

Searching for
Contemporary Legal Thought

Edited by

JUSTIN DESAUTELS-STEIN

University of Colorado School of Law

CHRISTOPHER TOMLINS

University of California Berkeley School of Law



CAMBRIDGE
UNIVERSITY PRESS

2017

A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary American Legal Thought

Duncan Kennedy

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 as “jurists,” meaning that they say what they believe the law requires. 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 to well-established legal techniques for critiquing literalism, precedent, induction/deduction, teleology, and balancing (the modes of contemporary legal reasoning) to a particular 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 a legally incorrect outcome that the jurist desired for extra-juridical reasons (Kennedy 2014: 92–104).

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 rest 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 should therefore be aware of, and 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 (Kennedy 2014: 104–6).

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: 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 is also postcritical, chastened by the vicissitudes of faith from *Lochner* to the Warren Court.

The hermeneutic of the restoration of legal meaning tacitly animates the methods of literalism, precedent, 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.

This chapter offers a social psychological account of the contemporary prevalence of the hermeneutic of suspicion, but keeping it always in tense relationship with its opposite. I sympathize with 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. After placing it in its complex sociological context, I try here to account phenomenologically for the legalism or neo-formalism of the contemporary version of the hermeneutic.

The hermeneutic is a contemporary phenomenon. Although it has its origin in the critique of *Lochnerism*, in that phase it was the accusation of a serious deviation from normal practice, rather than an expectation about everyday practice across the whole domain of law. At a very abstract level, its contemporary rise makes sense if we see it as an aspect of a Weberian "disenchantment narrative" that begins with religion, moves on to natural rights, and eventually reaches law, the last bastion (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, disenchantment *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 Felix Cohen (1935) and Thurman Arnold (1937), 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 its extreme skeptical conclusion. The rejection 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 that the intensity of the hermeneutic is intelligible as a response to the changing relations between, on the one hand, ideological intelligentsias (Kennedy 1997) 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.

The first is 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 (Kennedy 2006). Second, the judicialization of that juridified regime, as part of the reaction against the social after World War II. 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 subplot 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. In the longer article from which this chapter is derived, I develop this approach in detail (Kennedy 2014: 108–24).

At the same time, to understand the hermeneutic 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 of contemporary law.

I think a good way to understand it is through the idea of suspicion as "projection." The actor denies something in himself, something that is bad or conflict-inducing, relocates it in another, and then vigorously condemns it. 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 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 1963: 160)

Here I'll pursue the analogy between the hermeneutic of suspicion and Freud's model of sexual jealousy.

1 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 process of formulating and justifying legal conclusions of this kind is problematic, involving conflicts that are built into the role of the jurist. It is these conflicts that motivate the projection of bad motives onto the opponent.

(1) His role requires the jurist, whether judge, professor or advocate, to state and defend his legal position 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 whose answers are highly path-dependent, without offering an explanation of how he can choose a path without bringing in his forbidden ideological convictions (if he has any) (Kennedy 1986, 1997, 2007).

(1) *The Shakiness of Right (and Wrong) Answers*

(a) *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 the abuse of literal meaning, precedent, deduction, 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," 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 (which he might do covertly, or by openly refusing to perform as his role requires).

My sixteen-year-old granddaughter will be turned away from the polls if she tries to vote in this year's congressional election. I believe that any answer other than this one is an error as to what will happen in fact. This prediction is based

on plausible but defeasible factual assumptions – after all, my granddaughter might have a fake ID that she might be able to use to register to vote, if she so desired, and if her parents didn't find out or didn't care. It is also based on the quite different judgment that there is only one presently plausible legal right answer to the question of the voting age in congressional elections.¹

Here begin the buts.

(b) 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. The snap judgment that it's not worth going down that road represents a bare minimum of legal effort, but still involves the application of complex knowledge to a particular 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 factual and legal possibilities in different combinations, *in the hope that* we will end up able to affirm the necessity of an answer. There is never a guarantee that we will be able to make an argument for our position 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, against the odds, if the stakes are great enough to justify the effort, perhaps hoping to show that what looked settled was “really” a “case of first impression.” Or the effect may appear for the jurist in midstream, as the at least temporary result of a prior course of work, but with time remaining in which 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 it.

¹ It is notoriously difficult to resist the challenge of the asserted “right answer.” If my granddaughter registers and then votes with a fake ID, and she is later charged with voter fraud, her vote will have been counted, i.e., not subtracted from her choice's total. She will arguably have voted in spite of the one right answer to the question of legal voting age in congressional elections. But . . . and so on.

Suppose that the jurist ends up with a solution that has the effect of necessity for him. When he puts it forward (in a brief, as a majority opinion, as a dissent, or in 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 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 literalism, precedent, 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 it is always an illusion, because the actor was not "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 bound nor always bound. 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.

(2) *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.

(a) 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.

(b) 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 case for 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 duty of candor. But professors who operate at the boundary between legal and political discourses produce a well-developed genre of scholarly writing in which law journal articles are understood to be, and perfectly legitimately, a superior form of the brief on appeal.

I think it is uncommon, though it certainly happens, for any of these actors 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.

(3) *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, scholarly writing, and nonlegal contextualizing "studies" of all kinds. 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 choosing the direction of work on the basis of what had appeared at first to be decisive legal reasoning. If the work succeeds, then his interpretation, based on his new, outcome-supporting legal reasoning, 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 idea 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. The dependence of the outcome and the reasoning used to justify it on the choice of a work path seems unexceptionable for the lawyer but raises obvious problems for the judge and professor (and for conventional conceptions of the rule of law).

2 PATH DEPENDENCE AND PROJECTION

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 jurist's duty of submission to the 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. Nonetheless, when the choice of path is ideologically motivated, it clearly violates the norm that banishes ideology from legal reasoning, and it is plausible that there are many jurists who take the norm very seriously.

As I suggested above, it is a role constraint on legal discourse that the speaker must affirm the unequivocal truth of his legal position, and this obviously precludes defending it in a way that references any kind of influence of ideology, including that kind of influence on the choice of a work path. The

hermeneutic of suspicion, when it alleges something more than argument in bad faith, is based precisely on the accuser's understanding that choice of work path is simply unavoidable, although always denied, and so a prime plausible location for covert ideological influence.

Different jurists confront the problem of the choice of a work path in different ways. For purposes of understanding the hermeneutic of suspicion, I propose a rough division between jurists whose primary loyalty is unequivocally and in good faith to legal reason understood as ideologically neutral ("neutrals"), and the much smaller category of "liminal" jurists, or cause lawyers, who operate professionally at the boundary between legal and openly ideological or political discourses and practices. The liminal jurists emerged in tandem with the processes of juridification and judicialization I briefly described in the Introduction (Kennedy 2014).

The long-term upshot of the two processes of juridification and judicialization has been that every area of social life is to one degree or another a locus of ideologically framed legal conflict (Kagan 2001). Ideological intelligentsias play a major role in the litigation through which the judges monitor and sometimes actively control the administration of the various juridified regimes. 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 progressive public interest lawyers, sometimes the defenders of the liberal social project and sometimes rights-oriented critics of it.

When they go to work for a union-side law firm doing strategic litigation or for the ACLU or the NAACP Legal Defense Fund, the Environmental Defense Fund, gay rights or indigenous peoples' public interest law firm or a for-profit plaintiff's side employment discrimination or products liability practice, 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 preexisting ideological commitments remain as a source of influence on their judicial or professorial choices.

Among the liminal jurists, I propose a strong distinction between "realist cause lawyers" and "believer cause lawyers." Realist cause lawyers are those who will confess, under the right circumstances, 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 direction indicated by their extralegally grounded agenda, 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 based on the distinction between "making" and "interpreting" law.

By contrast, the "believer cause lawyers" act on the presupposition that the law itself immanently commands its own transformation to correspond to their particular ideological/professional projects. The universalizing claims of the project, say environmentalism, 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. The conviction that "the law," and particularly constitutional law, is (whatever may first appear) *intrinsically* "on their side" seems to me to be shared not by all, but by significant numbers of jurists whose intellectual/political commitment is to neoliberalism (whether Kantian or efficiency-based), religiously based social conservatism, civil liberties, feminism, identity-based anti-discrimination, or human rights.

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 the "believer" believes are valid. Interpretation in the sense of this immanent logic can be by induction/deduction or through the location of governing teleological principles, or by striking appropriate balances. These jurists are the bearers of Ricoeur's "hermeneutic of the restoration of meaning" mentioned at the end of the Introduction above.

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 they are drivers of legal change, and legal change, today rightward as much as or more than leftward, is a highly salient aspect of contemporary political consciousness. For this reason, they are very visible, and that visibility

is an obvious cause of the rise of the hermeneutic of suspicion among jurists generally. Realists and believers are nonetheless quite different in their own attitudes toward ideology in adjudication.

(a) *The "Realist" Cause Lawyer*

The realist 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,² 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 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 or his academic work.

What makes him a realist is 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. If he is a judge, however, it is very important to him 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.

The realist jurist 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.

² 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: 50-4, 189-91.

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. While he may well interpret a particular legal disagreement as caused by his opponent's ideologically motivated legal error, he is unlikely to see this as the root of all legal evil, given that they are doing what he does with the same tools, and he does not feel that what he does is evil. The hermeneutic of suspicion is directed against the realist, but he/she lacks the sense of inner conflict or ambivalence that makes the believer prone to that kind of projection.

(b) *Believer Cause Lawyers: Denial and Projection*

The jurist who is of interest for the hermeneutic of suspicion is quite different. He may be working in the same office as a realist cause lawyer and agree on every decision about a legal position or with every argument in a coauthored law review article. He pursues a work path that looks ideological to the general public and to his colleagues but which he claims to himself is legal, because the constitution or the common law are committed to it independently of his interpretive choices.

To the detached observer (me) this seems like denial. The believer is highly conscious of the potential role of politics in juristic judgment. 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 intentions 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 overinterpret the signs as evidence of actual guilt.

At the same time, 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.

(c) *Mixed Cases*

My intuition is that the liminal jurists, with their history of cause lawyering in practice followed by transition to judging and professing, are almost never purely realist or purely believing. One trend or the other will dominate, and maybe only for one stage of life, to be replaced by the other, or by an incoherent mixture.

3 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.

(a) *Working for Justice but Ideologically Neutral*

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 ideologically significant controversy. They themselves are obviously capable of waging the hermeneutic of suspicion against their fellow jurists.

The liminals, realists 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 "post-critical" 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. Projection 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. In this case, projection is an "alleviation" of inner doubt about the purity of one's own intentions, rather than a way of dealing with one's 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 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 garçon 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 to 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 first proposed it (1997: 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 garçon 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: 104)

It is striking, but not hard to understand, that as Posner has appropriated more and more crit ideas (Posner 1997, 1998, 2008), he has waxed increasingly dismissive and sometimes snide in regard to their authors (Posner 1997: 34; Posner 1998: 1667; Posner 2008: 213–4).

(b) *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 are denying it and projecting their own ideological impulses onto their adversaries while asserting themselves as staunch legalists.

On the one hand, the consensus of American postrealist 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 simply juristocracy (Kumm 2006).

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 nonideological 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 projection than their liminal colleagues.

CODA

Speculating on the Social Consequences of Projection

Of course, mechanisms like projection 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 cases, 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: 7)

The public, according to 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 did not depend on the Court’s decision. (Nagel 2013: 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: 7)

This seems like a valuable idea. The hermeneutic of suspicion mediates through projection 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 judges were mere politicians. As a final speculation, we might wonder whether it does this in two ways.

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 (Kennedy 1997).

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.

WORKS CITED — CHAPTER 19

- Arnold, Thurman 1937. *The Folklore of Capitalism*. New Haven, CT: Yale University Press.
- Cohen, Felix 1935. "Transcendental nonsense and the functional approach," *Columbia Law Review* 35: 809–49.
- Dworkin, Ronald 1977. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.
- Dworkin, Ronald 1982. "Law as interpretation," *Critical Inquiry* 9: 179–200.
- Dworkin, Ronald 1986. *Law's Empire*. Cambridge, MA: Harvard University Press.
- Freud, Sigmund 1963. "Certain neurotic mechanisms in jealousy, paranoia and homosexuality," in Sigmund Freud, *Sexuality and the Psychology of Love*. Philip Rieff (ed.). New York: Macmillan.
- Kagan, Robert 2001. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press.

- Kennedy, Duncan M. 1986. "Freedom and constraint in adjudication: a critical phenomenology," *Journal of Legal Education* 36: 518–62.
- Kennedy, Duncan M. 1997. *A Critique of Adjudication*. Cambridge, MA: Harvard University Press.
- Kennedy, Duncan M. 2004. "The disenchantment of logically formal legal rationality, or Max Weber's sociology in the genealogy of the contemporary mode of western legal thought," *Hastings Law Journal* 55: 1031–76.
- Kennedy, Duncan M. 2006. "Three globalizations of law and legal thought: 1850–2000," in Trubek and Santos (eds.), pp. 19–73.
- Kennedy, Duncan M. 2007. "A left phenomenological alternative to the Hart/Kelsen theory of legal interpretation," in Duncan Kennedy, *Essays on Adjudication*. Boulder, CO: Davies, available at <http://www.duncankennedy.net/documents/Photo%20articles/A%20Left%20Phenomenological%20Alternative%20to%20the%20HartKelsen%20Theory%20of%20Legal%20Interpretation.pdf>
- Kennedy, Duncan M. 2014. "The hermeneutic of suspicion in contemporary American legal thought," *Law and Critique* 25: 91–139.
- Kumm, Mathias 2006. "Who is afraid of the total constitution? Constitutional rights as principles and constitutionalization of private law," *German Law Journal* 7: 341–69.
- Nagel, Thomas. 2013. "Ronald Dworkin: the moral quest," *New York Review of Books* 60(18), available at www.nybooks.com/articles/archives/2013/nov/21/ronald-dworkin-moral-quest/?pagination=false. Accessed March 6, 2014.
- Peller, Gary 1985. "The metaphysics of American law," *California Law Review* 73: 1151–290.
- Posner, Richard 1972. "A theory of negligence," *The Journal of Legal Studies* 1: 1–29.
- Posner, Richard 1997. "Bad faith: review of Duncan Kennedy, *A Critique of Adjudication (Fin De Siecle)*," *New Republic* (June 9), pp. 34–7.
- Posner, Richard 1998. "The problematics of moral and legal theory," *Harvard Law Review* 111: 1637–717.
- Posner, Richard 2008. *How Judges Think*. Cambridge, MA: Harvard University Press.
- Ricoeur, Paul 1970. *Freud and Philosophy: An Essay on Interpretation*. Denis Savage (transl.) New Haven, CT: Yale University Press.
- Teles, Steven M. 2007. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton University Press.
- Trubek, David M. and Alvaro Santos (eds.) 2006. *The New Law and Economic Development: A Critical Appraisal*. Cambridge University Press.