outside partisan politics.

I think this has been the fate of each of the multiplicity of 'reconstruction projects' of our time, but I am quite aware that there is no way to prove the negative, and the theory that will convince us may be slouching toward Bethlehem as we speak (Kennedy 1997).

My conclusion is that the 'neutrals' are no less in need of the 'alleviation' of projective identification than their liminal colleagues.

CODA

Speculating on the Social Consequences of Projective Identification

Of course, mechanisms like projective identification can have complex social as well as individual consequences. In a commemorative article for Ronald Dworkin, who was his friend and collaborator, Thomas Nagel produced an interesting interpretation of how the 'public' understands the role of judges.

> In fact, judges have to make value judgments all the time, not only in major constitutional case, but in cases of negligence, employment discrimination, defamation, copyright infringement, and so on. Moreover, the public, insofar as it takes an interest in legal developments, expects the justices of the Supreme Court to make their decisions on moral grounds. They know which justices are liberal and which are conservative, they can often predict how the vote will go on a controversial issue, and even if they disagree with the outcome most of them do not think there is anything wrong with the process, provided that the justices are really deciding on the basis of principles they believe to be correct (Nagel 2013, p. 7).

The public, according Nagel's reconstruction of Dworkin's position, believes not just in the inevitability of judicial value judgments organized along a liberal/conservative axis, but at the same time that the right answers to ideologically charged questions are 'in' the Constitution:

> The public and the Supreme Court were clearly divided not only over whether the federal government should recognize same-sex marriage, but over whether the Defense of Marriage Act was already unconstitutional. Neither side thinks that the Court made it unconstitutional: some believe that the Court got it right, and others believe that the dissenting minority was right, but both sides believe that the right answer didn't depend on the Court's decision (2013, p. 7).

I think it true that 'the public, insofar as it takes an interest in legal developments' understands that the justices are predictably liberal and conservative, with contradictory constitutional theories, and all the while believes that there are right

answers in the text, independent of what the liberals and conservatives say about it. But the idea that the judge can legitimately exercise moral judgment in deciding which of the possible answers 'in' the constitution is right goes hand in hand with the hermeneutic of suspicion.

In other words, while the mainstream accepts that value judgments are inescapable, it also views ideologically driven legal error as transgression and sees it everywhere. For the mainstream it is altogether fitting for Dworkin and Posner, analyzing *Bush v. Gore* in the *New York Review of Books*, to play the odd couple, brutally subjecting each other to the hermeneutic from symmetrical positions of outraged neutrality.

And what are we to make of Nagel's sudden interpolation of a doubt, very much in line with the analysis of role conflict and ontological instability I suggested above:

> Of course this could be collective illusion, perhaps one that serves to inflate the law's authority and majesty, by attributing to it both a moral aura and an unearned objectivity when it goes beyond its basis in clearly established social fact. (Nagel 2013, p. 7)

This seems like a valuable idea. The hermeneutic of suspicion mediates through projective identification the apparent contradiction between a law that is 'in' the constitution and the possible presence of ideological motives in every act of interpretation. Making ideological motives aberrational, even if inevitable, makes juristocracy more tolerable than it would be if 'the public' had to acknowledge the full extent of ideological presence in good faith, not mistaken, legal work by liminals and neutrals alike. We might add as a final speculation that "the public" loves juristocracy for two reasons.

By placing all this power in the Supreme Court, understood to operate between conservatism and liberalism, liberals and conservatives gamble on preserving their constitutional triumphs of the past against the threat that mobilized right- or left-wing popular majorities would pose if they had unrestricted legislative power. The rightist public might repeal the accomplishments of identity politics and the leftist public might redistribute wealth.

Second, majesty, authority, aura and objectivity empower the legal intelligentsia that is alone capable of operating the technical discourse on which these traits apparently depend. It is not surprising that those with an interest in the juristic 'don't think there is anything wrong with the process', with its right and wrong answers confined within well understood limited liberal/conservative divisions, enlivened by the eternal circus of denunciation provided by the hermeneutic.

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