Dear Victoria Colloquium on Political, Social and Legal Theory participants:

You have here the draft of an article-becoming-a-book. As you will see, the fifth and final chapter remains incomplete. Although I imagine the first four chapters and a bit will give us plenty to chew on, I will also be very happy to discuss this final part during our session, which I am very much looking forward to.

Best,
Talha

# Legal Realism and CLS from an LPE Perspective

*Talha Syed*[*]

*What is the role of law in political economy? And what is the role of political economy in law? And in both cases when we speak of "law" and "political economy," are we speaking of academic disciplines or social realities? This tangle of questions constitutes the orienting research agenda of the emerging "law and political economy" movement in legal academia. Questions concerning not so much the interaction as the* interrelation *of law and political economy, with each of these understood simultaneously as fields of study and arenas of social life. And within that agenda the legacy of two prior efforts at grappling with these questions—Legal Realism and Critical Legal Studies (CLS)—looms large. This Article seeks to take stock of that legacy, and to advance a critique of central aspects of the received traditions of Realism and CLS, for the sake of developing new foundations for the analysis of both law and political economy.*

*The best way to understand Legal Realism and CLS, this Article contends, is along two dimensions: (1) the first concerns the critique of legal reasoning; (2) the second the role of law in society. After setting out the central Realist and CLS claims on both fronts, I offer critiques on each, that seek to push further in the same direction as the Realist/Crit views but in ways that ultimately repudiate the premises underlying these views. The main lines of Realism and CLS are, I contend, hostage to formalist premises in legal theory and liberal ones in social theory. This owes to the posture of internal critique that both adopted as their dominant strategy. Yet a central claim of the present Article is that the method of critique is always already a method of construction, both in the critique of law and the critique of political economy. To think the two may be separated is perhaps the fundamental flaw in the dominant strands of Legal Realism and CLS.*

*In that vein, the Article then offers a set of contrasting ideas for the development of legal, political, and social theory. In political economy, our critical and constructive aims should be less to point the hidden hand of the state in the market than to denaturalize the market itself, by showing it be a realm of irreducibly social relations. In law, our critical and constructive aims should be less to show the indeterminacy of law than to dereify it, by showing it to be a human artifact answering to human interests. Finally, in political theory, our critical and constructive aims should be less to show the internal contradictions of liberalism than its ideological blind spots and limitations, as revealed from the vantage point of an alternative political morality, that of democratic equality.*

[*] UC Berkeley Law. I am grateful to Yochai Benkler, Oren Bracha, and Roni Mann for extremely helpful discussions. This Article has a specific organizational origin, being written out of participation in two sets of Law and Political Economy (LPE) workshops: one on legal pedagogy and the other on CLS and LPE. It would not exist but for the foresight and initiative of those responsible for the workshops including, principally, Amy Kapczynski and Corinne Blalock. Earlier versions of this Article were presented at the LPE Workshop at Harvard Law School and the Legal Theory Workshop at Yale Law School and I thank the participants for their comments, in particular Bruce Ackerman, Jack Balkin, Corinne Blalock, Bob Gordon, Amy Kapczynski, Duncan Kennedy, Tony Kronman, Daniel Markovits, Sam Moyn, Mark Tushnet, Sanjukta Paul, Brishen Rogers, Taisu Zhang, and (in absentia) Luke Herrine and Jed Purdy. Finally, Saki Bailey has been an intimate collaborator—intellectually and otherwise—on this project for many years.

# Legal Realism and CLS from an LPE Perspective

*Talha Syed*

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## INTRODUCTION

What is the role of law in political economy? And what is the role of political economy in law? And in both cases, when we speak of "law" and "political economy," are we speaking of academic disciplines (or specific modes of social analysis) or social realities (specific arenas of social dynamics)? This tangle of questions constitutes, I take it, the orienting *problematique* or research agenda of the emerging "law and political economy" movement in legal academia.[1]

[1] *See, e.g.,* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman, *Building a Law-and-Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784 (2020); Angela P Harris & Jay Varellas, *Introducing the Journal of Law and Political Economy*, LPE PROJECT BLOG (2020), https://lpeproject.org/blog/introducing-the-journal-of-law-and-political-economy/; Martha T. McClusky, Frank

Questions concerning not so much the interaction as the *interrelation* of law and political economy, with each of these understood simultaneously as fields of study and areas of social life. And within that agenda the legacy of two prior efforts at grappling with these questions—Legal Realism and Critical Legal Studies (CLS)—looms large. The present Article seeks to take stock of that legacy, and to advance a critique of central aspects of the received traditions of Realism and CLS, for the sake of developing new foundations for the analysis of both law and political economy.

An initial obstacle to any such effort, of course, is how to characterize these prior schools. Thus, is Critical Legal Studies about the "indeterminacy" thesis or is it about "tilt"?[2] And in either case, what exactly *is* that? Or is CLS instead about collapsing the law/politics distinction? Or the law/society one? And where in all this is the critique of liberalism? Come to that, what about the critique of capitalism, as well as patriarchy and white supremacy—or, if we prefer, the critical analysis of the power dynamics and inequalities of race, gender, and class? "It's all very complex," one might say. But it is precisely a premise of the present Article that the point of analysis is to come to grips with, make sense of, complexity. Without ever losing sight that more could be said.[3]

The best way to understand CLS, this Article contends, is to begin by seeing it as reviving—and then further developing—two central strands of Legal Realism: (1) one concerning *the critique of legal reasoning;* and (2) the other concerning *the role of law in society*. It is from this point of departure that we can make sense of two signal CLS claims, namely that law is, simultaneously, *indeterminate* and *constitutive*. After setting out the key Realist and CLS claims on these fronts, I then offer critiques on both dimensions, ones that seek to push further in the same direction as the Realist/Crit views, but in ways that ultimately repudiate the premises underlying these views. Realism and CLS are, I contend, both deeply liberal in their social theory.[4] And it is precisely the repudiation of liberal social theory (*not* the same as liberal political philosophy) that, I believe, is a key promise of LPE. And in that vein, I offer what I see as a contrasting set of LPE ideas about law/politics, law/society, liberalism, and race, gender, and class in capitalism.

Part I distills the central prongs of Legal Realism as a critical theory of law and of political economy. Part II does the same for CLS, now as a critical theory of law and of society. Part III then critiques the critiques in summary form, situating the analysis within an LPE framework. Parts IV and V elaborate. Part IV critiques Realist/CLS views of legal reasoning and legal analysis more generally, to argue that in the place of an indeterminacy critique, we should adopt a critique of *dereification without disintegration*. Part V advances a parallel set of critiques of Realist/CLS views in social theory, urging to replace legal constructivism with an analysis of *social relations*.

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Pasquale and Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297 (2016). *See generally* "The Law and Political Economy Project" at https://lpeproject.org/.

[2] By "Critical Legal Studies" I mean here what Mark Tushnet calls "Critical Legal Theory without modifiers"—i.e., the work of scholars associated with the "Conference on Critical Legal Studies," and not the work of scholars subsequently associated with Critical Race and Feminist Legal Theory, whose aims and arguments are in important respects quite distinct. Mark Tushnet, *Critical Legal Theory (without modifiers)*, 13 J. POL. PHIL. 99, 107 (2005).

[3] This itself may signal a methodological departure from CLS, to which I return at the end of the Article.

[4] I recognize just how controversial such a claim may seem, even with respect to the Realists given their public/private critique, but especially so for the Crits given their strongly structuralist/poststructuralist dimensions. The burden of the discussion in III and V *infra* is to show that these do not undermine the claim so much as bring out its critical edge.

## I. LEGAL REALISM: CRITIQUES OF FORMALISM AND OF THE PUBLIC/PRIVATE DISTINCTION

Legal Realism is best conceived, on the present view, as consisting of two critical arms: the first is a critique of formalist reasoning in law, the second a critique of laissez-faire in political economy. The critique of formalism, in turn, may be further unpacked into two distinct variants: (a) an "internal" critique that argued, in a nutshell, that formalism was (often) unworkable; and (b) an "external" critique that argued, in a nutshell, that formalism was (often) empirically untenable. The critique of laissez-faire, meanwhile, built upon and deepened the critique of formalist legal reasoning, to take the form of a critique of the public/private distinction that sought to show the omnipresent role of "the state"—via legal decisions—in the shaping of the so-called private sphere of "the market." What follows is an explication of each of these prongs, incorporating along the way a number of additional sub-themes in the Realist corpus.[5]

### *A. The Critiques of Formalist Legal Reasoning*

The target of the Realist critique of legal reasoning—*formalism*—is best understood as the view that questions of law can (often) and should (when they can) be resolved solely via recourse to the *internal forms* of the law, rather than any external "matter" or "substance."[6] In other words, legal questions should be resolved solely via recourse to: (1) the positive source materials of law (precedents, statutes, constitution), per the "plain" (or "common" or "core") meanings of the words contained therein; and (2) any higher-order concepts and principles (e.g., "property," "contract," "liberty") that may be embedded in such materials or help organize them intelligibly. Views emphasizing the former may be called *doctrinalism;* views emphasizing the latter, *conceptualism*.

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[5] This conception of Legal Realism is not without contention of course. As is notorious, it is not even clear who best qualifies as a "Realist," and whoever does fit, the resulting motley group of scholars will no doubt exhibit a variety of views on diverse matters, with perhaps no common core. For discussion and debate on these fronts, *see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 169-192 (1992) ("TRANSFORMATION II"); WILLIAM W. FISHER III ET. AL, AMERICAN LEGAL REALISM xiii-xv (1993); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 3-44 (1986); Joseph W. Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 468-477; (1988); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 82-92 (1997); Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278, 280-281 (2001); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 607-610 (2007). The present conception of Realism lies closest to—being deeply influenced by—those of Singer, *id.*, HORWITZ, *id.*, FISHER ET. AL, *id.*, and KENNEDY, *id.* Its basis and key points of difference from alternative views are discussed and defended at the end of this section at note 46, *infra*.

[6] As with Realism, so with "formalism" there remains considerable contention in the legal literature on a number of questions, including: (1) What, precisely, did the Realists have in mind with formalism or its various aliases such as Langdellian "legal theology," "Bealism," "mechanical jurisprudence," and "transcendental nonsense"? *See* Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (reviewing C. LANGDELL, A SELECTION OF CASE ON THE LAW OF CONTRACTS [1879]); JEROME FRANK, LAW AND THE MODERN MIND 53 (1930) ("Bealism"); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). (2) Were the Realists' characterizations of their target accurate, or exaggerations, or even simply fabrications? *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 4-6 (1983); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 3, 10-25 (1994); KENNEDY, CRITIQUE, *supra* note 5 at 105-107. (3) And, in any case, (a) what at present is the most cogent conception of "formalism"; and (b) what, if anything, remains of "formalism" as a live issue today? *See* Robert W. Gordon, *The Elusive Transformation*, 6 YALE J. L. & HUMAN. 137, 154-157 (1994); KENNEDY, CRITIQUE, *supra* note 5 at 106-107; Thomas C. Grey, *The New Formalism*, (1999) (Stanford Law Working Paper No. 4 available at https://ssrn.com/abstract=200732); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L . REV. 1138, 1144-47 (1999). Part IV below takes up how the present conception relates to these concerns and the alternatives in the literature. *See* note 202 *infra* and accompanying text.

The Realists' (and their predecessors') critique of formalism came in two successive, if overlapping, waves. The first, subsequently to be called an "external" critique and associated most strongly with "sociological jurisprudence," took as its *leitmotif* the (early) Holmes aphorism that "[t]he life of the law has not been logic: it has been experience."[7] The second, subsequently to be called an "internal" critique and associated more strongly with "Realism" proper, took as its *leitmotif* the (late) Holmes aphorism that "[g]eneral propositions do not decide concrete cases."[8]

1. The External Critique: Formalism is (often) empirically untenable

The external critique unfolded along two dimensions: to vaunt external social factors ("experience") over internal formal consistency ("logic") was to insist at one and the same time that the law both *does* reflect social factors and that it *should* do so.[9] A leading illustration of the first, more descriptive vein, was Roscoe Pound's argument that the "law in books" of formal doctrine proves a bad guide to the "law in action" of how courts actually dispose of their docket.[10] A second, related, aspect of the "books" versus "action" argument then provided a bridge between the descriptive and prescriptive dimensions of the external critique: study of the rules in force may prove quite misleading as to their actual effects as applied in given social circumstances.[11] From this was a short hop to the prescriptive claim: where the law had "come to be out of touch" with changed social circumstances,[12] it ought to be reformed so as to better fit the new social reality.[13]

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[7] OLIVER WENDELL HOLMES JR., THE COMMON LAW 1 (1881). For the influence of this aphorism on "sociological" jurisprudence, see text accompanying notes 10 to 13, *infra* and Benjamin Cardozo, *Mr. Justice Holmes, in* MR. JUSTICE HOLMES 1, 2-3 (Felix Frankfurter, ed. 1931). For the characterization of this as an "external" critique (and skepticism toward it), see KENNEDY, CRITIQUE, *supra* note 5 at 92, 105, and 389 fn. 21. For the important distinction between an "early" and "late" Holmes, see HORWITZ, TRANSFORMATION II, *supra* note 5 at 109-143. *But cf.* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

[8] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). For the influence of this aphorism on "realist" jurisprudence, see text accompanying notes 18 to 20 *infra* and John Dewey, *Logical Method and the Law*, 10 CORNELL L. Q. 17, 21-22 (1924). For the characterization of this as an "internal" critique (and embrace of it), see KENNEDY, CRITIQUE, *supra* note 5 at 82. For discussion of sharp differences in the thrust of the two aphorisms, see HORWITZ, TRANSFORMATION II, *supra* note 5 at 110, 140-142. *But cf.* Grey, *Holmes and Legal Pragmatism*, *supra* note 7.

[9] HOLMES, COMMON LAW, *supra* note 7 at 1 ("prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed") and 305 (arguing, *pace* Langdell, that practical "convenience […] is a sufficient reason for … adoption" of a rule, irrespective of "merely logical grounds").

[10] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15-18 (1910) (citing examples from tort, property, criminal, and constitutional law in support of the proposition that "if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.")

[11] Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909) (arguing that the contrast between the premises underpinning formal "liberty of contract" and "actual industrial conditions" exposes the "fallacy" of "equal rights").

[12] HORWITZ, *supra* note 5 at 6, 187-189.

[13] *See* Pound, *Law in Action, supra* note at 22-24, 26-31 ("individualist" legal conceptions "of the old type" need to be reformed to better "promote the ends of society"); Louis Brandeis and Josephine Goldmark, *Brief for Defendant in Error*, Muller v. Oregon, 208 U.S. 412 (appending, to two pages of legal argument, 95 pages of social scientific evidence on the conditions of working women in factories in defense of the constitutionality of a maximum working hours statute). *See generally* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

"Books versus action" proved, like "logic versus experience," to be an immensely fertile formulation of course, despite or even because of its ambiguity, launching at least three major lines of subsequent inquiry: (1) the distinction between the "formal" versus "actual" rules in force was the seedbed of later descriptive "realism" in theories of adjudication;[14] (2) the distinction between the "intended" versus "actual" effects of the rules in force was the seedbed of the Realists' turn to the social sciences as a way to study the "law in action";[15] and (3) this latter was then extended by Law-and-Society scholars to study not only the effects of formal legal rules but also their interplay with informal social norms "on the ground."[16] But for present purposes—namely the relation of the external critique to the internal one, and of both to CLS—what needs underlining are two points: (a) the sociological claim that courts (often) *do not* adhere to the formal rules when deciding cases was taken by the Realists in a new direction, namely that courts (often) simply *cannot* adhere to formalist reasoning, given its internal difficulties; (b) meanwhile, the sociological claim that courts *should* decide cases to better "fit" with social "needs" was soon enough seen to be what it was, namely an implausible smuggling of value judgments under cover of describing social facts.[17]

2. The Internal Critique: Formalism is (often) unworkable

Turning to the internal critique, it too came in two forms: a critique of conceptualism and a critique of doctrinalism. The first—an extended disquisition on Holmes' "general propositions do not decide concrete cases"—undertook to show again and again that higher-order abstractions such as the concept of "property" or the principle of "liberty" cannot self-execute to lower-order conclusions without intermediate premises that break the chain of deductive reasoning (or disrupt the drawing of straightforward analogies).[18] Two leading examples: Hohfeld's demonstration that "property" refers not to a single right of "ownership" but rather to a set of logically distinct possible rights, with the awarding of one (e.g., a "privilege") having no necessary connection to that of another (e.g., a "claim right").[19] And, shifting from property to contract and rights to remedies, Fuller and Perdue's demonstration that you cannot derive from the category "contract" an answer to whether damages for breach should protect expectation or reliance interests.[20] The critique of doctrinalism, meanwhile, took its lead from Walter Wheeler Cook's aphorism that legal rules and principles tend to "hunt in pairs" such that, even when attempting to reason from lower-order meanings in specific rules, one will often be faced with either a counter-rule or counter-maxim for

[14] *See* BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007); Ran Hirschl, *The Realist Turn in Comparative Constitutional Politics*, 62 POL. RES. Q. 825 (2009). For further discussion of this strand, *see infra* notes 24 to 29 and accompanying text, and note 46.
[15] *See* John Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1980); *but cf.* KALMAN, *supra* note 5 at 44-46.
[16] *See, e.g.,* Stewart Macauley, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts, and Credits Cards*, 19 VAND. L. REV. 1051 (1966); Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974); Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC. REV. 891 (1979).
[17] *See* Felix S. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L. J. 201, 202-209 (1931). In fact, there were three distinct Realist reactions to this sociological approach to value questions, as discussed below at notes 31 to 33.
[18] *See* Dewey, *Logical Method and the Law*, *supra* note 8; HORWITZ, *supra* note 5 at 200-206.
[19] Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).
[20] Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 2 (1937).

construing the same rule.[21] The most elaborate such demonstrations were of course those of Karl Llewellyn with respect to competing canons on how to interpret statutes and construe precedents.[22]

The upshot? That the formal legal "reasoning" in a judicial opinion is often more an exercise in *ex post* rationalization—be it to oneself or one's audience—of a decision reached on other grounds, than it is an actual form of ratiocination through which one arrives at an answer.[23] This naturally raises the question: if the formal legal materials (often) neither *do* nor *can* determine the decision, *what* does? Here, Realist views divide into three main camps.[24] A minority view—which we can associate with Joseph Hutcheson and Jerome Frank—gave *individualist* replies that focused on the idiosyncratic "hunches" or psychological "temperaments" of judges.[25] A second, more common and perhaps majority view—well represented by Max Radin, Herman Oliphant, and Karl Llewellyn—gave what we may call *descriptive sociological* answers that focused on similarities in how courts handle recurrent sub-doctrinal fact patterns or "situation types."[26] Finally, a third view, perhaps less common than the previous but not altogether rare—with leading exponents including Walter Wheeler Cook, Felix Cohen, and Holmes himself—gave what may be called *critical sociological* answers that focused on judges' ideological outlooks—their overall "policy" views or "sympathies"[27]—with these in turn reflecting and reshaping larger "social

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[21] Walter Wheeler Cook, *Review of* The Paradoxes of Legal Science by Benjamin N. Cardozo, 38 YALE L. J. 405, 406 (1929) ("Judge Cardozo […] overlook[s…] the fact that legal principles—and rules as well—are in the habit of hunting in pairs. [W]henever we are confronted by a doubtful situation, one which therefore demands reflective thinking, we usually find that in the past conflicting interest and conflicting social policies have each received recognition from the courts to some extent, and that these results have been rationalized in terms of 'conflicting' principles (or rules), each of which can easily, and without departing from any prior decisions, be 'construed' as 'applicable' to the 'new' case.")

[22] Karl Llewellyn, *The Leeways of Precedent, in* THE BRAMBLE BUSH 67-71 (1930); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

[23] FISHER ET. AL, *supra* note 5 at 165 ("Drawing on recent developments in psychology and sociology, the Realists answered that judicial opinions serve the functions of rationalization and legitimation. By making each decision seem inevitable, opinions deflect popular criticism of the courts' rulings and conceal from the judges themselves the true bases of their rulings.")

[24] Professor Leiter insightfully identifies and labels what he sees as two main camps, a (minority) "idiosyncrasy wing" and a (majority) "sociology wing." Brian Leiter, *American Legal Realism, in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY (Golding & Edmundson, eds. 2005). I follow Professor Leiter's judgment of membership in the first camp but, for reasons given in the text, I find it more helpful to break out the latter into two distinct sub-camps. Professors Fisher et. al, on the other hand, also identify three camps, but separate out as two distinct views what I feel are more usefully grouped under a single "individualist" camp, while they group together under a single "social determinants" camp what, again, I think are importantly distinct positions. FISHER ET. AL, *supra* note 5 at 165.

[25] Joseph C. Hutcheson, Jr., *The Judgement Intuitive: The Function of the 'Hunch' in Judicial Decision*, 14 CORNELL L. Q. 274 (1929); JEROME FRANK, LAW AND THE MODERN MIND (1930).

[26] Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 358-359, 362 (1925) (suggesting that when confronted with the facts of a case judges look past formal doctrine to determine what "type situations" they are facing, and legal analysis revamped to focus on these may go a long way in reducing "arbitrariness" and bringing us "fairly near certainty"); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928) (illustrating the thesis of sub-doctrinal consistency in fact patterns, by reconciling a formal conflict in contract cases involving non-compete clauses by showing how they align in terms of their underlying facts, with clauses involving sales of a business upheld, while those involving employees struck down); KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 124-125 (1960) (illustrating judicial "situation-sense" with sub-doctrinal consistency in decisions involving similar facts in conditional sales, despite variation in the "clumsy tool[s]" of doctrine invoked).

[27] Holmes, *Privilege, Malice, and Intent* ("The ground of decision really comes down to a proposition of policy of rather a delicate nature […] and suggests a doubt whether judges with different economic sympathies might not decide such a case differently."); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L. J.

determinants" and "social forces,"[28] including those of "economics and politics."[29] This last leads then to the second critical arm of Realism, going to the political economy stakes of legal decisions.

Finally, if judges neither (often) *do* nor (typically) *can* decide cases by following formal legal reasoning, then how *should* they do so? For many, perhaps most, Realists the answer was: just as they already do—i.e., in accord with sub-doctrinal "situation sense," "custom," or "craft"—only now a bit more self-consciously and explicitly rendered in their opinions.[30] This represented a circuitous return to origins, being in effect a refined version of the sociological claim that law should "fit" social circumstances. An initial Realist disquiet with this smuggling of value questions found expression in Llewellyn's infamous plea for a "temporary postponement" of value questions altogether.[31] That, in turn, was met soon enough with internal dissent (Felix Cohen) and external criticism (Lon Fuller), both calling for the explicit taking up of value questions.[32] When the calls reached deafening levels in the post-Nazi, Cold War atmosphere of the 1950s, Llewellyn's reply was, in a second time as farce, to mimic his once bête noire Pound's own trajectory and turn from critic to celebrator of the virtues of social "custom," as divined and channeled by judicial "craft."[33]

### *B. The Critique of the Public/Private Distinction*

The Legal Realist critique of laissez-faire in political economy—developed in tandem with institutionalist economists and pragmatist philosophers—argued, in a nutshell, that the state sets the rules for market activity and in so doing shapes both the liberty of individuals and distributive outcomes of the processes. More specifically, the critique aimed to show that the state plays a pervasive role in structuring the so-called "private sphere," in a manner that renders classical liberal (and contemporary libertarian) views untenable—analytically implausible and normatively incomplete. In brief, the argument runs: The state sets, assigns, and enforces the "background" legal entitlements that form the "rules of the game" of private activity in the market. These rules heavily shape the liberty and bargaining power of market agents and as such play a significant role in determining the distributive outcomes of so-called "natural liberty." Moreover, these entitlement decisions are under-determined both by prior law or by any pre-political "natural rights" or other

779, 783 (1918) ("in the last analysis the decision really turns upon notions of policy entertained—consciously or unconsciously—by the members of the court").

[28] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935) ("A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and index of social consequences. A judicial decision is a social event.").

[29] *Id.* at 844.

[30] *E.g.,* Oliphant, *supra* note 26; Radin, *supra* note 26; LLEWELLYN, *supra* note 26. *See generally* William W. Fisher III, *American Legal Theory and Legal Education*, *1920-2000*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA 34, 37-39 (Christopher Tomlins, ed. 2008); and Leiter, *supra* note 24 at 18-21.

[31] Karl Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

[32] *See* Cohen, *Transcendental Nonsense*, *supra* note 28 at 848-849. Lon Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934). For discussion of Fuller as both fellow traveler and critic of Realism, *see* HORWITZ, *supra* note 5 at 184, 211. As Horwitz also points out, an even earlier third critic in this respect was Morris Cohen. *Id.* at 327-328 fn. 103. My inclusion of Fuller (above) and Morris Cohen (below) within the present account of central Realist arguments and themes, despite their status as critics of Realism on the value question, is defended below at note 46, *infra*.

[33] *See* LLEWELLYN, COMMON LAW, *supra* note 26 at 213-225; Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); HORWITZ, *supra* note 5 at 170-185 ("the famous exchange over Realism between Karl Llewellyn and Roscoe Pound") and 247-250 ("Llewellyn's retreat").

distributively-neutral, political-moral considerations such as "fair process." Hence, in making such decisions, it is implausible to prescind from consideration of their distributive effects.[34]

In reconstructed form, the argument consists of three distinct levels or stages—with each subsequent stage arising in response to an objection facing its predecessor.

First, we notice the relatively straightforward point that all "private" action takes place within a background structure of legal entitlements regarding what persons may or may not do vis-à-vis themselves, other persons, and nonpersonal or "external" resources. This refers not only to cases where a private party clearly relies on (actual or potential) government enforcement of their legal entitlements of property and contract. Rather, it also applies when there is no governmental enforcement in the offing either way, i.e., when the private parties exercise their at-large liberties or Hohfeldian "privileges," free from tort or criminal liability.[35] This is not to say that once a legal order is established, government should instantaneously be deemed a partial author of all private actions in its wake, given that the at-large liberties embodied in such action are now the result of (implicit) government permission. Rather, the more modest point is that at some point into the system's existence, legal decision-makers will have had occasion to turn their minds to many of the relevant at-large privileges and decide whether they or their opposites ("duties") should be enforced—so that if the liberties remain, they are as much a product of government decision, or "action," as the duties, being the result of explicit government permission.[36] And—what is the key upshot here—government decisions regarding the shaping and conferral of such legal entitlements will have significant effects on the liberty, bargaining power, and resultant distribution of goods and opportunities among private parties.[37] Or, to put it another way, the extent to which someone possesses effective agency—i.e., the means for pursuing their own aims—depends in considerable part on the presence or absence of governmental coercion.[38]

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[34] The central works here include: Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710 (1917); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L. J. 779 (1918); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927); Morris R. Cohen, *The Basis of Contract,* 46 HARV. L. REV. 553 (1933); *and* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). For a pioneering retrieval, *see* Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261 (1973). For an in-depth review and further references, *see* Singer, *supra* note 5 at 475-495. *See also* HORWITZ, TRANSFORMATION II, *supra* note 5 at 162-166, 194-208; *and* FISHER ET. AL, *supra* note 5 at 98-100. Pioneering extensions of the argument include: Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 577-83 (1982); Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, WISC. L. REV. 975 (1982); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities* 34 AM. U. L. REV. 939, 949-956 (1985); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 102-109 (1987); *and* Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEG. STUD. FORUM 327 (1991). For a comprehensive reconstruction of the critique as an explicit confrontation with classical liberal political economy and philosophy, *see* BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 29-107 (1998).

[35] Hohfeld (1913), *supra* note 34; Cook, *The Privileges of Unions*, *supra* note 34.

[36] Kennedy, *Stakes of Law, supra* note 34 at 333-334.

[37] For a revival of this analysis within liberal political philosophy, see LIAM MURPHY AND THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002).

[38] For subsequent recognition of this point within analytical philosophy, see G.A. Cohen, *Freedom and Money, in* COHEN, ON THE CURRENCY OF EGALITARIAN JUSTICE, AND OTHER ESSAYS IN POLITICAL PHILOSOPHY 166 (2011).

Now as stated above, this would seem to be a relatively straightforward point, and one open to the rejoinder that it says nothing about legitimate, distribution-independent, considerations for guiding such government decisions. And so to leave the argument at this—as some proponents have[39]—is to leave it vulnerable precisely to being so disarmed, as some critics have thought.[40] To round out the case, then, we need to reply to the two classical forms of this objection.

The first is that it is of little import to point to government action involved in the ongoing enforcement and elaboration of legal entitlements, since such action is constrained by earlier decisions or "settled law." Hence, it is a mistake to say that those making current entitlement decisions are actively exercising governmental power or agency: they are merely following rather than making law. Leaving aside that this still leaves open the course of legislative power to remake the law, the mainline Realist response is of course to rely on the Realist critique of legal reasoning. And the basic upshot of that critique, again, was to show that the positive doctrinal legal materials were typically under-determinate—silent, ambiguous, or conflicting—with respect to the relevant issues at hand. Thus, any decision was bound to be, at least in part, one of "justice or policy."[41]

It is at this stage—of showing the doctrinal under-determination of cases with distributive stakes—that many defenders or extenders of the Realist critique may be tempted to rest.[42] There remains, however, a final objection that certainly preoccupied the original developers of the critique. And this is the argument that, in any case, government action ought to be rooted in, or at least constrained by, "pre-political" natural rights or other procedural moral considerations, which the law is best seen as enforcing or elaborating in a manner free from taking (distributive) sides with respect to outcomes. It is here that the second of the Realist critiques of legal reasoning—of conceptualism rather than doctrinalism—enters, and indeed comes fully into its own. It was precisely a central motivation of the critique of conceptualism to show that classical liberal moral principles of "natural liberty" (security, liberty, desert) that ostensibly lie at the back of the legal categories of torts, contracts, and property, were inadequate to fill out their corresponding legal conceptions. This was the main thrust of Holmes on "harm," Hohfeld on "ownership," and Hale on "liberty": such abstract conceptions simply could not provide determinate resolutions in concrete cases given conflicting possible interpretations to choose from.[43] Thus, commitments to "natural" desert, freedom, and security—which were not challenged so much as presupposed by the Realists[44]—simply fell far short of justifying existing laws. Or, for that matter, of guiding any massive libertarian reform project, given their under-determinacy in the face of the full scale of intertwined relations that any plausible system of private law must confront and govern.[45]

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[39] *See* Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).
[40] *See* Leiter, *supra* note 24 at 33-34 (critiquing the argument, including Sunstein's version, along such lines).
[41] *See* Hohfeld, *supra* note 34 at 36; text accompanying notes 21 to 22, 28 to 29, *supra*.
[42] *See, e.g.,* Kennedy, *Stakes of Law*, *supra* note 34 at 348-350; FISHER ET. AL, *supra* note 5 at 99-100. *But cf.* HORWITZ, TRANSFORMATION II, *supra* note 5 at 194-198.
[43] Holmes, *Privilege*, *supra* note 34; Hohfeld, *Fundamental, supra* note 34; Hale, *Bargaining, supra* note 34.
[44] *See* FRIED, THE PROGRESSIVE ASSAULT, *supra* note 34 at 15-28, esp. p. 19, 74-76, 91-99.
[45] For post-Realist debate on the conceptual and normative viability of such a massive libertarian reform project, *see* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE PUBLIC DOMAIN (1985); Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 26 (1986); Mark Kelman, *Taking Takings Seriously*, 74 CALIF. L. REV. 1829 (1986).

In sum, the Realist critique of laissez-faire in political economy was an internal critique of classical liberalism, one that both motivated and depended upon a similar internal critique of formalist reasoning in law. And, as with the critique of formalism, so with the critique of laissez-faire, the Realists had less to offer about how to analyze and decide cases with distributive stakes.[46]

## II. CLS: THE INDETERMINACY CRITIQUE AND LAW AS CONSTITUTIVE

In CLS hands, the Realist critique of formalism became the *indeterminacy thesis*. And the Realist critique of the public/private distinction became the *law-as-constitutive* claim.[47]

### *A. The Indeterminacy Critique(s)*

With respect to the critique of formalism, the main strand of CLS worked three operations on Realism. First, it picked up the internal critique from indeterminacy and jettisoned the external one from empirical implausibility.[48] Second, it adopted a "minimalist" rather than "maximalist"

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[46] The present conception of Realism may face objections on three principal counts: (1) Its expansive *chronological* view of the movement—as extending from Holmes through to postwar Llewellyn—so as to include also "sociological" jurisprudents, some of whom (such as Pound) were, notoriously, sharp antagonists of the Realists. (2) Its broad sense of *members* of the movement, to include figures commonly thought to be critics of Realism, such as Lon Fuller and Morris Cohen, as well as institutionalist economists such as Robert Hale. (3) Finally, its view of central *themes* to be principally two: the critique of formalism in law and laissez-faire in political economy. These raise an issue of method: while some may query whether any set of "core" themes are plausibly attributed to a disparate group of scholars—*see* DUXBURY, *supra* note 6 at 64-71—Professor Leiter argues to the contrary that, against such a "dogma," in fact careful attention to the writing of the "major figures" of Realism *does* reveal a "core claim," namely a "*descriptive* thesis about adjudication" that "judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons." LEITER, NATURALIZING, *supra* note 14 at 61 (emphasis in original) and 103-118. The present conception, however, seeks to sidestep the issue of accurately capturing either the "major" figures or their "core" claims. Its aim is not to *describe* the writings of any specific *group* of scholars. Rather, it is to *conceptualize* a set of *arguments* that have proven especially influential or meritorious. While these arguments may then be attributed or traced back to specific authors and works—as the above discussion has sought to do—the primary aim here is simply to attend to the merits of the arguments themselves and to their subsequent influence on American legal thought in general and critical legal studies in particular. And, *given that purpose*, the present claim is that this distillation of the Realist enterprise—as consisting of two interlocked critiques in law and political economy—is a particularly helpful unifying framework, one that also provides crisp analytic purchase on most of the other themes of the Realists adumbrated in the literature (including the descriptive thesis about adjudication, the turn to social sciences, Law-and-Society extensions—*see* text accompanying notes 14 to 16 and 24 to 29, *supra*—as well as various others as listed in FISHER ET. AL, *supra* note 5). This same orienting aim also explains the expansive chronological view taken here and why *some* writings of those who are in other respects critics of Realism—Pound, Morris Cohen, and Fuller—are included, namely when they make contributions to the above framework (here I follow HORWITZ, TRANSFORMATION II, *supra* note at 5 at 169-171, 183-184, 211-212; and FISHER ET. AL, *supra* note 5 at xiii-xv, 88ff, 109ff). Finally, it must be admitted that there remains one key omission in the present conception, which is that it sets aside the jurisprudential question of a Realist theory of law as such, where that is seen to be distinct from theories of adjudication or of the role of law in society (which of course have been central to the present account). For views taking this to be either central to the Realist project or at least significant to consider in connection with Realism, see FISHER ET. AL, *supra* note 5 at 165; LEITER, *id.*; Hanoch Dagan, *The Real Legacy of American Legal Realism*, 38 OXFORD J. LEG. STUD. 123 (2018).

[47] Perhaps the most influential single source for both claims is Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). *See generally* Dennis W. Davis and Karl Klare, *Critical Legal Realism in a Nutshell, in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 27 (2019). The ultimate provenance for the indeterminacy claim lies in the work of Duncan Kennedy, *infra* notes 51-56 and 58. For works on the constitutive claim, see *infra* notes 64, 67, 83.

[48] KENNEDY, *supra* note 5 at 82 (adopting internal critique) and 92, 105, 389 fn. 21 (distancing from external critique).

variant of the internal indeterminacy critique.[49] Third, it extended the indeterminacy critique from a Realist focus on doctrine to post-Realist arguments of "policy and principle."[50] (In each of these respects, there were also minority strands of CLS, which I discuss along the way.)

Integrating these moves, the canonical version of the indeterminacy critique consists of two main sub-types. The first is with respect to "doctrine"—or "rule application" that goes from the positive legal materials to a decision on the given facts of a case.[51] Here, the critique is *not* the maximalist one that rules are never determinate as to their meaning or scope of application. Rather, it is a critique from "praxis" whereby, in the specific setting of a given case, "work" on the positive materials may successfully "destabilize" them, so as to "budge" any initial impression of "hard" determinateness and open up room for another outcome to seem plausible (to the decision-maker and/or their audience). Or it may not. Nothing can be said ahead of time or in general about whether the "objectivity" of the materials may yield to a "phenomenological" experience of openness.

The second type concerns arguments with respect to "policy"—or "rule determination" in the face of "gaps, conflicts, ambiguities" in the positive legal materials.[52] Here, the critique is *not* the maximalist one that policy arguments always fail to provide convincing closure. Rather, it is a critique from the "stereotyped" character of legal policy argument, namely that it tends to come in opposing pairs of "argument bites," with each generic assertion drawn from a fund that contains its generic negation or "other."[53] And not only that, but even when a choice between alternatives is made at one level of abstraction, a parallel opposing pair may be found "nested" at a lower level below.[54] Again, in any given context, a specific policy argument may be so convincingly superior to its counter as to garner accession from most participants and observers as to its "necessity." But repeated immersion in the practice of legal policy argument will tend to gnaw at the genuine as opposed to mechanical character of the exercise,[55] opening the floor to feelings of aporia.

Two questions are raised by this account of legal policy argument: (1) What accounts for its stereotyped "structured contradiction" character? (2) What "actually" determines the decisions, behind the veil of opposed argument bites, if not the backs of the participants themselves, who may be as much "spoken by" as "speaking" the language they deploy? On each front, there have been two main contending views. On the first, an "early" CLS view was a "structuralist" one that

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[49] *Id.* at 31-32, 37-38, 92-93.

[50] There is also a third strand of the indeterminacy critique, one applied neither to doctrine nor to policy but to the construction of "the facts" themselves. For extended discussion of this in the Realist vein, including rebuke of fellow Realists for overlooking it, see Jerome Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs Aristotle: II*, 25 NOTRE DAME L. REV. 460 (1950). For an influential CLS treatment, see Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

[51] Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518 (1986).

[52] Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

[53] For example: "no liability without fault" versus "between two innocents, the party causing the harm should pay"; or "my rule is easy to administer" versus "your rule lacks case-specific flexibility." *See* Kennedy, *id.* at 75, 78-79.

[54] Kennedy, *id.* at 97-103, 112-116; Jack Balkin, *Nested Oppositions*, 99 YALE L. J. 1669, 1683-85 (1991). An example: even if the debate between "no liability without fault" versus "between two innocents" is settled at the general regime level in favor of the former—i.e., for negligence over strict/enterprise liability—nevertheless, it may arise again *within* negligence, now in choosing between "subjective" versus "objective" standards of fault or, at the stage of determining liability exposure, between rules of "proportionate share" versus "joint and several" liability for defendants.

[55] Kennedy, *id.* at 103-104.

these contradictions in law reflect deeper ones in liberal ideology which, in turn, reflect basic existential ones, both between and within us all—most famously, a "fundamental contradiction" between the self and others.[56] A "later" CLS view was a "semiotic" one that eschewed any such "external" source of the contradiction, finding it instead in the formal structures of language or discourse itself, whereby "meaning" may be always already disrupted or deferred (*différance*)[57]—or, instead, finding it simply mysterious, both as to the sources of structured contradictions and the "event" of their eruption so as to disrupt meaning or closure and produce despair, ecstasy, irony.[58]

Turning to the second question—of what actually determines legal decisions if not the reasoning that purports to justify them—here too we can delineate two main views: a (determinate) "sociological" one and an (indeterminate) "ideological" one. The first was advanced by Morton Horwitz in his famous "tilt" debate with Duncan Kennedy: legal conceptions, Horwitz argued, may well be indeterminate in the abstract, but in specific historical contexts they tilt in favor of one over another set of outcomes, their meanings delimited by prevailing ideological winds that themselves stabilize and help reinforce the prevailing balance of power between social forces.[59] More broadly, some Crits—Mark Tushnet principal among them—took care to underline that while legal decisions may be underdetermined by the reasons offered for them, they are not for all that unpredictable: rather, they are often quite predictable from an analysis of external social factors.[60] These sociological accounts of what shapes law can be seen, of course, as a revival and extension of the Realist "law in action" critique of formalism and its "critical sociological" wing of the analysis of what actually shapes the "law on books."[61] Kennedy, for his part, continued with his eschewal of this variant of the Realist critique and offered in its stead an extension—indeed radicalization—of both the internalist and indeterminacy views: (a) in an earlier incarnation, the

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[56] A particularly crisp formulation is the following from Robert Gordon: "[L]aw is indeterminate at its core […] because legal rules derive from structures of thought […] that are fundamentally contradictory. We are […] constantly torn between our need for others and our fear of them, and law is one of the cultural devices we invent in order to establish terms upon which we can fuse with others without their crushing our identities, our freedom, even our lives." Gordon, *supra* note 47 at 114. The original source of "the fundamental contradiction" thesis is of course Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979). Kennedy also famously "renounced" the fundamental contradiction (indeed in the very same volume where Gordon was citing it). Peter Gabel and Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-16 (1984). But he remained an ardent "structuralist" while weaving that into a more "semiotic" view and both of these into a modernist/postmodernist position. *See* references cited at *infra* note 58.

[57] *See* Jack Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1133-35 (1990).

[58] Duncan Kennedy, *A Semiotics of Legal Argument (with European Introduction)*, *in* COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW v. 3, bk. 2, 321-323, 350-360 (1994); KENNEDY, CRITIQUE, *supra* note 5 at 344-350. "Despair, ecstasy, irony" is my phenomenological reduction (in the sense of Hegel, not Husserl) of Kennedy's more descriptivist listings ("contradiction, irony, alienation, despair, and so on" at 346; "loss, nostalgia, yearning, depression, despair" at *id.*; "alienation, doubleness, irony, ecstasy, and despair" at 347). This is not to deny the place of aestheticist imagism; only to foreground the importance of conceptual precision in explanatory theory.

[59] *See* HORWITZ, TRANSFORMATION II, *supra* note 5 at 68, 106-108 (1992). It is well understood that Horwitz's target in these pages, Dewey's indeterminacy view of abstract legal conceptions of the corporation, serves as a stand-in for Kennedy. *See* Robert W. Gordon, *The Elusive Transformation* 6 YALE J. L. & HUMAN. 137, 145-146 (1994). Indeed, in the earlier article version of the chapter, the link was made explicitly. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175-176 (1986).

[60] Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINN. L. REV. 339 (1996); Tushnet, *Critical Legal Theory, supra* note 2 at 108-109.

[61] *See* text accompanying notes 10 and 27-28. Note that this Crit view remains distinct from the *descriptive* sociological wing of Realism, for which the grounds of external determinacy or predictability lie in courts' common "situation sense" or shared response to various types of recurring fact patterns: see text accompanying note 26 *supra*.

claim was that legal conceptions were so malleable as to be equally deployable for both "conservative" or "liberal" outcomes in a given case;[62] (b) later, the claim came to be that to point to "ideology" as the source of closure is to fail to see that it, too, is semiotically indeterminate like law—and indeed, not only does ideology shape but it also is shaped by legal-policy arguments, with each of these contradictory blocs of argument jumbles helping to constitute one another.[63]

### *B. Law as Constitutive*

This claim of the (mutual, indeterminate) constitution of law by ideology leads us straight to the second key dimension of CLS, its extension of the Realist public/private critique to the claim of law as socially constitutive.[64] Now there is, as Reva Siegal points out, something of a paradox here: how can something that is indeterminate (law) be constitutive of something else (society)?[65] The answer, ultimately, is that that something else—society—is also indeterminate, and for similar reasons and in similar ways: two semiotically indeterminate forms mutually constituting each other. And along the way are two intermediate steps in the argument, both extensions or further developments of the Realist public/private critique: (a) first, the law disposes not only of classically "economic" *distributive* stakes (between "classes"), but also those between race and gender groups;[66] and (b) second, in addition to such classically "material" stakes, the law also disposes of "ideological" ones, those involving the *legitimation* of society via "consciousness."[67]

#### 1. The Critique of Liberalism

The CLS critique of legitimating consciousness centered, of course, on "liberalism" as an ideology. Here, two crucial distinctions need to be made: (1) first, between the critique of *legal* liberalism and liberalism *simpliciter;* and (2) within each, (a) an indeterminacy critique based on structured contradictions; and (b) an ideology critique based on motivated distortions. The critique of *legal* liberalism took aim at a series of related distinctions around which liberal thought in its legal form was said to pivot, including: legislation/adjudication, substance/process, public/private, state/market, act/omission, and—at bottom—politics/law. On the indeterminacy critique, each side of the opposing pair was "always already" contained in the other, so as to radically destabilize, if not simply collapse, the distinction between them. On the ideology critique, by contrast, the

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[62] DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 8-15 (2006) (1975) (discussing the malleability of Classical Legal Thought in the case of *Lochner*).
[63] KENNEDY, CRITIQUE, *supra* note 5 at 19-20, 133-134, 147-155, 289.
[64] The most extensive and influential discussion of the "fundamentally constitutive character of legal relations in social life" is likely Gordon, *supra* note 47 at 102-109 ("Blurring the 'Law/Society' Distinction") and 109-113 ("Law as Constitutive of Consciousness"). *See also* Davis & Klare, *supra* note 47 at 36 ("The relationships and identities that fill daily life […] are *always already legally constituted*.") (emphasis in original)
[65] Reva Siegal, Critical Legal Histories *and Law's (In)determinacy*, 70 STAN. L. REV. 1673, 1674-5 (2018).
[66] Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEG. STUD. FORUM 327 (1991). Davis & Klare, *supra* note 47 at 37-39.
[67] KENNEDY, RISE AND FALL, *supra* note 62; Gordon, *Critical Legal Histories*, *supra* note 47 at 109-113; Davis & Klare, *supra* note 47 at 39-41.

distinctions served to suppress one side of the polarity in each pair, in a manner that served to legitimate social inequities.[68] The target of the former? Reason. The target of the latter? Injustice.[69]

With respect to liberalism *simpliciter*—i.e., liberalism without modifiers, as a worldview—the critique took aim at three motifs seen to be central to all liberal thought: its individualism, its attempted neutrality, and its privileging of "negative" over "positive" liberty (or, closely related, of "formal" over "substantive" equality). Here too the critique could take the form of either an indeterminacy one that the relevant commitments were internally unstable or an ideological one concerning their role in papering over, and hence propping up, pervasive forms of social injustice or—a new addition here—alienating, anomic, or otherwise unattractive forms of social life.[70]

Either way, however, these comprehensive attacks on liberalism were soon enough disarmed or disavowed. In reply to the first, structured contradictions critique, the liberal could easily enough ask: what alternative can the critic offer to our attempts at muddling through by seeking to attenuate if not dissolve higher-order contradictions through lower-order contextual resolutions?[71] Indeed, what *is* the liberal if not someone deeply at home in precisely the sort of "ambivalence"[72] or "tragic choices"[73] that the critic is pointing toward?[74]

As to the second, ideology critique, the replies came fast *and furious:* (a) first, it was claimed, the critics had simply failed to get in their sights a proper target of critique, with their portraits of liberalism being unrecognizable because either too broad—ranging over too many disciplines or authors[75]—or, when restricted to a narrower compass, simply inaccurate (more

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[68] For a succinct illustration of the contrast, *compare* Duncan Kennedy, *Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); *with* Morton J. Horwitz, *History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

[69] Thus, with respect to the process/substance distinction, *compare* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, HARV. L. REV. (1976) *with* Morton J. Horwitz, *The Rule of Law: An Unqualified Good?* 86 YALE L. J. 561 (1977). With respect to the efficiency/distribution distinction, *compare* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) *with* Morton J. Horwitz, *Law and Economics: Science or Politics?* 8 HOFSTRA L. REV. 905 (1980). With respect to the formal/substantive equity distinction and liberal rights discourse, *compare* KENNEDY, CRITIQUE, *supra* note 58 at ch. 13 (The Critique of Rights) *with* Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. REV. 393 (1988). With respect to the legislation/adjudication distinction in the constitutional context, *compare* Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 NOVA L. REV. 909 (1995) *with* Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality without Fundamentalism*, 107 HARV. L. REV. 30 (1993). Finally, with respect to the law/politics distinction, *compare* KENNEDY, RISE AND FALL, *supra* note 62 *with* HORWITZ, TRANSFORMATION II, *supra* note 59.

[70] For perhaps the single most influential work of this sort, encompassing both forms of critique pitched at their most systematic level, *see* ROBERTO MANAGABEIRA UNGER, KNOWLEDGE AND POLITICS (2nd ed. 1984) (1975). For illustration of work in the first vein, *see* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). For the second, *see* Peter Gabel, *The Phenomenology of Rights Consciousness and the Pact of Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

[71] *See* Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, *in* 28 NOMOS: JUSTIFICATION 71 (1986). It is worth emphasizing that Michelman was writing here as a liberal highly *sympathetic* to the Crits—indeed, basically as a fellow-traveler—and *not* in the vein of incomprehension of or hostility to the critique. For the latter two registers, see, respectively, Philip Johnson, *Do You Sincerely Want to be Radical?* 36 STAN. L. REV. 247 (1984); Paul D. Carrington *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

[72] *See* LIONEL TRILLING, THE LIBERAL IMAGINATION (1950).

[73] *See* GUIDO CALABRESI AND PHILIP BOBBITT, TRAGIC CHOICES (1978).

[74] *See* Arthur Leff, *Memorandum (Review of* UNGER, KNOWLEDGE AND POLITICS), 29 STAN. L. REV. 879 (1977).

[75] *See* William W. Ewald, *A Critical Legal Study*, YALE L. J. (1987). I return to Ewald's critique below at V.B.

"forgery than caricature"[76]); (b) second, when a properly focused target *was* specified—typically, liberal *political philosophy*—the critique was held simply to misfire or fail really to wound, with the critic providing no alternative conceptions of the right and the good to address the questions of political morality being faced by the liberal.[77] Two emblematic moments. One was a confrontation between Mark Tushnet and Ronald Dworkin on the floor of the AALS, in which Dworkin systematically dismantled Tushnet's characterization and critique of liberal political philosophy.[78] Around the same time (in fact shortly before) Roberto Unger wrote a 1983 Postscript to his 1975 *Knowledge and Politics*—the most ambitious of the CLS critiques of liberal thought as a whole, encompassing not only legal and political but also social theory, and epistemology. In it he repudiated its ambition of "total critique," and now embraced the label "super-liberalism" over "anti-liberalism."[79] To be sure, some critical holdouts remained,[80] and the critique *did* provide some stimulus for important post-liberal epistemological and normative projects in law.[81] But, by and large, the comprehensive critique of liberal theory did not take and was dropped.

2. The Critique of the Concept of Capitalism

If the critique of liberalism (*sans* modifiers) was called off, the critique of capitalism was never on to begin with. At work here was a combination of the indeterminacy and constitutive claims—on steroids. The nub of the argument was that just as legal reasoning is indeterminate, so too are legal concepts, and since these are indispensable to defining the institutional order of an economy, abstract conceptions of that order will be hopelessly indeterminate. Put simply, the claim was of the "legal indeterminacy" of the central concepts and hence institutions (notice the leap) of capitalism.[82] Stripped to its core the argument ran as follows: (a) central to capitalism is the concept and institution of "the market"; (b) yet the market simply is, or least cannot exist without, the legal institutions of "private property" and "freedom of contract"; (c) these higher-order abstractions are radically indeterminate as to their lower-order implications for concrete legal choices; and (d) these concrete legal choices are constitutive of the actual institutional stuff of any really-existing market. Hence, to speak of "capitalism" is to speak of an unhelpful—indeterminate—abstraction.[83] An important partial exception here was the early work of Mark Tushnet, whose bracing critique of liberal constitutional thought was devoted to showing how such thought skirted what he asserted

[76] RONALD DWORKIN, LAW'S EMPIRE 440-441 (1986) (discussing Mark Tushnet).
[77] For misfiring, *see* DWORKIN, *id.* at 441-444 (discussing Allan Hutchison). For failing really to wound, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 204, 337-338 n. 46 (1986). Note that the latter is a *Crit's* assessment of Unger's critique of Rawlsian political philosophy.
[78] For the print version, *see* DWORKIN, *supra* note 76. Professor Tushnet subsequently downgraded the theoretical ambitions of CLS arguments in this vein, from political philosophy to "informal political theory." *See* Mark Tushnet, *Rights: An Essay in Informal Political Theory*, 17 POL. & SOC'Y. 403 (1989); and Tushnet, *Critical Legal Theory, supra* note 60 at 102. I return to Dworkin's critique below at V.B.
[79] UNGER, *supra* note 70 at 338-340. I return to Unger's renunciation below at V.B.
[80] *See* Peter Gabel, *Critical Legal Studies as Spiritual Practice*, 36 PEPP. L. REV. 515 (2008).
[81] *See* Frank I. Michelman & Margaret J. Radin, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988).
[82] ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 7-9 (2015).
[83] For key works in this vein, *see* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567-570, 663-665 (1983); Gordon, *Critical Legal Histories supra* note 47 at 82-3, 102-09; Kennedy, *Stakes of Law*, *supra* note 66 at 332-334, 338-341; KENNEDY, CRITIQUE, *supra* note 58 at 281-289.

was *the* central question of political theory: "whether justice demands capitalism or socialism?"[84] A fleeting moment, rarely to be glimpsed again.[85] More representative—and influential—was Roberto Unger's 1987 declaration in *Politics* that we have to "find a way to think generally about the history of production and power without having to rely on concepts like 'capitalism.'"[86]

Whatever their other differences, then, on this one front the Crits were united: "capitalism" must go. Not as a social reality of course—it doesn't exist—but as an analytical concept.[87]

## III. CRITIQUE OF THE CRITIQUES: AN LPE AGENDA

The following two Parts will advance two fundamental sets of claims. First, as to law, the *indeterminacy* critique is deeply misguided and should be jettisoned *in toto*, be it for legal analysis of doctrine, concepts, or policy. The apt critique of formalism in law is a *dereification* one, which comes with its own constructive upshots. Second, in political economy, *legal constructivism*—either in the form of the Realist public/private critique or the CLS law-as-constitutive claim—is very limited both critically and explanatorily, carrying over the blind spots of liberal social theory that it accepts as a form of internal critique. The apt critique of individualism in political economy is a *denaturalization* one, which points not to "the state" but, rather, to *irreducibly social relations.*

In respect of both critiques, the argument takes a parallel form: sharing (indeed, following) what I take to be the animating impulses of the Realist and CLS critiques—namely to dereify law and to denaturalize political economy—I argue that in both cases the critiques founder on their character as *internal critiques*, in the one case internal to formalist premises in legal theory, in the other internal to liberal premises in social theory. And in both cases the tools for forging more

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[84] Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 696 (1980) ("Someone who learned political philosophy […] from reading law reviews, would be surprised to learn that the central issue in political philosophy today, as it has been for at least a century, is […] which social-economic system, capitalism or socialism, justice demands.") Soon after, however, Tushnet himself adopted the Crit indeterminacy and constitutive critiques of the concept of capitalism. *See* Mark V. Tushnet, *Marxism as Metaphor* 68 CORNELL L. REV. 281 (1983); Mark Tushnet, *Critical Legal Studies: A Political History*, YALE L. J. 1515, 1526-1529 (1991).

[85] *But see* Fisher, *supra* note 81 at Part V (advancing a "utopian" theory of copyright) *and* William W. Fisher III, *The development of modern American legal theory and the judicial interpretation of the Bill of Rights, in* A CULTURE OF RIGHTS 266, 310 (Michael J. Lacey and Knud Haakonssen, eds.) (characterizing the "utopian" theory in Fisher, *id.* as a "version of egalitarian socialism.")

[86] ROBERTO MANGABEIRA UNGER, PLASTICITY INTO POWER, VOL. 3 OF POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY 69 (1987). *See also* Samuel Moyn, *Thomas Piketty and the Future of Legal Scholarship*, 128 HARV. L. REV. 49, 51 (2014) (citing Unger in support of the proposition that "there is no such thing as capitalism").

[87] The one *possible* or at least *partial* holdout on this front—as opposed to Gordon, Kennedy, Tushnet, and Unger as cited above—is Morton Horwitz. Thus if we compare TRANSFORMATION I, where the entire story hinges on the shift from a precapitalist to capitalist economy in 19th century America, with TRANSFORMATION II, where "capitalism" rates only a single mention in the entire volume, it seems Horwitz too ultimately reached the same destination as the others. Reinforcing this is his documentation of the struggles of Mark Tushnet first to refine, then ultimately to abandon, any distinctively Marxian analysis of law by 1983, efforts that "influenced [Horwitz's] own work as a practicing historian." Morton J. Horwitz, *Mark Tushnet as Legal Historian*, 90 GEO. L. J. 131, 131-135 (2001). But on the other hand, an abandonment of Marxian analysis is *not*, in fact, the same as an abandonment of the value of "capitalism" as an explanatory concept—despite how easily the two may be elided, see *infra* V.C. Nor is a shift in substantive focus between books—from understanding changes in legal doctrine to those in legal theory—itself decisive, especially since the one mention of capitalism in TRANSFORMATION II is hardly skeptical, and indeed could hardly be more categorical: "the issues generated by industrial capitalism had formed the central agenda for all categories of social thought." TRANSFORMATION II, *id.* at 250. For more on the complex case of Horwitz *see infra* V.C.

powerful arguments lie close to hand, in recovering submerged aspects of the Realist and critical traditions in legal and social theory. These alternative strands prove more powerful in two respects: as critiques they go deeper in their analysis and repudiation of formalist and individualist premises, and they also furnish the constructive tools for alternative explanatory and programmatic frames.

The unifying thread across both cases—the critique of law and of political economy—is that the method of critique is always already a method of construction. To think that the two may be separated is perhaps *the* fundamental flaw in the dominant strands of Legal Realism and CLS.

The arguments of the following two Parts are highly theoretical. And so it may help in orienting the reader to identify at the outset what I take to be some of their central concrete stakes, in terms of implications for key aspects of a Law and Political Economy agenda today.

Law and Political Economy (LPE), as I understand it, is driven principally by the twin concerns of the ideological hegemony of neoliberalism in law and policy, and the social reality of late American capitalism.[88] By "neoliberalism" I mean something quite specific: an ideology and associated political project that responded to the mid-20th century critique of market naturalism in theory and laissez-faire in practice—by institutionalist, welfarist, and Keynesian economics in theory and the New Deal in practice—with a program of instituting market fundamentalism in theory and privatization of the state in practice.[89] By "late American capitalism" I mean to signal (1) how capitalist social relations and dynamics,[90] (2) have from their onset in the U.S. been co-constituted by slavery and its legacy,[91] and (3) as of late are undergoing dramatic transformations owing principally to: (a) a prolonged systemwide crisis in traditional profitability resulting in financialization, rentier-ism, and dramatic inequality;[92] (b) a shift from an industrial core to a data, care, and precariat economy; and (c) ecological catastrophe. Finally, I take a third defining feature of LPE to be—alongside the foregoing critical concerns—a programmatic one: the aspiration to institute socioeconomic transformations in the direction of greater "democratic equality."[93]

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[88] What I say above regarding the conception of Legal Realism offered here (*supra* note 46) also applies to the present conception of LPE, namely that this is *not* meant as an accurate description of the writings of a group of scholars, who may be quite disparate in their concerns and claims, but rather as a *conceptualization* of what I take to be central and significant themes, which others are of course free to challenge on grounds of either their centrality or significance. For important programmatic statements of LPE as a distinctive approach to law, *see* Britton-Purdy et. al, *supra* note 1; Harris & Varellas, *supra* note 1; McClusky, et. al, *supra* note 1.

[89] I elaborate on this conception of neoliberal political economy—locating its roots in the work of Hayek and Coase and situating its relation to its predecessor political economies of classical liberalism and welfarism—in Talha Syed, *Law and Political Economy Today* (draft). For influential treatments of neoliberalism as an ideology and its history, *see* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2006); PHILIP MIROWSKI AND DIETER PLEWE, EDS. THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (2009); QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM (2018); COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM (2020). The present conception lies closest to that of CROUCH, *id.*

[90] *See infra* V.C.

[91] *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION (1935); ERIC WILLIAMS, CAPITALISM AND SLAVERY (1944); BARBARA J. FIELDS AND KAREN E. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE (2014); John Clegg, *A Theory of Capitalist Slavery*, 33 J. HIST. SOC. 74 (2020).

[92] *See* ROBERT BRENNER, THE ECONOMICS OF GLOBAL TURBULENCE: THE ADVANCED CAPITALIST ECONOMIES FROM LONG BOOM TO LONG DOWNTURN, 1945-2005 (2006); Brenner, *Escalating Plunder*, II/123 NEW LEFT REV. 5 (2020).

[93] *See* Part IV.B.2, *infra*.

My present concern is not to further develop these themes here.[94] Rather, it is to use them as points of contact between the critiques offered below of Legal Realism and CLS and the intellectual and political concerns animating a revamped analysis of law and political economy.

A first point of contact concerns *neoliberalism*. A central theme, again, of LPE from its outset has been to challenge the dominance of neoliberal discourse in law and policy.[95] Indeed, the point can be put more forcefully, and in fact has been by Corinne Blalock in a powerful article arguing that it was precisely its failure even to identify, much less to challenge, the hegemony of neoliberal ideology that marked out a signal lacuna of CLS (and, hence, helped spur LPE).[96] The problems here are three-fold.[97] First, even to speak of neoliberal ideology—or of a discourse with a specific conceptual structure—is immediately to invite indeterminacy-based Crit responses querying the "coherence" of the discourse, advancing internal critiques of its "contradictions," and suggesting that, at most, it might be a *langue* within which many different *paroles* can take place.[98] Second, against the claim that "market fundamentalism" lies at the heart of neoliberal ideology, comes the reply that "the market" is anyway a legal construct, and a highly indeterminate one at that. And so twin forms of indeterminacy—toward both *discourses* and *institutions*—hobble from the outset any attempt to take neoliberalism seriously. Finally, there is an irony here: it is likely in private law more than any other academic field that neoliberalism has exercised hegemonic sway, in the form of law and economics.[99] And here too the Crit responses—an indeterminacy critique of law and economics combined with (hopeful) denials of its dominance in law[100]—are unavailing.

The remaining two points of contact are of course *capitalism* and *democratic equality.* All talk of *capitalism*, as we have seen, will likely be met with skepticism owing to a combination of the constitutive and indeterminacy claims.[101] As for *democratic equality*, the indeterminacy view

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[94] I attempt to do a *small* part of that in Talha Syed, *Law and Political Economy Today* (draft).

[95] See the 2014 "Special Symposium on Law and Neoliberalism" in *Law and Contemporary Problems* edited by two of the co-authors of Britton-Purdy, et. al, *supra* 88, (Jed Britton-Purdy and David Grewal) and featuring a contribution by a third (Amy Kapczynski), as well as by many others central to LPE as a scholarly and activist network today. On the hegemony of neoliberalism, the classic statement remains that of Perry Anderson: "Ideologically, the novelty of the present situation stands out in historical view. It can be put like this. For the first time since the Reformation, there are no longer any significant oppositions—that is, systematic rival outlooks—within the thought-world of the West; […] Whatever limitations persist to its practice, neo-liberalism as a set of principles rules undivided across the globe: the most successful ideology in world history." Perry Anderson, *Renewals* II/1 NEW LEFT REV. 1, 13 (2000).

[96] Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROB. 71 (2015).

[97] The following is *my* diagnosis, and not to be blamed on Blalock, *id*., although I believe it is compatible with hers.

[98] It should be noted that Duncan Kennedy has recently started using the term "neoliberal" while denying that it is an ideology or "philosophy" with any "coherent" content. Duncan Kennedy, *A Left of Liberal Interpretation of Trump's 'Big' Win, Part One: Neoliberalism*, 1 NEV. L. J. FORUM 98 (2017). More importantly, the concept and its associated periodization—i.e., the claim of a sea change in the structure of American legal, economic, and policy discourse from the 1980s on (with its intellectual roots going back much earlier, and its enabling socioeconomic conditions dating to the 1970s' economic crises)—is entirely absent in the periodization and analysis of what is likely the most influential CLS account of legal consciousness in the last half century: Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000, in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19-73 (David Trubek and Alvaro Santos, eds. 2006). I discuss that analysis and periodization in Syed, *LPE Today, supra* note 89.

[99] I discuss the neoliberal conceptual structure of law and economics, as well as its dominance in private law fields over the past few decades, in Syed, *Law and Political Economy Today* (draft).

[100] *See* Duncan Kennedy, *law-and-economics from the perspective of critical legal studies*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (Peter Newman, ed. 1998) (indeterminacy critique); Fisher, *American Legal Theory*, *supra* note 30 at 34, 42-45, 59 (indeterminacy critique and denial of dominance).

[101] *See supra* text accompanying notes 83 to 86.

erects a formidable barrier—of constant hesitation if not outright skepticism—against any efforts at elaborating its commitments in dialogue with an institutional program for their implementation.

In sum, on each of four central fronts, the current Realist/CLS legacy seriously hobbles key parts of an LPE agenda, those of: (1) *explanatorily*, understanding the social structure and attendant dynamics of late American capitalist relations; (2) *critically*, delimiting the conceptual structure and political valence of neoliberal discourse; (3) *evaluatively*, articulating commitments of democratic equality to inform social transformation; and (4) *programmatically*, specifying the distinctive institutional architecture of markets so as to break out of market fundamentalism.

How did this come to pass? To roadmap the following two Parts, fateful moves were made in three related, but distinct, areas. First, in *law*, the method of internal critique adopted the same dubious premises of mystified authority as its formalist target, so as to confuse what is a practical debate about political values as a cognitive debate about the meaning of words. Giving us the "indeterminacy" critique. But the meaning of "words" is neither here nor there. Meanwhile, *concepts* are not indeterminate quasi-things but, rather, simply tools of analysis. As for values, conflict over them is not a cognitive but a practical matter in which, again, "determinacy" plays no role. The indeterminacy critique is a confusion and red herring on all fronts. Second, this same set of confusions then migrated over to the analysis of *ideology* or *political theory* in general, where again the method of internal critique meant adopting rather than evaluating the premises of its liberal target, so as to result in the "internal contradictions" critique of liberalism. But there are no serious cognitive contradictions in liberal theory. What there are, perhaps, are *competing or even conflicting values*, but then many liberals are the first to admit that, some even to *insist upon* it.[102] The question is, what is their practical upshot?[103] Much more promising than an internal contradictions critique is an *ideology critique* of liberalism, one that points to distorting limitations in liberal value commitments—but to successfully carry that out, I suggest below, requires meeting liberals on their own ground of normative debate.[104] Thus, ideology critique as meant here turns out to be continuous with simply doing political theory or philosophy.[105]

Finally, and for LPE purposes perhaps most importantly, when it comes to *social theory*, the upshot of the Realist/CLS critiques has been to install a disabling form of *legal constructivism* in social analysis, wherein the dynamics of political economy are analyzed (primarily if not solely) through the prism of legal concepts. Since these concepts, in turn, are taken to be indeterminate,

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[102] For those admitting the point, see references in notes 71 to 74. For a leading case of insisting upon it, see Isaiah Berlin, *The Pursuit of the Ideal* and *Two Concepts of Liberty, in* ISAIAH BERLIN, THE PROPER STUDY OF MANKIND 1-16, 191-242 (1996).

[103] This is *not* to deny the value of extending the notion of "contradiction" from its *logical* sense to an analysis of either *phenomenological* or *sociological* contradictions. *See* JON ELSTER, LOGIC AND SOCIETY (1978) (defending as cogent the use of "contradiction" in these senses by a line of analysis inaugurated by Hegel and Marx). And so nothing here should be taken as criticism of the works of Unger and Kennedy for pioneeringly picking up on that tradition of analysis. But in the case of analysis of liberal *values*, the question of practical upshot remains. And if the target is instead liberal *concepts*, then, I believe, the analysis *is* misguided, suffering from the same reification of concepts as in the case of the critique of formalism in law. See discussion below at IV.B.1.

[104] For the difference between the "internal contradictions" and "ideology" critiques of liberalism, see *supra* notes 68 to 69 and accompanying text. For discussion below of how ideology critique is continuous with (*not* "the same as") normative argument, see *infra* note 140 and IV.B.2.

[105] I do not mean to imply that "political theory" and "political philosophy" are just the same, but I will not undertake to spell out their difference here.

the result is a highly *disintegrative* form of social analysis, indistinguishable from anti-theory.[106] Four related culprits were involved here, in an intricate story. First, the Realist internal critique of classical liberalism put in place no constructive analysis of political economy, except to say "the state." Similarly for the CLS expansion of the public/private critique into the law-as-constitutive claim: as with Realism, so with the Crits, the main response to naturalizing liberal individualism in social analysis was "the state." And hence what slips in through the back door is a reassertion of neoclassical economics, now wedded to post-Realism about law. Why? Because any attempt to carry out such a "sovereign constructivist" view of society would stumble on three major obstacles. First, the legal concepts deployed by state actors in making their legal decisions were, of course, held by the Crits to be indeterminate. Second, in what is a crucial leap, the purported *internal* indeterminacy of legal *concepts* was often linked with a view of the *external* indeterminacy of legal *institutions*—i.e., not only are legal decisions *conceptually* under-determined, they are also *sociologically* under-determined in the sense of not being explicable by a systematic analysis of external social forces shaping them.[107] Why? A two-fold explanation: (a) first, a migration of the (mistaken) indeterminacy view from legal concepts to explanatory concepts in social theory more generally, one aided by the widespread (and correct) view that functionalist Weberian and Marxist analyses had been largely discredited;[108] (b) second, the clouding effect of the law-as-constitutive

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[106] Or what Roberto Unger calls "ultra-theory," as one of the two main options that come out of the CLS critique, with the other being "super-theory." ROBERTO MANGABEIRA UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK, VOL. 1 OF POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY 9, 144, 165-169 (1987). Unger declines the former route—marked by an abandonment of any explanatory ambitions or systematic programmatic ones—and embraces the latter, which seeks to retain such ambitions, but now in a revised, chastened, form after the critique of naturalizing liberal and deep-structuralist Marxist theories. But in V.A.2 below, I suggest that his variant of post-positivist, post-Marxist social theory of "formative social contexts" does not escape the charge of being basically a loose taxonomic assemblage ("descriptivism"), with few underlying generative factors identified and hence little to no explanatory or programmatic bite. For a penetrating sociohistorical critique of Unger's project in *Politics* along these lines (one that also registers generous appreciation of its novelty and scope), see Perry Anderson, *Roberto Unger and the Politics of Empowerment*, I/173 NEW LEFT REV. 93 (1989). I hasten to add that, as discussed in IV.B.1 below, the analysis offered here is deeply indebted to Unger's work, while taking it in a (very) different direction.

[107] Here it is important to note that there were discordant notes: alongside the strand of sociological indeterminacy represented by Duncan Kennedy and Robert Gordon, a second strand of sociological determinacy may be associated with Morton Horwitz and Mark Tushnet. *See* notes 59 to 60. However, as discussed below at Part V.C, this second strand also struggled under the weight of the generalization of the indeterminacy critique—i.e., its migration from the analysis of legal concepts to analysis of legal institutions to analysis of societal dynamics at large—owing in part to the leap from conceptual to sociological indeterminacy, and in part to its sense that the only theories available for sociological analysis were Weberian and Marxian functionalisms that had been largely discredited on their own terms. The following passage from Professor Tushnet—discussing "the implications of the analysis of indeterminacy for social theory itself"—provides a telling example of the complete leap from conceptual to sociological indeterminacy:

> Classical social theory had not paid much attention to questions of law, yet legal terms—in particular, "ownership of private property"—played a large role in the fundamental structure of Marxist and, to a lesser extent, Weberian social thought. *If those terms were*, as we believed them to be, *indeterminate*, *the conclusions of classical social theory* regarding the inevitable triumph of the working class or of the 'iron cage' of bureaucratic society *rested on sand*. (emphasis added)

Tushnet, *A Political History, supra* note 84 at 1527. The leap is, frankly, quite remarkable and likely best explained by Tushnet himself a couple of sentences later: "Put a different way, *the indeterminacy thesis*, *developed in the specific context of legal doctrine*, *created an atmosphere* in which the deterministic leanings of classical social theory were suspect." *Id.* at 1527-1528 (emphasis added). Indeed.

[108] For CLS works developing, crystallizing, or registering critiques of functionalist Weberian and Marxist theories, see Gordon, *Critical Legal Histories, supra* note 64 at 57-100; UNGER, SOCIAL THEORY, *supra* note 106 at 87-120; HORWITZ, TRANSFORMATION II, *supra* note 5 at vii-viii; Tushnet, *Political History*, *supra* note 84 at 1526-1529. I return to the issue in V.C.

claim on any attempt to specify "extra-legal" social factors, since these were also taken to be shaped by legal decisions.[109] Finally, into the explanatory and programmatic void left by such legal constructivism—since it is unlikely many believe you can actually understand social dynamics or reshape social arrangements with such an exclusive, voluntarist focus on agents of the state or decisions at law—what has tended to re-enter are liberal explanatory frames: pluralist political science and neoclassical economics. Hence, legal constructivism oscillates between a form of descriptivist anti-theory or a slide back into, as the default analytic frame available, neoclassical economics, now in the form of a "left-wing law and economics" that marries neoclassical analysis of the economy—though now with a strong dose of indeterminacy about efficiency claims—with post-Realism about law.[110] Yet the problem with neoclassical price theory is *not* its indeterminacy but, rather, its *reification* of social relations. And sound analysis of social relations is not troubled by the false problem of conceptual indeterminacy nor has any difficulty, as a matter of explanatory cogency, leaving functionalism and defusing exaggerated claims of law's constitutive character.[111]

The next two Parts will develop these three sets of claims—in legal, political, and social theory—as follows. First, in law, the indeterminacy of concepts is a non-starter while conflicts in values need to be confronted on their own ground. Developing these points (based on overlooked strands of Realism) not only results in a more thoroughgoing critique of formalism in law, but also yields a constructive account of the distinctive contribution of legal analysis to social theory. Next, with respect to the relationship between legal reasoning and liberal political theory, while Crit internal contradictions critiques of both legal liberalism and liberalism *simpliciter* are non-starters, the Crit ideology critique should be built upon, by developing a systematic account of liberalism's (non-contradictory) structure, to set up an encounter with an alternative political morality, that of democratic equality. Finally, with respect to social theory and political economy, Part V will first set out some key critical blind spots of the Realist/CLS public/private critique—its limitations as a challenge to mainstream naturalizations in political economy—and then set out its even more significant explanatory limits. Next, building on the earlier account of the distinctive structure of law as (one part of) a system of social relations (based on a reconstructed Hohfeldian analysis with no role for indeterminacy), it will offer an account of market social relations more generally (building on a reconstructed Polanyian analysis with no role for legal constructivism). Responding to objections from conceptual indeterminacy, functionalism, and law's constitutive character, I will argue for the explanatory and programmatic indispensability of a conception of capitalism as "market-dependent" social relations. One that enables us to come to grips with central ills such as

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[109] Here the leading work is Gordon, *Critical Legal Histories*, *supra* note 47 at 102-113. *See also* Tushnet, *Marxism as Metaphor*, *supra* note 84 at 284-285, 288-290. I return to this issue in V.C.

[110] *See* Duncan Kennedy, *Left-Wing Law and Economics Essays* (self-published reader 1995). By "left-wing law and economics" I mean a Ricardo/Hale focus on distributive effects via law combined with mainstream—classical or neoclassical—economic analysis. *See infra* V.B (distinguishing between three traditions of political economy: (1) Smithian, analyzing markets in individualist terms, with a focus on allocation and its efficiency; (2) Ricardian, analyzing markets in state terms, with a focus on distribution and its equity; and (3) Polanyian, analyzing markets as social relations, with a focus on production and substantive outcomes, ones not reducible to the efficient satisfaction of subjective preferences or their fair distribution.)

[111] To forestall possible misunderstanding, I hasten to add that the challenging of strong claims of law's constitutive role is not done for the sake of replacing "law" with "material" factors, be it technological development or economic interests. Rather, as Part V will elaborate, the alternative explanatory frame here is *social relations*, which are no less political than law. The point is that such social relations—when properly conceived in terms of their institutional and discursive forms—provide greater explanatory insight into social dynamics, as well as greater programmatic leverage on how to transform them, than the mere (liberal) invocations of "law" or "the state" added to "individuals."

dramatic inequality and ecological crisis—driven largely by the disembedding of market social relations from non-market ones—while also providing orientation for systematic transformation, in the direction of shifting from market-dependency toward market-independent social relations.

To aid navigation, here is the central thread of the two Parts that follow: (1) indeterminacy was a mistaken critique in law, (a) especially for concepts; (b) but also for values; (2) its migration to political theory as a critique of liberalism founders in both its (a) conceptual and (b) value facets; and (3) its further migration to social theory, and marriage there with the law-as-constitutive claim, triply founders: (a) there is no more of a conceptual indeterminacy problem in social theory than in legal or political theory; (b) in any case, it is an unwarranted leap to go from conceptual to explanatory indeterminacy in social analysis; and (c) finally, while functionalist social theories have problems of their own (having nothing do to with conceptual indeterminacy, however), a non-functionalist form of social relations analysis provides greater explanatory and programmatic purchase than a legal constructivist anti-theory backing into left-wing neoclassical analysis.

## IV. THE CRITIQUE OF LAW AND THE LAW/POLITICS DISTINCTION

The internal critiques of formalism, both of Legal Realism and of CLS, are based on a *deep mistake*. Indeed, three. It is only against the background of these mistakes that the critique from indeterminacy can proceed as it does in CLS and much of the Realist canon. The first is a mistake about the *self-evident authority* of the positive legal materials. The second is a mistake about *given meanings* for the terms contained in such materials. And the third is a mistake about *fixed meanings* of such terms, or of legal concepts in general. Taken together, these mistakes amount to a *mystification of authority* and a *reification of meaning*, errors shared by both formalists *and* their internal critics. To break out of them, we need to reconstruct a *dereification critique* of legal reasoning, out of three strands of the work of Holmes, Hohfeld, and Felix Cohen that have been either submerged, mischaracterized, or simply missed entirely.[112]

The first strand—taken from Holmes—is to insist that no piece of legal parchment has self-evident authority: for any given "source" of law we must always first ask, *before* inquiring into *what* its meaning is, *why* we are taking it as (provisionally, partly) authoritative to begin with. Only with a *practical* purpose in hand for how a source matters can we then move on to the *cognitive* task of determining its meaning. Second, as Cohen drove home, the *meaning* of "words" is *never*

[112] It is important to be clear at the outset that my aim here is a *reconstruction of aspects* of the work of Holmes, Hohfeld, and Cohen—it is *not* to "get them right" as a matter of descriptive fidelity to their texts (or intentions or contexts). My aim is to construct what I take to be especially powerful arguments, the sources of which lie, I believe, in their writings. But it is the merits of the arguments themselves that principally matter here. Having said that, as a secondary matter, it also the case that I *do* believe these themes—alongside others no doubt, including perhaps ones in tension or even contradiction with them—*are* present in the texts I specify *and* that, as the text above the line states, in the secondary literature they have been either submerged (in the case of Holmes and *Path of the Law*), mischaracterized (in the case of Cohen and *Transcendental Nonsense*) or simply missed (in the case of Hohfeld's two *Fundamental Conceptions* articles). And so I provide the textual bases for that—both in their writings and in the secondary literature—as I proceed. This is a secondary matter because my main aims are to crystallize the integrated dereification critique I present here, not to insist that its component parts have gone unnoticed. The secondary point is simply that these parts have not been seen for what they are—as components of a very distinct critique of legal reasoning—and instead been either missed or assimilated into received views of "external" and "internal" critiques. For leading examples of the assimilation of all Realist critiques into variants of the internal and external ones distilled in Part I, *see* FISHER ET. AL, *supra* note 5 at 164-65; Dagan, *supra* note 5 at 612-17; *and* Leiter, *supra* note 24 at 3-6.

*given*—whether as "plain" or "common" or "core"—but rather *always constructed* as "concepts," according to purpose and context. We are not to "look" for something "out there" but rather to *think* about *our aims*. Finally, and most fundamentally, Hohfeld teaches that the meaning of concepts is *never self-contained*, but *always relational*, and hence never *fixed* but always *fluid*. Hohfeld is best understood *not* as showing that concepts are "indeterminate"—as if they have some stand-alone and fixed "core" meaning, but one that may then be too abstract or "open-textured" at the margin—but rather as showing that concepts are always *forged*—in relation to other concepts—with the distinctions drawn in light of whatever best serves our epistemic and practical purposes at hand. Consequently, to speak of the indeterminacy of a concept—as if it is some "thing" out there with "given" and "fixed" (if fuzzy) meaning—is to be in the grip of reification.[113]

The upshots of this dereification critique of formalism—*and* of the internal critiques that share its premises—are three-fold. First, an immense amount of legal "reasoning" is simply riddled with errors, involving the mystification of authority—a fetishism of paper—and the reification of meaning. The point is not to adopt these error-riddled premises and then argue from "within" them to see if one can "destabilize" fetishized "sources" and reified "words" with "given" meanings. As if this were some sort of game. Law is not a game. Law is *not* baseball. Law is about structuring social life by weighing competing substantive claims in light of considerations of procedural equity and administrability. To think it anything else—i.e., to think of it as some rules "out there," with "words" having "given" meanings that must be divined (or destabilized)—is to seek to replace what is always, ultimately, a question of purposes and values with a pseudo-cognitive operation. Thus, unlike the internal critique—which plays along with the formalist game but shows that it is (often) unworkable—the dereification critique simply says formalism is *always* pointless. Indeed, a pernicious mystification. Consequently, the critique has revisionary implications for the practice of legal argument: to rid legal analysis and reasoning of all such mystifications and reifications.

Flowing out of these critical implications are two constructive upshots, one regarding the role of *concepts* in legal analysis, the other the role of *values* in legal reasoning to decide cases. The first is the more important here. And this is that a reconstructed Hohfeldian analysis not only dispenses with *any* role for conceptual indeterminacy in its critique of formalism, but also and relatedly, furnishes the tools for a constructive analysis of the distinctive architectures of different fields of law, with respect to both their distinctive subject matters and the distinctive institutional tools at their disposal—without any reification. Regarding doctrine and concepts, then, the better Realist critique is not the internal one that formalism is often unworkable, but the dereification one that it is always simply pointless, an evasion of what matters, namely: forthright conceptualization of the subject matter at hand, the institutional tools at our disposal, and the value stakes they raise.

Turning to values—or the role of "purposes, policies, and principles" in legal reasoning—the apt critiques are not the internal "structured contradictions" Crit ones, be it of legal reasoning

[113] By "reification" I mean of course the false hardening—or *thingification*—of something that is not a "thing." In modernity, I take dereification analysis to have been developed principally by two lines of work: (1) in one, the focus is on reification of social relations; (2) in the other, on reification of conceptual relations. For the former, *see* KARL MARX, CAPITAL, VOL. 1, ch. 1, bk. 4, 163-177 (1867) ("The Fetishism of the Commodity and Its Secret"); I.I. RUBIN, ESSAYS ON MARX'S THEORY OF VALUE, ch. 3, 21-30 (1923) ("Reification of Production Relations among People and Personification of Things"). For the latter, *see* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 65-70 (Bally et. al, eds., W. Baskin, Trans. 1959) (1915); Cohen, *Transcendental Nonsense, supra* note 28. The two lines are integrated in the work of Hohfeld. For elaboration of this latter point, *see infra* section IV.B.2.

as consisting of opposed pairs of stereotyped argument bites or of liberal legalism as afflicted with high-level internal contradictions. The latter, as discussed above, simply doesn't bite,[114] while the former is premised on a mode of legal reasoning that the dereification critique precisely targets for revision: namely, a *game* where participants, feeling constrained by various "given" materials (including now "funds" of policy arguments), mechanically mobilize perceived "authoritative" sources as a distraction from making either mental contact with, or explicit to others, the genuine grounds of decision. The internal critique of policy in law is the artifact of adopting reifying formalist premises. This is not to say that when we turn to consciously and explicitly deliberate about the genuine grounds for legal decisions, there may not be competing or even conflicting values. But that values may conflict is not some pseudo-cognitive problem of "contradiction" but, rather, a practical problem requiring resolution—one that the critic can no more wash their hands of than anyone else. The internal critique of values is a misplaced migration of the indeterminacy view from concepts (where it is a mistake) to values (where it is an evasion). None of this is to say that liberal political morality merits no critique. Only that the better critique is to build on the Crit ideology critique, but seeing that now as continuous with political theory or philosophy (in making normative arguments itself), by developing it further in terms of both diagnosis and prescription.[115]

The first of these constructive arguments go to analysis of legal *concepts* and *institutions*—or the distinctive *forms* of law. The second go to analysis of legal *values*—or the distinctive *means* of law. Together, they furnish an account of the relation between law and politics: law is *a form of* politics, using particular *means.* The final section of this Part elaborates on this view of the law/politics distinction, situating it vis-à-vis the two main CLS conceptions of the distinction (alongside a third, unlikely held by any Crit, that simply collapses it), as well as Ronald Dworkin's.

### *A. The Dereification Critique: Formalism is (Always) Pointless*

When Holmes thundered in *Path of the Law* that "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," he inaugurated modernity in American law.[116] With this one line Holmes fundamentally turned the tables on the formalist: no piece of legal parchment is self-justifying. Before we ask *what* it means, we must ask *why* do we care. To fail to do so is a fetishism of paper, resulting in a mystification of authority. There is *no self-evident authority* in law. Holmes furthered the demolition when he added, a few years later,

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[114] *See* text accompanying notes 71 to 74, and 101 to 102.

[115] *See* discussion in IV.B.2, *infra*.

[116] Holmes, *Path, supra* note 113 at 469. And *not*, on the present view, with either the *Common Law*'s "logic … experience" launching of "external critique," nor *Lochner*'s "general propositions…" ushering in "internal critique." Nor also with those parts of *Path* that have drawn the lion's share of attention in the secondary literature: "the bad man" "theory of law," as "prophecies of what the courts will do in fact," or the related, and infamous, separation of law and morality. To reiterate, the present argument is a selective interpretation of parts of Holmes' writings, or better yet a *reconstruction of aspects* of his thought. But on the secondary point of Holmes interpretation, I do believe that *Path* bears out the reading that its central theme is one of dereifying law by demystifying authority, and yet it is one that has tended to be either completely missed, submerged, or assimilated to the other, foregoing themes. *See, e.g.,* William W. Fisher III, *Interpreting Holmes,* 110 HARV. L. REV. 1010 (1997) (centenary retrospective on *Path* with no mention of the "revolting" passage); HORWITZ, TRANSFORMATION II, *supra* note 5 at 141 (mentioning it in passing at the tail end of a chapter-length interpretation of the "The Place of Justice Holmes in American Legal Thought"); and Grey, *Holmes and Pragmatism*, *supra* note at 811-812 (assimilating the passage with "historicist" aspects of Holmes, as part of a general reading of Holmes guided by "logic… experience" as its central theme).

that the "law is not a brooding omnipresence in the sky."[117] The law is not some "thing" "out there" but a human creation answering to human interests.[118] And the dereification job was complete by the time the Realist-influenced Second Restatement on Torts opened its Genesis (Section 1) with "in the beginning" was *neither* "the Word" *nor* "the Deed" but, rather, human "Interests."[119]

Holmes' lines fundamentally change the game of legal reasoning—better, make clear that legal reasoning is precisely *not* a game. What Holmes does here is *not* to accept, for purposes of argument per internal critique, the self-evident authority of some "given" rule, and then tussle over about how best to interpret, construe, or apply it. Rather, Holmes does something *very* different. He asks not "what does this precedent mean here?" but, rather, "what is *the point* of 'precedent' here?" That is, *why* should precedent be followed, not *how* to follow it. This forces an entirely new posture upon the formalist proponent of "positive doctrine": to explain what, exactly, is *the point* of adhering to said doctrine. Suppose the formalist gets over their initial shock and likely impulse to answer: "What do you mean 'why'? Why *not?* To do so *simply is* to do law." And instead comes up with a considered reply: "Fine, the point of precedent here is to..." protect "settled expectations" (reliance interests) or make law "predictable" (enable planning) or treat "like cases alike" (horizontal equity). Then and only then can a real discussion begin: how to weigh said procedural values against any substantive concerns we may have with this precedent's implications in the present context. What does this change? *Everything*. Rather than engage in a game of word-play and framings, we get to the substantive heart of the matter: which interest—the substantive or procedural—is more compelling to protect here? That hardly settles the issue, of course, but it forces a real joinder on the real stakes, namely over competing values than canons of interpretation.

And this applies not only to the positive sources of precedent, but also to those of statutes and the Constitution. For statutes, the point is not the familiar one that we have to choose between taking a "literal" (or "plain meaning") versus "purposive" (or "mischief-solving") approach to the interpretation of statutory terms. Rather, the point is that there is a prior question: *why* should the statute be taken as an authoritative source? The reply forthcoming will no doubt be "legislative supremacy" ultimately cashed out in "democracy." But that in turn raises two further questions: *why* is democracy a compelling political value—what is our political morality of democracy—and in light of that, *how* should the relationship between legislatures and courts be conceived?[120] The point? That there can be no "interpretation" of the "meaning" of a statute—even a "literal" one—absent a prior inquiry into the point of our enterprise. Finally, it is with respect to the Constitution that this dereifying move has perhaps its greatest effect. As Andrei Marmor has cogently pressed, the majority of American theories of constitutional interpretation currently in circulation—whether

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[117] Southern Pacific Company v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[118] In other words, the first passage defetishizes an actual thing—a piece of legal parchment—so as to avoid reifying social relations (legally authoritative ordering), while the second passage dereifies non-things—human thought in the form of "rules," "concepts," or "principles"—taken to be human-independent entities (indeed, quasi-deities).

[119] "§ 1. *Interest*.
The word 'interest' is used throughout the Restatement of this subject to denote any object of human desire." RESTATEMENT OF THE LAW, SECOND, TORTS, § 1 (1964).

[120] These are of course points that Ronald Dworkin has pressed to great effect, from the account of judicial "principle" in "Hard Cases" to that of "law's integrity" in *Law's Empire* to that of "liberal equality" in *Sovereign Virtue*. *See* Ronald Dworkin, *Hard Cases*, 75 HARV. L. REV. 1057, 1061-1063, 1082-1087 (1975) (the relation of "political" and "institutional" rights to legislation); RONALD DWORKIN, LAW'S EMPIRE 178-187, 217-218 (1986) ("checkerboard statutes"); RONALD DWORKIN, SOVEREIGN VIRTUE 362-371 (2000) ("partnership conception" of democracy). I return to how the present conception of law relates to Dworkin's in IV.C, *infra*.

plain meaning textualism, or original public meaning, or framers' intent, or ratifiers' intent (be it application intentions or semantic intentions (Dworkin)), or living originalism, and for each of these whether adopted as the sole, primary, or just default starting approach—stumble right out of the starting gates, by failing to specify the point of having a constitution, in the relevant sense here of a supernormal constraint on normal democratic processes and, *in light of that*, the point of their chosen interpretive approach.[121] And the same applies to most other "modalities" of interpretation: they too simply assume the Constitution is authoritative, with the task being how best to construe it.[122] But without some account—some political morality—for why normal legislative processes should be so constrained, all such interpretative modalities simply cannot get off the ground.[123]

Turning from the authority of the positive legal sources to the meaning of the terms they contain, we come to the second strand of the dereification critique: Felix Cohen's blistering assault on any notion of the meaning of legal terms as *given* rather than *constructed*. From "[c]orporate entity, property rights, fair value, and due process" to "title, contract, [] proximate cause" and all the other "magic solving words of jurisprudence,"[124] Cohen's attack in *Transcendental Nonsense* is two-fold: (1) First, many instances of purported legal reasoning involve clear errors of circular reasoning, with conclusions smuggled into the premises—as aided by the wooly use of polysemous "words" without specification of their underlying *conceptual* meaning, so that the same term is used to mean one thing at one turn of the argument, and then another at another.[125] (2) Second, in many other cases, while there may be no circularity, there remains an emptiness or begging of the question, such that at some point in the argument a "word" is either "defined" in a manner having no relation to the matter at hand or "deployed" without any clear associated mental process.[126] In both cases, the underlying culprits are two. The first is a mistaken focus on "words"—as sounds or markings—rather than on *concepts*—as the underlying ideas.[127] The second is a mistaken

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[121] *See* Andrei Marmor, *Constitutional Interpretation, in* ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY (2005) (observing that, given the paucity of persuasive arguments for addressing the "conditions of legitimacy of constitutional interpretation," the "widespread attraction of 'originalism' is one of the main puzzles about theories of constitutional interpretation.") Marmor wrote those words in 2004; suffice to say, things have not changed much since. It is also worth noting that in the very same article, Professor Marmor himself exhibits a formalist fetish of text:

> *It would be a mistake to assume that there are no 'easy cases' in constitutional law*. Not every provision of a written constitution is particularly abstract or problematic, nor is the whole constitution confined to such high minded issues as basic rights or important moral or political principles. *Many constitutional provisions can simply be understood, and applied, without any need for interpretation.* (emphasis added)

But whether a case is easy or hard cannot be determined simply by the meaning of the terms in a legal source—it also depends, *always* on the dereification view, on the persuasiveness of the reasons for giving that source authority as against alternative considerations. (There is also the point, taken up next, that the view of meaning here is implausible.)

[122] *See* PHILIPP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

[123] For an especially candid embrace of this sort of groundless—the dereification critique would say *pointless*—form of legal internalism, *see* Philipp Bobbitt, *Is Law Politics?* 41 STAN. L. REV. 1233 (1989) (answering the title question of the essay with an emphatic "no"). For a similar argument concerning the question-begging character of many modes of constitutional interpretation, of how they presuppose rather than explicitly supply their underlying basis in some view of the point of constitutionalism in politics, *see* CASS SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION (2023).

[124] Cohen, *Transcendental Nonsense, supra* note 28 at 820.

[125] Thus the double use of "property" as both "value" to serve as the premise and "right" to serve as the conclusion: *id.* at 815-816.

[126] Thus the "search" for the "physical" location of a "corporation" as the occluded way of stumbling toward a legal conclusion regarding jurisdiction: *id.* at 809-812.

[127] *Id.* at 812, 820-821.

"search" for meanings (be it of words or concepts) "out there," via irrelevant physical referents, past usages, etc.,[128] rather than understanding meaning as *always purposively constructed*.[129]

There are two fundamental points to establish about Cohen's argument. First, the critique of legal reasoning involved here *has nothing to do with indeterminacy* and *everything to do with errors*. Neither the term nor the notion of the indeterminacy of concepts makes an appearance in the article—its single-minded focus in the portions on the critique of legal reasoning is on errors of meaning and argument owing to mistakes about words and concepts. Its common assimilation into the line of "internal critique" based on the indeterminacy of concepts[130] is without warrant. The driving theme of the article, splashed on almost every other page, is that of the false reification of concepts via their conflation with "words" or "things."[131] And its driving ambition is to rid legal reasoning of such reification errors, with a constructive upshot of a purposive redefinition of terms.

Alas, it is here, with Cohen's constructive advice—namely that all concepts be "defined" in terms of either underlying facts or values[132]—that marks the Achilles' heel of the article. This implies an unduly reductive, if not nominalist, view of concepts,[133] one that, it should be stressed, takes nothing away from Cohen's highly effective critical demolitions in the piece, nor his view of concepts as purposively constructed. But just as Holmes did not possess a dereifying critique of concepts to go along with his demystification of authority,[134] so too Cohen did not possess a fully adequate constructive view of concepts to go along with his fully effective dereification critique. For the latter, we must turn to (a reconstructed) Hohfeld, who in fact fully integrates the two.

The idea that we should turn to Hohfeld for a *constructive* rather than simply disintegrative view of legal concepts and institutions is one claim that may raise eyebrows. Another is that, in fact, even when it comes to Hohfeld's *critical* side, I believe, and will argue at length below, that it is a mistake to think of it in terms of indeterminacy at all. Rather—and this is the fundamental point—Hohfeld's critical and constructive side are simply two sides of the same dereification coin. The exact same reasons that tell us it is a mistake to conflate a "privilege" with a "claim right" in the analysis of property, also allow us to specify the basic building blocks of all property forms, to result in a generative analysis of the institutional architecture of property. It is my view that the "indeterminacy" view of Hohfeld's critique of the concept of "ownership" in property, one that issues in property's *disintegration* is—whatever its textual plausibility (and I think it is only

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[128] *Id.* at 811-812, 813-814.
[129] *Id.* at 821ff.
[130] As done by FISHER ET. AL, *supra* note 5 at 165 and KENNEDY, CRITIQUE, *supra* note 5 at 135.
[131] *See* Cohen, *Transcendental Nonsense, supra* note 28 at 811 ("But this does not give us the right to hypostatize, to "thingify," the corporation, and to assume that it travels about from State to State as mortal men travel."), 815 ("The circularity of legal reasoning in the whole field of unfair competition is veiled by the "thingification" of property."), 817 ("It will not be recognized or formulated so long as the hypostatization of 'property rights' conceals the circularity of legal reasoning."), 828 ("But for legal purposes a right is only the hypostasis of a prophecy") (quoting Holmes).
[132] *Id.* at 810, 814, 820, 821.
[133] For critiques of Cohen along these lines see, briefly, KENNEDY, CRITIQUE *supra* note 5 at 135 and, at length, Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16 (2000).
[134] For a searching and incisive treatment of Holmes' views on conceptualization in law, *see* Grey, *supra* note 6 at 4, 44-45, fns. 162, 163. In this connection, it may be worth noting that while "general propositions" became the *leitmotif* for the Realists' indeterminacy view of *concepts*, the original context for Holmes' phrase was, in fact, less about concepts than *principles* (referring to his own "rational" basis standard for judicial review in *Lochner)*.

partially plausible[135])—an entirely misguided and unhelpful analysis. A far more powerful account is available from Hohfeld, on which the disaggregation (*not* the "indeterminacy") of the monolith "ownership" furnishes at one and the same time—for one and the same reasons—the *constructive* tools for an architectural analysis of property's institutional form. And the reasons lie in the fact that Hohfeldian analysis is a *dereification* of property, conceiving of it *relationally*.

But before turning to this constructive analysis of the legal *institutional* form of property, the task of the following section, we need first to crystallize Hohfeld's contribution to the dereification analysis of legal *concepts.* While Cohen was able to drive home that the meaning of concepts is never given, but always purposively constructed, he faltered at the next step of how the construction proceeds. Hohfeld contains the entire system. Not only are concepts not given but constructed, more fundamentally concepts are *never self-contained*, but *always relational*, forged via distinctions with other concepts within a framework of inquiry, with the distinctions in turn tracking our sense of what best serves our cognitive and practical purposes at hand. Consequently, being sensitive to purpose and context, the concepts themselves are *never fixed* but *always fluid*, subject to dynamic development or refinement as our contexts, purposes, or understandings shift. But none of that means that concepts are "indeterminate." Determinacy is neither here nor there. Concepts are *tools* of *thinking* that we *make*, not *things* to be *found "out there."* To think concepts may be *either* determinate *or* indeterminate is to think they have some fixed, likely self-contained, "core"—whether "defined" by "necessary and sufficient" conditions, or past usages or convention, etc.—which then either has fuzzy edges or may be "destabilized." But that entire way of thinking is to reify concepts—as "things" or meanings "out there," sometimes having a grip, sometimes loosening. But concepts are neither "objective" (whatever that may mean) nor "arbitrary": rather, they are *inter-relations* between ideas, fashioned by us in accord with our purposes and contexts.

The following section will elaborate on this constructive account, of both legal concepts and institutions, using the test case of *property*. The section after will then turn to its implications for the constructive analysis of legal reasoning and the role of values. There, I will also return to its implications for the construal of the meanings of "words" in the sources of law—including drawing out more fully the critical implications of the above Cohen-Hohfeld dereification critique of standard views of meanings as being about "words" or concepts as given, self-contained, fixed.

Presently, it is enough to underline the two fundamental critical upshots of the dereification critique of legal reasoning. First, it aims to rid legal analysis and reasoning of the mystifications of authority and reifications of meaning that mark the formalist view of doctrine and concepts, as simply pointless and in error, a series of delusions and mistakes. Second, with these evasions and barriers removed, we can finally make mental contact with what matters: the substance of the subject matter at hand in a given legal field, its institutional tools, and the value stakes it raises. Doing so requires developing the constructive upshots of the dereification analysis, for which its foregoing revisionary implications for legal argument are simply a ground-clearing operation.

[135] And even this because, like many fundamental pioneers, Hohfeld was still partly trapped in the old ("analytic") system that he was in the midst of forging a revolutionary breakthrough out of, and so bears traces of it. *See* discussion below at note 181, *infra* and accompanying text (discussing the infamous case of the shrimp salad).

### *B. Constructive Implications of the Dereification Critique*

Before launching into the constructive implications of dereification analysis, it will be good to take up an objection even to the need for "constructive" analysis and—even more importantly—to spell out precisely what I mean by it. I do so by way of an engagement with perhaps the most elaborate response in the CLS literature to the question "but what's your alternative?": Richard Michael Fischl's *The Question that Killed Critical Legal Studies.*[136] The title, as Professor Fischl explicitly warns in the article, is bound to mislead, since he is definitively *not* saying that the failure to present an alternative was CLS's killer flaw. Rather, Fischl's point is basically the opposite:

> My argument here is that this question ["what's your alternative"—ed.]—not the supposed failure of cls to answer it, but the assumptions and structures of thought that are embedded in and revealed by the question itself—has been a principal cause of a systematic misreading and mischaracterization of cls work by mainstream legal scholars.[137]

But Fischl's argument does not succeed, I believe, and this for two very separate reasons.

First, the central passage of the article, around which the entire argument hinges, fails to confront an obvious rejoinder, which takes the wind out of the sails of the entire piece. Arguing that liberal demands upon CLS scholars to accompany their critiques with some alternative would be unimaginable in any other discipline, Professor Fischl gives the hypothetical example of a critical study of a drug on the market—one "reasonably effective" in treating a "deadly infectious disease"—that reveals some of the drug's hitherto unnoticed harmful side effects.[138] Somewhat rhetorically, he asks "would anyone think the critical study is incomplete unless it provided some alternative course of treatment?"[139] Like Jesting Pilate he perhaps should have stayed for an answer: "Well, yes, by itself the study *is* incomplete: without an analysis of how the newly disclosed harms affect the overall risk-benefit profile of the drug—be it supplied by the authors or someone else—we have no idea of the study's overall import." Translated back into the present context, unless someone spells out the intellectual or practical upshot of an internal critique of "contradictions" in legal liberalism at a highly abstract level, it is not clear why, as discussed above, liberals cannot simply continue as they were, fashioning attempts at attenuating or resolving such contradictions (perhaps merely "tensions" at lower levels) in contextual ways.[140]

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[136] 78 L. & SOC. INQ'Y 779 (1993).
[137] *Id.* at 782.
[138] *Id.* at 801.
[139] This is my paraphrase of the following passage: "Consider our likely reaction to an evaluation of those follow-up studies that mirrored Massey's critique of cls, particularly if it was published by someone whose own research was called into question by the new studies: For there to be significance in these studies it is essential that the authors establish that there is some escape from the side effects they see. Even if their criticisms are meaningful, there is no alternative treatment described in anything other than the most general or abstract terms." *Id.* at 801-802.
[140] *See* text accompanying notes 71 to 74. Note that this expressly does *not* apply to the ideology critique of liberalism that was distinguished above from the internal contradictions one. *See* text accompanying notes 68 to 69. The upshot of *that* critique is stated on its face: there is a motivated distortion having inequitable effects, which should be removed. Fischl's article, however, centers on critiques of the internal contradictions type. *See* Fischl, *supra* note 136 at 785ff.

The second—and for present purposes *far more important*—point is that Professor Fischl, and here he joins company with most mainstream and critical legal scholars, elides two very different forms of "constructive" analysis: (1) prescriptive analysis, which may take either the normative form of elaborating values or the programmatic one of making institutional proposals for change; and (2) what is entirely distinct from—indeed *prior to*—any such prescriptive analysis, explanatory analysis of the subject matter at hand. It is precisely omission of the latter from the field of vision of most legal scholars that explains the predominance of "law and" scholarship in a post-Realist world: without any idea of what law's distinctive contribution to social analysis may be in a post-doctrinal landscape, it is only natural for many legal academics to think that besides doctrinal analysis there is either empirical analysis (supplied from the outside by social sciences or history) or normative analysis (supplied by lawyers in the vein of less abstract philosophers). But this radically impoverished conception of the field would leave out of its purview two of the most important pieces of 20th century legal scholarship: Hohfeld and Coase. Thus, the task of this section is to begin to remedy this omission, building precisely on (a reconstruction of) Hohfeld.

It does so by developing a critical *and* constructive account of property—as both concept and institution—that is distinct from standard mainstream and critical views. "Property" provides a crucial test case for central claims of this Article, concerning the critical and constructive virtues of a denaturalized account of law and of political economy in terms of social relations rather than "the state," and the critical and constructive virtues of a dereified analysis of legal and social forms in terms of architectural building blocks rather than "indeterminacy." Consequently, the analysis is undertaken in considerable depth and detail, for which I beg the reader's patience: as the proof of method is in the pudding of substance, the best way to show the viability and power of a non-indeterminacy mode of analysis of concepts and institutions is simply to do it and show its fruits. And so that is what the following attempts to do for the case of *property*. Following this account, the remainder of this Part will seek to extend the analysis, from property to *law* in general. Part V will then shift to *political economy*, using as its test case that of *the market as a social relation*.

1. Constructive Analysis of Legal Concepts and Institutions (Forms of Law)

What is property? The standard mainstream views are (a) a *natural* or *private* right of (b) *ownership*. To which the standard critical replies are (a) *state created* (b) *bundles of rights*. Fueling the critical views are the twin aims of denaturalizing ("state created" as opposed to "natural" or "private" rights) and dereifying (various possible "bundles of rights" as opposed to a monolithic "ownership"). And while these critical answers are fine as far as they go, they do not go far enough.

Thus in response to the naturalization prong of the mainstream view, the claim that property rights are granted and enforced by the state may still be thought compatible with a view of the state as merely recognizing and enforcing "prepolitical" natural rights, such as Lockean ones of labor or desert.[141] Recall that the Realists did not challenge such classical liberal premises so much as presuppose them, to argue in the mode of internal critique that even accepting them you still could not derive all the decisions needed for a complex legal system, the bases for which must come

[141] *See* JOHN LOCKE, *Second Treatise of Civil Government*, *in* TWO TREATISES OF GOVERNMENT §§ 27-28, 30, 34, 40-43, 44 (Peter Laslett ed., 1970) (1690); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174-182 (1974). While Locke may be interpreted in various ways on this point, the claim of a natural right to property is certainly the most influential of the "Lockean" views, even if that classical liberal view remains distinct from its modern libertarian interpretation.

from elsewhere.[142] Similarly for rights of "private ordering," the neoliberal version of the classical liberal view, as initially installed by Coase and later updated by the "new private law" theory.[143] Here the argument shifts from enforcing prepolitical rights of desert or security from "physical invasion," to facilitating efficient private ordering by lowering transaction costs to bargaining or, in their wake, mimicking the results of such bargaining.[144] And here too the Crit response is the appeal to indeterminacy: in many contexts, arguments from efficiency prove inconclusive.[145] What is noteworthy in both Realist and CLS cases is that not only is no constructive account given, *either* of the systematic stakes *or* bases for such decisions,[146] but the critique itself is limited to showing the indeterminacy, *not* the implausibility, of arguments from prepolitical natural rights or private ordering. Hence, its upshot is less to denaturalize mainstream claims than to delimit their scope.

Similar remarks apply to the attempts at dereification. Here again there lie two difficulties. First, it is unclear what the status is of the claim that property rights consist not of any necessarily unified set of "absolute" rights of "ownership," but rather of contingent "bundles" of discrete and qualified rights. Is this a normative assertion about how property rights *should be?* If so, arguments in support of it have been in notoriously short supply.[147] Or is it instead a descriptive claim about how property rights *actually are*, under most existing legal systems? If so, then a standard enough reply will be that this is not how the rights *should be*, on either revived classical liberal/libertarian claims of natural rights,[148] or more instrumental neoliberal ones of private ordering.[149] To these, the critical response has been, again, one of indeterminacy rather than implausibility, more to delimit than really debunk the claims. And as for an alternative, again no constructive conception of property rights has been on offer, but rather only an endless series of ad hoc, piecemeal details.

This of course is the famous "disintegration of property" thought to result from Hohfeld's analysis.[150] In contrast to a Blackstonian conception of property as "the sole and despotic dominion" of a person over a thing,[151] Hohfeld is thought to have offered a rival account of it as a "bundle of rights" with "respect to persons and things."[152] And this rival view is thought to unravel into an endless spool of possible rights regarding possible subject matters, so as to rob property

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[142] *See supra* I.B.

[143] Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012).

[144] Coase, *id.*; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerous Clausus Principle, 110 YALE L. J. 1 (2000).

[145] Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

[146] *See* text accompanying notes 46 (Realism) and 106 (CLS). For further discussion, *see infra* V.A.

[147] *See* text accompanying notes 31 to 33 (Realism) 136 to 140 (CLS).

[148] *E.g.,* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN (1985).

[149] *E.g.,* Merrill & Smith, *Optimal Standardization*, *supra* note 144.

[150] *See* Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980); Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1979).

[151] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1979) (1765-1769). It is debated whether Blackstone himself held the influential "Blackstonian" conception widely attributed to him. *See* discussion below, at text accompanying note 170, *supra*. It is not debated that the conception was widely influential. *See* GREGORY S. ALEXANDER & HANOCH DAGAN, PROPERTIES OF PROPERTY 100-01 (2012 (even if Blackstone himself "did not intend that phrase to be taken literally," nevertheless the "dictum … has become an icon of property theory.").

[152] As Professor Alexander points out, the "bundle of rights" phrase precedes Hohfeld, who in fact never used it. Nevertheless, as Alexander also suggests, it has since become the standard label for Hohfeld's analysis of property as "a complex aggregate of jural relations." GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY 319, 322 (1997).

rights of any distinctive content and property law of any distinctive subject matter. A result embraced by some ("neo-Hohfeldians") and decried by others ("neo-Blackstonians").[153] With the latter then advancing, out of their dissatisfaction with disintegration, various reassertions of a "core" or "essence" to ownership,[154] and taking property law itself to be "the law of things."[155]

In previous work, I have argued that the debate between these camps has largely misfired, since the contrast between them is along not one or two, but three distinct, dimensions: not only what does property *consist of*, but also what is property *about* and, at the back of and prior to both of these: what, simply, *is* property?[156] And, as importantly, what both camps have failed to appreciate is that on all three fronts a deeper conceptualization of property is available from Hohfeld than the standard "bundle of rights" view, one that is both more far-reaching in its critique of mainstream naturalizations and reifications than the standard critical responses, while also, unlike these, furnishing the tools for constructive institutional analysis. The following lays out a reconstruction of this Hohfeldian conceptualization, as a platform upon which to build an architectural approach to property, and to legal institutional analysis more generally.[157]

*Property is a social relation*. Property is not a thing, nor a relation between a person and a thing. It is—*always and only*—a relation between persons (regarding things). It is always, in other words, a social relation. This is the fundamental starting point of Hohfeldian analysis, the platform from which all of the other claims follow.[158] Thus, at the outset of both his 1913 and 1917 articles, Hohfeld goes to great pains and lengths to underline that as a legal concept, property refers *neither* to any physical thing that may be the ultimate object of legal entitlements, *nor* to any physical or other relation of a person to the thing, but rather *solely* to the relation between persons regarding the thing.[159] As a legal institution, property always and only pertains to how two or more persons

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[153] For endorsement, *see* Grey, *supra* note 150; Vandevelde, *supra* note 150. For critique, *see* J. E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2000).

[154] *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 742ff (1996); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008).

[155] *See* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691(2012); Eric Claeys, *Is Property a Thing or a Bundle?*, 32 SEA. U. L. REV. 617, 618, 631ff (2009) (advancing "a 'thing' or 'thing-ownership' conception of property" in opposition to "'the ad hoc bundle' conception"); Penner, *supra* note 154 at 799 ("despite the bundle of rights picture of property, property truly is a right to things").

[156] *See* Anna di Robilant & Talha Syed, *Property's Building Blocks: Hohfeld in Europe and Beyond, in* WESLEY HOHFELD A CENTURY LATER: EDITED WORK, SELECTED PERSONAL PAPERS, AND ORIGINAL COMMENTARIES 223 (Henry Smith et. al. eds) (2022).

[157] What follows draws, in significantly revised and expanded form, from Sections 5.2 and 5.4 of di Robilant & Syed, *id.*. As indicated therein, I am the principal author of those parts. But the present discussion is also richly illuminated and reinforced by my co-author Anna di Robilant's historical analysis in Section 5.3, which traces the central contours of the development of continental European conceptions of property from Roman law to the present.

[158] The following is a reconstruction of Hohfeld's analysis, making few claims to textual or any other interpretive fidelity. It stands or falls on its own substantive, rather than interpretive, merits. I call it "Hohfeldian" because I believe its core claims owe to insights from Hohfeld, but even if that were wrong it is the substance of the claims that matters here. The question of how this reconstruction relates to other interpretations of Hohfeld in the literature is taken up in di Robilant & Syed, *supra* note 156 (see especially notes 6-8, 16-17, 20-22, 31-33, and 91-94 and accompanying text). The question of how this attribution of the claims to Hohfeld relates to other attributions, namely to Bentham and, before him, Pufendorf, is briefly taken up below at note 173, *infra.*

[159] *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 20-28 (1913) (devoting eight pages "[a]t the very outset … to emphasize the importance of differentiating purely

are related with respect to a resource: Can one use the resource without another's interference? Can one exclude another's use of it? Can one remain secure against another's removal of one's use and exclusion entitlements? And so on.[160] Property rights only exist in the presence of other persons. There is no such thing as property on a desert island. Indeed, in such a situation there are no rights at all, since all *rights simply are social relations*.

Two fundamental points need underlining about this *relational conception* of property, one going to what is common between it and other social relations, the other to what is distinctive. The first is that the *relation is prior to, being constitutive of, the parts*. One simply cannot even have the concept "right" without already having the concept "duty." This is in common with many extra-legal social relations: for instance, one simply cannot even have the concept "teacher" without also already having the concept "student." The relation "teacher-student" is, in this sense, prior to and constitutive of the parts. *The relation is the fundamental level, the basic unit of analysis.* And the same for law: no "right" without "duty"; no "privilege" without "no-right" and so on. It is the relation that constitutes the "pair" of component parts. *The parts do not exist outside of the relation*. The relation, that is, is an *internal relation*—going inside, to the very constitution of the parts.[161]

Yet, and this is a second key point, the social relations of law have a *distinctive structure.* Consisting as they do in rights or entitlements, such relations have a special feature not always present in other social relations. Structured as it is by correlative entitlement/disentitlement pairs, the property relation an inherently conflictual one, of *competing interests*. In law, as Hohfeld was at pains to emphasize, a benefit to one, by way of an entitlement, correlates to a burden on another, by way of a disentitlement. One cannot specify an entitlement or benefit for X without a correlative disentitlement or burden for Y. In other words, with the correlative entitlement/disentitlement structure of law comes a corresponding benefit/burden structure to its social relations. But the same is not necessarily true of, say, the teacher-student relation: there is no inherent reason to believe that with any benefit to the teacher comes a burden for the student, or vice versa. By contrast, the social relations of property involve—*always and necessarily*—pairs of competing interests.[162]

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legal relations from the physical and mental facts that call such relations into being.") Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 720-33 (1917) (devoting twelve pages to establish his first point, namely that "a right *in rem* is not a 'right against a thing.'").

[160] As Pierre Schlag rightly emphasizes, it is *not* "so much that rights 'imply' or 'give rise' to duties," as it is that "to say that *B* has a duty towards *A*" is "exactly what it means to say that *A* has a right." Pierre Schlag, *How To Do Things With Hohfeld*, 78 LAW & CONTEMP. PROB. 185, 201 (2015).

[161] The method of "internal relations" traces back to Hegel, but was given its name by the British Idealists. The present retrieval of it is shorn of two features that often accompany the approach, and have brought it in for disrepute: an undue "holism" (or focus on "totalities") and an application to nature, not just society and thought. The present analysis restricts its claims to *institutional* and *conceptual* analysis; and to their *relations*, not their "wholes." The antonym of "part" here is not "whole" but "relation"; similarly, the antonym of "individual" here is not "group" but "relation." Finally, much of the classical debate between proponents and critics of internal relations turned on their relative preponderance (often framed in terms of whether *all* relations were either internal or external), an issue on which the present analysis takes no stand. For a review of the history of internal relations analysis and of the central contours of the debate with its critics, *see* Richard Rorty, *Relations, Internal and External, in* ENCYCLOPEDIA OF PHILOSOPHY 125 (Paul Edwards, ed.) (1967). For a contemporary effort to revive the classical analysis in its holistic, metaphysical, and pervasive form, *see* Jonathan Schaffer, *The Internal Relatedness of All Things*, 119 MIND 341 (2010).

[162] Whether the formal "advantage" conferred by an entitlement and the corresponding "disadvantage" conferred by a disentitlement always lead to *substantive* "burdens" and "benefits" has been queried by scholars, from the onset of the Hohfeld reception on, with respect to one entitlement/disentitlement pair, that of power/liability. *See* Walter Wheeler

Flowing out of this pair of fundamental points are three crucial implications. First, it is of paramount importance to underline that property is *only* a social relation, and not *also* a person-thing relation. To insist, in other words, that property is only "a relation between persons" (with respect to a thing), and not a "*relation between a person and a thing* and other persons."[163] Why? Because otherwise we are liable to move straight from physical descriptions of person-thing relations to normative conclusions about how to weigh competing interests across persons. This of course was precisely Hohfeld's key concern, to warn against the false naturalization of social judgments, whereby conclusions of "justice and policy" are smuggled in under cover of asocial descriptions of physical facts and person-thing relations.[164] Bearing in mind that property is *always and only* a social relation, and not also one between a person and a thing, helps guards against this. For this reason, then, contrary to a widespread tendency persisting to the present, it is a misnomer to refer to "possession" as an entitlement of property—that denotes a relation between a person and a thing, not between persons regarding a thing (the latter is better denoted by "exclusion").[165]

Once we fully internalize the relational character of property, it also becomes evident that the notion of "absolute" property rights is simply a misnomer as well—not just normatively contestable, but conceptually unviable. It is a commonplace among those following in Hohfeld's footsteps to inveigh against "absolutist" Blackstonian conceptions of property on the grounds that they are either undesirable or not descriptive of our present arrangements—and thus to urge that property entitlements "ought" to be relative or subject to varying limits. However, once we fully internalize the point the property is a social relation, with correlative/competing entitlements, then the claim that its entitlements *ought* to be "qualified" or "relative" is somewhat curious, since there is no coherent sense to the notion of "unqualified" or "absolute" entitlements once we understand their relational character. Once, that is, the relational character of property is fully absorbed it becomes either unclear or empty to speak of "absolute" entitlements—either the term has no

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Cook, *Introduction: Hohfeld's Contribution to the Science of Law, in* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 8 (Walter Wheeler Cook, ed. 1919); *and* Arthur Corbin, *Legal Analysis and Terminology*, 29 YALE L. J. 163, 169 (1921). We discuss this "Cook/Corbin puzzle" and resolve it for the case of property, in di Robilant & Syed, *supra* note 156, by identifying the power to expropriate/liability to loss as the relevant pair in the property context. However, as I discuss in an in-progress work, the puzzle remains in contractual settings, and its resolution there may well contain a key to both the power and the limits of Hohfeldian analysis for the analysis of social structure. See Syed, *Law and Political Economy Today* (draft).

[163] As has sometimes been suggested: *see* JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 6 (2000); Carol Rose, *Storytelling about Property*, 2 YALE J. L. & HUMANITIES 37, 40 (1990).

[164] Hohfeld (1913), *supra* note 159 at 36.

[165] *See, e.g.,* A.M. Honore, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, (A.G. Guest, ed. 1961) (referring to "the right to possess" as involving "exclusive physical control" over an object); JESSE DUKEMINIER ET. AL, PROPERTY 81 n.2 (6th ed. 2006) (including in the bundle "the right to possess, the right to use, the right to exclude, the right to transfer."). This is not a terminological quibble. To be sure, in speaking of a "right to possess" one *might* have clearly in mind that this is not a matter of "control over" an "object"—i.e., a person-thing relation—but rather precisely about "exclusion of" a person—i.e., a person-person relation—and hence be making no conceptual error, but only using words loosely. But to speak of a right to "exclusive physical control" over an object is surely to slide into the sorts of conceptual confusions and normative elisions that Hohfeld was at pains to dispel. And, even more clearly, to list a "right to possess" as part of the "bundle" of property rights *alongside* rights "to use" and "to exclude" can only evince faulty conceptualization: robbed of its role as a hazy substitute for the more precise "right to exclude," the phrase can only plausibly be taken to mean the flawed notion of a "right of control" over/against a thing, or simply be empty of meaning (a third possibility—that it is serving as a substitute coverall term for the misleading "right to own"—is foreclosed by the fact that it is precisely "ownership" that is being unbundled by the enumerated rights).

meaning or it means "unfettered," which would involve a case that no jurist can ever have had in mind.[166] And the point is not a normative one, but rather an elemental conceptual one.[167] Indeed, to challenge absolutist conceptions on normative grounds is in fact partly to reinforce them, by presupposing their analytical tenability and thereby reverting implicitly to unilateral, person-thing, conceptions of property. And the same holds for any discussion that emphasizes the "relative" character of property as being somehow controversial or a "modern" move.[168] The only thing modern about it is the explicit recognition of something that was always inescapable.[169]

This helps neatly to resolve, then, a long-standing puzzle of property scholarship: "was Blackstone really a Blackstonian?" As a number of scholars, including Carol Rose and David Schorr have shown, in his detailed discussions of the contours of specific property rights Blackstone did not, in fact, hold to the "absolutism" for which his name has become a by-word and his "sole and despotic dominion" a catch-phrase.[170] On the present analysis, not only is this not surprising, it is hardly avoidable: since absolutism is simply a misnomer, conceptually not on the cards, it is unsurprising that when he turned from abstract declarations to the concrete specifics of the system, Blackstone simply *had to* cast aside a view—namely, that property is a person-thing relation, conferring rights that may be enjoyed absolutely—which, whatever normative appeal it held for him, is simply conceptually untenable and to register, however inchoately, the unavoidable reality brought home by any detailed acquaintance with the specifics of property rights, namely that property is a social relation in which unfettered rights are simply a chimera.[171]

Integrating these first two implications of the relational conception—i.e., that property as absolute dominion, on the model of a person-thing relation, is conceptually unviable whatever its normative appeal—leads us to a third, concerning the view of property as a natural right. The

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[166] For X to have unfettered entitlements against all persons with respect to a thing or good would mean (1) not only that others had no legitimate interests in that thing or good meriting legal protection, (2) but also that they had no legitimate interests in other things or goods meriting legal protection, the exercise of which may in some cases come into conflict with X's exercise of entitlements pertaining to their thing or good, and (3) finally, that others also had no *other* legitimate interests—for instance, in their person—meriting legal protection, which may in some cases come into conflict with X's exercise of entitlements regarding their thing or good. The only actual imaginable case of "absolute" property entitlements, then, is of a person living alone on an island—but in that case they have *no* property or, for that matter, *any other legal entitlements* since *all legal entitlements always and only* pertain to social relations.

[167] It is for this reason that we need to go even farther than Professor Singer's important statement that "[t]he recognition and exercise of a property right in one person *often* affects and *may* even conflict with the personal or property rights of others"—by dropping his qualifiers. JOSEPH SINGER ET. AL, PROPERTY LAW: RULES, POLICIES, AND PRACTICES x (2006) (emphasis added). This connects up with the preceding insistence on the difference between a conception of property as *always and only* a social relation versus one conceiving it as *both* a relation between a person and a thing *and* one between persons with respect to a thing. For the latter, *see* SINGER, *supra* note 163 at 6.

[168] *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1979); ALEXANDER AND DAGAN, *supra* note 151 at 255.

[169] For discussion of Roman conceptions of property in this connection, see di Robilant & Syed, *supra* note 156 at fn. 23.

[170] *See* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L. J. 601 (1998); David Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQ. L. 103 (2009).

[171] Does this mean, then, that the contrast between "Blackstonian" and "Hohfeldian conceptions of property can simply dissipate, like so much hot air? Not at all. What it *does* mean is that we have be more precise in specifying what we might mean by "Blackstonian" in contrast to Hohfeldian views. In di Robilant & Syed, *supra* note 156, we specify three key points of potential contrast, concerning: (1) What *is* property (a person-thing or a person-person relation)? (2) What is property *about* ("things" or "resources")? (3) What does property *consist of* (a "core" or "essence" of a right to exclude or of "exclusive use," or an architecture of generative building block entitlements)?

relational conception of property deprives natural rights' views of two of their main historical supports: *physicalism* and *individualism.* The first refers to efforts to derive normative conclusions from a physical description of the relations between a person, their body, and environment—most famously "dominion."[172] The second refers to efforts at establishing normative conclusions about a person's rights *unilaterally*, by taking into account only their individual capacities, activities, or interests.[173] Both of these are simply question-begging once we fully absorb the wholly relational character of rights, which require for their justification an accounting of the competing interests (capacities, activities) and hence contending claims at stake. To be sure, stripped of these historical props, a natural rights view may still be reconstructed, by shedding any reliance on such conceptual elisions and instead forthrightly advancing a substantive normative argument, one that still retains its "natural" moniker by making appeal to notions such as divine command, natural law, "right reason" in "the state of nature," or "human nature." The relational view of property, being a conceptual claim, does not rule out this (or any other) substantive normative argument. But what it does do, however, is two things. First, again, it presses upon such—indeed, *all*—normative justifications the need for an explicit shift in frame, away from a unilateral focus on a given person and their capacities, activities, or interests, and toward the *relational aspect* of the question, to take up competing claims as internal to the normative enterprise.[174] Second, the *social* character of the enterprise makes arguments with a *naturalist* tinge harder to sustain: fully absorbing the social character of the questions pushes strongly in the direction of *historical specificity* in the normative enterprise.[175] Stripped of physicalism, individualism, and naturalism, little is left of natural rights.

In sum, property is a social relation, not a natural right nor mere state construct. The latter is not wrong so much as it is unhelpful and incomplete. It is unhelpful because by itself it tells us little-to-nothing about the structure of the rights enforced by the state, as correlative entitlement-disentitlement pairs that necessarily come in packages of competing interests. And as a result it is incomplete, by making it seem as if the only reason the natural rights view fails is because property requires state enforcement. But as discussed above, this is an incomplete denaturalization of property, pointing only to the indeterminacy of natural rights arguments, not to their implausibility, and hence only delimiting their reach rather than debunking their force. By contrast, fully to

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[172] *See* RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 1, 5-7 (1979).

[173] *See* TUCK, *id.* at 159-161. As Tuck shows, the usual predecessor to Hohfeld—Bentham—was himself anticipated in his correlative conception by Pufendorf, just as the usual predecessor to Blackstone—Hobbes—was himself preceded by Grotius. This may be fully recognized without losing sight of key differences between Hohfeld and his pre-Hegelian predecessors, which is that theirs were primarily negative and normative critiques, ones strongly informed by a focus on the state and its legitimation. By contrast, as discussed below, Hohfeld's argument goes through with less reliance on the state, reflecting his more deeply, post-Hegelian, relational conception. One that, in turn, also furnishes a positive analytic platform for the constructive conceptualization of such social relations, rather than merely negative state-based critiques. Little of Hohfeld's architecture of fundamental legal entitlements is present in Pufendorf or Bentham—or more precisely, what *is* there, in Bentham, is marred by physicalist misnomers. For a representative (if inadvertent) illustration of the physicalist and loosely taxonomic or descriptivist—in a word, pre-theoretical—character of Bentham's notions, *see* H.L.A. Hart, *Bentham on Legal Powers*, 81 YALE L. J. 799 (1972), *reprinted in* H.L.A. HART, ESSAYS ON BENTHAM 194-219 (1982). For cogent criticism, both of Bentham and of Hart's interpretation, *see* Andrew Halpin, *The Concept of a Legal Power*, 16 OXFORD J. LEG. STUD. 129 (1996).

[174] For one instructive example of the extent and depth of the difficulties meeting this requirement can pose for natural rights arguments, here of Lockean stripe, *see* G.A. Cohen, *Nozick on Appropriation*, I/150 NEW LEFT REV. 89 (1985).

[175] This is not to say that the normative enterprise must be robbed of any critical character, being hostage to existing conventions or positive law. But to reduce "natural rights" views to any normative views making appeals outside of social convention or positive law would be to rob them of their distinctive character as a sub-family of such views.

internalize that property is a social relation undermines the very historical core of natural rights claims, and renders suspect any lingering naturalism going forward.

There is a deeper point here. A legal constructivist view of property remains within a liberal imaginary: in response to the *individualism* of natural rights, the critics' response is *the state*. But this simply adopts the liberal ontology: methodological individualism plus "the state." With the entire debate then hinging on whether where the classical liberal sees only individuals, the critic can show the presence of "state action." Yet this drastically restricts our critical interrogation of social processes and outcomes, as always having to show the hidden hand of the state. Whether or not *state coercion* is in play, property always involves *irreducibly social relations*, consisting of *competing claims*. Such relations are always political, or apt targets for critical scrutiny and social agency, whether or not they implicate state action.[176] And transforming them requires a deeper understanding of their structure than simply adverting to the fact that they are ultimately anchored in state decisions. "The state" here does both too much critical work and too little constructive.

These critical and constructive limitations of legal constructivism are further revealed when we turn to its second aspect here: the attempt to dereify monolithic views of unified "ownership" by pointing out that property consists of a disaggregated "bundle of rights." A first problem here, recall, was uncertainty over the critical status of the disaggregation claim: is it merely a descriptive claim of how existing legal arrangements simply are, and as such vulnerable to a normative riposte about how they should be, or is it a normative assertion itself, yet one made with little supporting argument? What a relational understanding of Hohfeldian analysis reveals, however, is that the disaggregation claim is neither merely descriptive nor normative, but in fact conceptual: a claim not just about how property relations can or should be fashioned, but rather how they *must* be so. And flowing out of this critical point is a constructive counterpart: the same reasoning for why we must disaggregate the relations of property into divisible and variable parts can guide us in how to refashion these, by specifying the fundamental building blocks of different property architectures.

Why are the relations of property best understood as a divisible and variable bundle, with both the conferral of discrete entitlements ("divisibility") as well as even their existence and shape ("variability") differing by context? Precisely because property is a social relation implicating competing interests. That is, since any given entitlement or benefit for one entails a disentitlement or burden for another, it would be a mistake to conflate distinct pairs of benefits/burdens—i.e., distinct pairs of competing substantive interests—under cover of a single umbrella term. Thus: (1) It is one thing to protect Jill's interest in use of a space by not conferring on Jack any entitlement to exclude Jill from accessing the space. (A privilege-to-use space *A*.) (2) It is another thing entirely also to entitle Jill to prevent Jack from using that space as well, by conferring upon Jill the entitlement to exclude access. (A right-to-exclude from space *A*.) (3) And it is a third thing again to confer upon Jill the entitlement to prevent Jack from engaging in a noisy activity in a neighboring space, one that interferes with Jill's "quiet enjoyment" of the first space. (A right-to-exclude from space *B*.) Each of these implicates distinct kinds of competing interests, whose settlement will vary by purpose and context. And so the relations of property are best understood as consisting not of only one or a unified aggregate, but, rather, a divisible and variable bundle.

[176] This point is elaborated in V, *infra*, which will also take up its constructive counterpart adverted to next in the text.

The crucial point to underline here is the difference between this *purposive* approach to the drawing of Hohfeldian distinctions between entitlements and a more purely *formal* one. Illustrative of the latter is an example commonly used—across a century of Hohfeld reception—to convey the distinction between a "privilege" and a "right": the case of having merely an "exclusion-privilege" with respect to a piece of land (where X is allowed to try personally to exclude Y, with neither of them having recourse to state help), without an "exclusion-right" regarding the same (where X would also have state backing in excluding Y).[177] Yet while the conferral of an *exclusion*-privilege without the corresponding right is certainly a formal possibility, it is also a *merely* formal one, one having little purpose or sense in most real-world contexts. And the upshot of drawing up such formally possible, but practically inert, options is a tendency for the point of Hohfeldian analysis to become lost in the mists ad-hoc proliferation of arid "logical" variations without end.[178]

A purposive approach, by contrast, provides a controlling orientation to the elaboration of the distinctions, showing their point by grounding them in substantive differences between pairs of competing interests in resources. Thus, consider the distinctions drawn two paragraphs above: The first distinction, between a *use*-privilege and an *exclusion*-right, is of paramount importance in the policy context of resources varying in their rivalry.[179] Meanwhile the latter distinction, between a use-*privilege* and a use-*right* is central to nuisance law, where the latter claim—being applied to neighboring conflicting uses—is in fact better understood as converting a use-privilege over one's own resource into a distinct *exclusion*-right over a neighbor's (use of their) resource. The leap involved in this conversion—of an entitlement to use one's own space into an entitlement to prevent another's use of "theirs"—was at the heart of the historical controversies in this area.[180]

By contrast, consider an example commonly adduced to illustrate this distinction, one going back, alas, to Hohfeld himself: a *bona fide* purchaser of a shrimp salad now has the privilege to eat it, but that does not necessarily confer upon them the right to do so—i.e., to stop another from activity that obstructs their consumption (say, by preaching the environmental harms from shrimp farming or simply making distracting noises). The reader—once they have stopped twisting and turning to get their head around the example—can ask themselves just how illuminating it is of anything that matters. The point here is a fundamental one of method. One approach invites the spinning out of "formally possible" distinctions, to be followed by debates over whether something "really" is different from something else, or what "logically follows." An arid exercise masking as "analytical" rigor.[181] The other approach says: the distinction between privilege and right is forged

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[177] *See* Arthur Corbin, *Foreword*, *in* HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 162 at 8; *and* Pierre Schlag, *How To Do Things With Hohfeld*, 78 LAW & CONTEMP. PROB. 185, 202-03 (2015).

[178] It should be noted that neither Professors Corbin or Schlag endorse such a formalistic approach to Hohfeld. Indeed, both explicitly underline the practical significance of his analysis. Yet the use of such formalist examples to illustrate Hohfeldian distinctions partially undermines their own insistence on a practical approach to Hohfeldian analysis.

[179] Thus, the nonrivalrous character of the resources at issue in the intellectual property rights of patent and copyright helps explain key distinctive features of such rights that make them weaker than most other property rights, including their time-limited duration, narrower scope of protected subject matter and activities, and typically weaker remedies.

[180] *See* Robert Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1101 (1986).

[181] That the shrimp example comes from Hohfeld shows that he himself had not fully left the "analytic" mindset—of taking a formal and atomistic view of concepts, as "defined" in some self-standing way—that he was forging a way out of, with his relational and substantive approach to conceptualization. Hardly unheard of for a pioneer in method. For differences between prevailing interpretations of Hohfeld as "purely analytic"—in the sense of both formal *and*

because it tracks key substantive distinctions in underlying competing interests. Those disagreeing with the claim are then invited to say how and why they disagree that it is one thing to say that X is free to study while neighbor Y is also free to play their music, and another thing to say that not only is X free to study but they are also to be aided in studying, by stopping Y's playing.

Once we appreciate that the driver behind the bundle claim is a purposive one, we are better able to grasp both its critical force *and* its constructive upshot. The claim that property relations are best understood in terms of divisible and variable bundles is not merely a descriptive assertion about what shape they take under current law, nor just a normative exhortation about what shape they should take. Rather, it is a *conclusion* drawn out from the relational claim: once we register that each property entitlement/disentitlement pair is a social relation involving a pair of competing interests, then when substantively distinct pairs of interests are involved it would simply be a mistake of reasoning—in terms of transparency in its process and cogency in its substance—to treat a decision on one pair of interests as the same as, or controlling, a decision on a distinct pair. The bundle claim, then, is *neither* a descriptive *nor* a normative one; rather, it is a *conceptual* claim about what analysis of property must involve in *any* legal system, namely divisibility and variability of its social relations according to distinct substantive purposes (and, hence, contexts).

Turning from critique to construction, a purposive analysis allows us not only to deepen the critical force of the bundle claim beyond standard variants, but also to develop its constructive side, replacing the disintegrative view standardly thought to issue from disaggregation with an *architectural* approach to the analysis of property. Such an approach aims to specify key points of distinction and transformation in institutional analysis. How? By having a clear sense of the subject matter at issue—the distinctive policy questions posed by an area of law—and of the institutional tools at our disposal—the generative building blocks of its variable policy options. Equipped with the foregoing Hohfeldian analysis, we can specify that property pertains to (1) social relations regarding resources (not "things"),[182] (2) consisting of divisible and variable pairs of entitlements/disentitlements, the existence, shape, and conferral of which depend on purpose and context. And indeed we can go further: equipped with this conception of the *content* of property (its purposive subject matter)—shaping social relations regarding resources—we can go beyond the critical bundle claim to a constructive architectural one concerning its institutional *form*, by specifying the fundamental building blocks of property, its generative component parts.

The point of doing so is to orient institutional analysis in a systematic way, enabling it both to relativize (so as not to reify) without collapsing (so as not to disintegrate) the distinction between existing institutional options, and also to help generate new ones. To be sure, the method of such architectural analysis is not a matter of mechanical application of a recipe, but involves creative analytical work. Nevertheless, three crucial pointers may be gleaned from the case of property.

First, as opposed to disintegrating into a series of ad hoc discrete details, the aim of disaggregating is to orient ourselves systematically to *constitutive distinctive* entitlements, tracking

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atomistic—and the present reconstruction of him as substantive and relational, *see* di Robilant & Syed, *supra* note 156 at fn. 33 & 94. On the aridity of self-standing "conceptual analysis" in general, *see* Gilbert Harman, *Doubts About Conceptual Analysis, in* PHILOSOPHY OF MIND 43-48 (Michealis Micheal & John O'Leary-Hawtham, eds.) (1994).

[182] For an argument in favor of *resources* as the aptly conceived subject matter of property, as opposed to either *things* or *anything and everything*, see di Robilant & Syed, *supra* note 156 at 5.4.1.

core distinctive underlying interests in resources. In the case of property, equipped with Hohfeld's fundamental distinction between "primary entitlements"—those directly pertaining to the subject matter at hand—and "secondary entitlements"—those pertaining to other, primary entitlements—analysis discloses there to be four fundamental component entitlements of the property system: (1) (a) Use-privilege; (b) Exclusion-right; (2) (a) Expropriation-immunity; and (b) Transfer-power. These: (a) form a tightly integrated set, starting out from the most basic entitlement, of a use-privilege, to build out to the rest in a series of close conceptual steps of correlatives and opposites, primary and secondary entitlements, which in turn track core underlying interests in resources; (b) to result in a theoretically powerful, indeed generative architecture: furnishing the four primitive building blocks for all property entitlement analysis, the ones necessary and sufficient for generating all possible permutations and combinations of property buildings; and (c) they are the *differentia specifica* of property entitlements, distinguishing the field from other areas of law.[183]

Second, to specify these as the constitutive components parts or generative building blocks of the system involves *no prejudgment* regarding their existence, shape, or conferral in any given setting—whether singly or in some combined configuration. That is a matter of substantive legal analysis and institutional design, ideally sensitive to the distinct contexts and purposes implicated by different resources, in terms of the positive, normative, and strategic concerns they raise. The aim of architectural institutional analysis is to furnish the organizing focal points indispensable for systematic positive, normative, and programmatic inquiry, *not* to prejudge its substantive results.

Finally, the analysis, being sensitive to purpose and context, remains open-ended—subject to dynamic development in light of changed understandings, contexts, and purposes. And of course it is hardly self-contained. Thus, alongside this architectural analysis of entitlement options we must immediately add a similar architectural analysis of remedy options. To mention remedies is to recall a distinguished line of legal-institutional analysis that has precisely pursued a more architectural, rather than disintegrative, approach in the wake of Hohfeld. Thus, building upon Hohfeld's platform of purposive disaggregation of *entitlements*, Fuller and Perdue inaugurated a similarly systematic approach to *remedies*, one brought to a point of crystallization by Calabresi and Melamed, and subsequently further deepened by Margaret Radin.[184] Continuing in the same vein, but now extending this mode of analysis to larger institutional clusters than strictly legal entitlements and remedies, has been work by Roberto Unger and Yochai Benkler.[185]

What unifies these as architectural rather than disintegrative modes of institutional analysis are the same three features: (1) orienting the analysis by specifying the *distinctive subject matter* of the field at issue; (2) a focus on *constitutive* component parts, or generative *building blocks*, as

[183] For the fleshed out analysis underlying this summary, see di Robilant & Syed, *supra* note 156 at 5.4.2.
[184] Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 2 (1937); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Margaret J. Radin, *Market Alienability*, 100 HARV. L. REV. 1849 (1987).
[185] ROBERTO MANGABEIRA UNGER, FALSE NECESSITY 491-497 (1987) (proposing a "rotating capital fund" conceived via the method of disaggregation and recombination); UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 12-15, 125-126, 152 (1996) (disassembling and recombining property and capital); Yochai Benkler, *Overcoming Agoraphobia*, 11 HARV. J. L. TECH. 287 (disassembling and recombining spectrum rights in light of reconceiving their aim from managing scarcity to congestion) (1998); Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 YALE L. J. 369 (2002) (disaggregating and recombining the institutional forms of the firm and market to forge commons).

opposed to loose piecemeal details; and (3) a *structural*, as opposed to ad hoc, *experimentalism* of disassembly, reshaping, and recombination in service of more effective pursuit of specified ends.

Yet there is a tension between this architectural approach and the strong strains of legal constructivism present in some of this work. The case of Unger is illustrative. Thus in the 2015 foreword to the reissue of his *Critical Legal Studies Movement*, Unger speaks in precisely legal constructivist tones of the "legal indeterminacy of the idea of a market economy."[186] But to speak of the legal indeterminacy of "the market" is no better—indeed, worse—than to speak of the same with respect to "property." As with property, so here, a legal constructivist approach to institutional analysis faces crucial critical and constructive deficits. First, it implicitly short-circuits our explanatory horizons: just as with property, so here, the attempt to denaturalize the market with "the state" rather than "social relations" adopts a liberal ontology of methodological individualism plus "the state," with its same blinkering effect on our analysis of social dynamics, as if there can be nothing wrong with market processes and outcomes absent the role of the state. Second, it also narrows our programmatic aspirations: if there is no "there there" inside the market—i.e., if the market is simply indeterminate as a concept and institution—then there is also no "outside" the market. And this indeed is the hidden premise of all "market indeterminacy" talk: the fear that there is no real alternative to market social relations, and so no point in questioning them. But just as there remains an "outside" to property—despite its social relations coming in divisible and variable component parts, which may be relativized along a continuum with non-property forms such as prizes or public funding—so there remains an inside and outside to market social relations.

Strikingly, it is Unger himself, in an unpublished essay on "The Universal History of Legal Thought," who comes closer than perhaps any other legal scholar in frankly acknowledging the explanatory and programmatic shortcomings of legal constructivism, in the following passage:

> Suppose that as an outsider to a society, coming from a place far away from it in time and space and uninformed of its history and particulars, you can decipher its language and gain access to all its texts of law and legal doctrine but to none other. You would be unable to infer from these sources the actual organization of the society and the economy.[187]

Precisely so.

Part V aims to elaborate on how that is and why it matters. It does so by arguing that we should conceive of political economy as the *macro-institutional* counterpart to the *micro-institutional* analysis that is law.[188] And that institutional analysis, as in law, should be oriented around *social relations.* In law, it is the distinctive social relations and subject matters of different fields of law. In political economy, it should be the distinctive social relations and subject matters

[186] UNGER, ANOTHER TIME, A GREATER TASK, *supra* note 82 at 7-9.
[187] Roberto Mangabeira Unger, *The Universal History of Legal Thought* (2017) available at www.robertounger.com
[188] In this, the present analysis follows Unger, who refers to law and political economy as "the twin disciplines" of "institutional imagination." UNGER, LEGAL ANALYSIS, *supra* note 185 at 22-23. Where it departs from Unger is in how it conceives of each of these disciplines, and of their inter-relation. For further discussion, see V.B. It also departs by speaking of institutional *analysis* rather than institutional "imagination": as argued below, any programmatic work needs to be oriented, and hence preceded, by prior explanatory analysis. Unger's unduly voluntarist view of the former is connected, I believe, to explanatory deficits in his descriptivist approach to the latter. *See* note 223, *infra*.

of production, reproduction, meaning, and ordering. For law, the illustrative example used was "property as a social relation"; for political economy, it will be "the market as a social relation." And just as with property, where the argument is that a legal constructivist view faces *both* critical and constructive deficits—those of disintegration and descriptivism—so for markets it will be argued that a legal constructivist approach faces similar deficits, unable to provide *either* plausible explanatory accounts of the distinctive dynamics of different kinds of markets—such as "embedded" versus "disembedded"—or any programmatic orientation for their transformation. In both cases, an architectural approach—be it to property as a legal form or the market as a social relation—provides the tools for systematic analysis that avoids both reification and disintegration.

As a bridge to that discussion of political economy, it may be helpful briefly to encapsulate the central claims of the present institutional analysis of law. These have been four-fold: (1) First, from a *critical* perspective, a social relations approach shares with legal constructivism the aims of denaturalizing and dereifying mainstream views, but pushes deeper on each front, reaching past the indeterminacy of standard naturalizations and reifications, to their implausibility. Specifically: (a) a *social relations* view of property renders *natural* or *private* rights views untenable, not merely restricted in their scope as under a *state-backed* view; and (b) analysis of the *distinctive structure* of these social relations furnishes a stronger basis than the *ad hoc* bundle of rights view for why property simply cannot be understood on the model of *monolithic* ownership. (2) In turn, the same conceptualizations that give a social relations approach deeper critical purchase also enable it, from a *constructive* point of view, to avoid both the disintegrative and descriptivist pitfalls of legal constructivism. They do so by furnishing the tools needed for orienting analysis in a systematic or architectural fashion, with respect to both (a) the distinctive subject matter(s) of different areas of law and policy; and (b) the generative building block institutional tools at their disposal. The following section generalizes this constructive analysis, shifting from property to *law* in general.

2. Constructive Analysis of Legal Values (Legal Reasoning)

What is law? Among the leading candidate answers are state-backed "commands,"[189] officially-sanctioned "rules,"[190] "rules and standards,"[191] "principles,"[192] "principles, policies, and purposes,"[193] and… "decisions."[194] For present purposes, what matters less is whether any of these answers is right or wrong, than that they are all incomplete. What do all these commands, rules, standards, etc.—in a word, *prescriptions*—pertain to? What are they *about?* "Well, all manner of things" might intone a seasoned legal analyst, "a veritable cornucopia of subject matters. Just open any law school's course offerings!" But if law is about anything and everything, then it is about

[189] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1, 9-11, 13-33 (1954) (1832).
[190] *See* H.L.A. HART, THE CONCEPT OF LAW 79-99 (2nd ed. 1994) (1960). The gap or relation between "state-backed" and "officially-sanctioned" rules in Hart's theory of law—as a "union of primary and secondary rules" grounded in a master secondary "rule of recognition," accepted from an "internal point of view" by legal officials who both sanction and are sanctioned by the rules—is one we can set aside for present purposes.
[191] *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) *reprinted in* DWORKIN, TAKING RIGHTS SERIOUSLY 14-45 (2nd ed. 1978) (1977); Kennedy, *Form and Substance, supra* note 69.
[192] *See* Dworkin, *Hard Cases*, *supra* note 120, *reprinted in* DWORKIN, TAKING RIGHTS SERIOUSLY, *id.* 81-130.
[193] *See* HENRY M. HART, JR. AND ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994 [1958]); Unger, *CLS, supra* note 83.
[194] Holmes, *Path*, *supra* note 113; Llewellyn, *Bramble Bush, supra* note 22; FRANK, MODERN MIND, *supra* 25.

nothing in particular. And the trouble with that answer is that it threatens to rob law of any distinguishing features, either as a mode of social thought or as a field of social practice.[195]

What's wrong with stripping law of any distinctive features? The answer may be seen from either of the two main vantage points concerning us at present. From within the received traditions of Realism/CLS, central questions concerning law/politics and law/society relations simply cannot be posed without specifying, at least tentatively, what is meant by "law." Indeed an abiding concern of CLS, one that we have not yet taken up but which will occupy us in Part V below—the thesis of the "relative autonomy" of law—cannot even get off the ground without specifying what ("law") is being claimed to be relatively autonomous from what ("politics" or "economy" or "society").[196] And the point is even stronger from an LPE perspective of the sort being advanced here: to examine the inter-connections between *law* and *political economy*, each being seen as a distinct mode of institutional analysis and arena of social dynamics, it is even more imperative to specify what distinguishes law as a specific mode of social analysis and aspect of social life.

Yet any attempt at specifying the distinctive features of law will, understandably enough, likely be met with Realist-inspired skepticism toward any "formal definition" of law, as being arid at best and downright misleading at worst. On the one hand, any such attempt risks devolving into a barren exercise in taxonomy (trying to capture a broad range of common or central usages) or search for an essence or "core" (via "necessary and sufficient" conditions, "family resemblances," etc.), one that seems beside the point of any substantive question we might be interested in, and in any case threatens to become undone by the first significant counter-example. On the other hand, to avoid such aridity, it may smuggle in priors under cover of an ostensibly neutral "starting point," so as to misleadingly disguise what is really a substantive controversy as a tussle over definitions.

The answer to these cogent concerns, however, is not to give up specifying our meaning, but, rather, to underline the radical gulf between stipulating "formal definitions" versus developing *substantive conceptualizations*. Formal definitions are precisely what the reconstructed Realist critique from reification articulated above—in sharp contrast to the received Realist critiques from indeterminacy—targeted in its attack on formalist legal reasoning: namely, attempts to *delimit* in some *self-contained* way the boundaries of a term, which are then to be *fixed*. Concepts, however, are not *things*—past usages, central meanings, essences, cores—that we find "out there," but *tools* for thinking that we make. Moreover, they are never self-contained, but always *relational*, and hence not delimited but *forged*, via distinctions made with other concepts within a framework of inquiry, the distinctions serving the epistemic and practical purposes at hand. Consequently, being

[195] Of course, it might be replied that what is distinctive about law simply resides in what one of the answers just given says, namely that it consists of either "state-backed" or "officially-sanctioned" commands, rules, principles, etc., as per the leading candidate replies to the jurisprudential question: "what is (the nature or essence of) law?" I take up the relation between this jurisprudential question and the present inquiry below at note 198 and accompanying text.

[196] Indeed Pierre Schlag, building on views of CLS and Law-and-Society scholars among others, has taken precisely this point—i.e., that we first need to be able to specify the distinct character of law before examining its relation to something else, be it society or economy or politics—in the opposite direction of the present argument, by arguing that since the law/society (or law/economy, law/politics, etc.) distinctions are unsustainable, this pulls the rug out from underneath the guiding research agendas of most (conventional *and* critical) legal scholarship. Pierre Schlag, *The De-Differentiation Problem*, 41 CONT. PHIL. REV. 35 (2009). I believe Professor Schlag has with great acuity drawn out the implications of the CLS and Law-and-Society views that he is building upon but, in V.C. below, I argue that what follows from this is not the conclusion he draws, namely "so much the worse for these distinctions," but, rather, the opposite, namely "so much the worse for these views."

sensitive to purpose and context, the concepts themselves are *never fixed* but *always fluid*, subject to dynamic development or refinement as our contexts, purposes, or understandings shift.[197]

Thus the conception of law being offered here is fully substantive, in the sense of theory-embedded. The aim is to develop an analysis of the distinctive features of law as a social institution and political practice, for the sake of addressing the central questions of Realism/CLS and LPE identified above. And so as with *property*, so with *law:* a concept is being forged and refined within a framework of inquiry, one subject to open-ended development. To fail to offer any such concept, out of fear of reifying the subject matter, is to risk lapsing into a form of descriptivist anti-theory that has difficulty even getting off the ground, by simply failing to constitute or conceptualize its object of inquiry. What follows, then, is carried out in that spirit: of contributing to a framework of inquiry—a *theory*—of law, one answerable to the twin controlling purposes of specifying what is distinctive about law *both* as a form of social life *and* as a mode of social analysis.[198]

The distinctive feature of modern law, on the present conception, is that it is about (1) social relations, (2) structured as rights.[199] Thus, the starting point of legal analysis must be analysis of the structure of rights. And that analysis, as argued in the preceding section, was crystallized in proper theoretical—generative and systematic—form by Hohfeld. It consists, again, of four distinct parts: (a) rights are social relations; (b) the relation is prior to, and in that sense constitutive of, the parts; (c) the social relations of law have a specific and distinctive structure, taking the form of correlative benefit/burden pairs and hence of competing interests; and (d) the relations come in a generative set of distinct pair-types, forming the fundamental building blocks of the system.

What marks out distinct fields of law, in turn, are the distinctive subject matters (or areas of social life) in respect of which they dispose of rights, subject matters that typically pose distinct central concerns. To illustrate, consider three fields. Property law, on the present conception, is

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[197] The key source for this view of conceptualization is, as discussed above, a reconstructed Hohfeld. *See* text following notes 135 and 181, *supra*. For consilient treatments in the contemporary philosophy of mind and language concerning the substantive, or theory-embedded, character of apt conceptualizations, at least for purposes of naturalistic inquiry, *see* Harman, *supra* note 181; Sylvain Bromberger, *Natural Kinds and Questions*, 51 POZNAN STUD. PHIL. OF SCI. & HUM. 149 (1997); NOAM CHOMSKY, NEW HORIZONS IN THE STUDY OF LANGUAGE AND MIND 106-133 (2000).

[198] Reasons of space prevent me from taking up in any depth the question of how the substantive agenda guiding the present conceptualization of law relates to those animating more classically jurisprudential enterprises. Three brief comments must suffice here: (1) First, to the extent that the classical enterprises aim to capture the very "nature" or "essence" of (the concept of) law, in some way divorced from substantive explanatory or evaluative inquiry, the gulf between them and the present endeavor is sufficiently large as to render the resulting conceptions fully orthogonal. (2) Second, to the extent that a jurisprudential enterprise, such as the (very distinct) ones of Fuller, Dworkin, and Finnis, is anchored primarily in a normative aim (be it that of upholding the "rule of law," justifying state coercion, or promoting human flourishing), then while such aims may form a part of the present inquiry, they do so only in part, and only within the context of a prior aim, that of clarifying the distinctive social structure of law as a form of social life (a "sociological" inquiry the theoretical interest of which Dworkin, at least, has been witheringly dismissive from the first to the last of his jurisprudential writings). (3) Finally, the animating aim here may be thought closest to that of Hartian positivism, at least where the latter is understood to be an exercise in "descriptive sociology" rather than linguistic analysis, but even here the distance between the substantive conceptions that result is quite large, owing to the departure here from theories of authority (or "obligation") and meaning that seem central to Hart's enterprise.

[199] By "rights" I simply mean Hohfeldian entitlements as a matter of institutional structure. Thus the term serves here as a coverall for "privileges, claim-rights, immunities, and powers." I do *not* mean any specific normative arguments—be they legal, constitutional, or political-moral—concerning such entitlements. In particular, I do not mean to exclude "policy"-based (as opposed to "principled") justifications for legal rights, as somehow debarred from legal argument.

about social relations regarding resources, with its twin central concerns being those of ensuring adequate production and distribution.[200] The tort law of accidents, meanwhile, is about social relations regarding risk, aimed at securing adequate prevention and compensation. Antitrust law, to take a third, is about social relations regarding market structure, with its central concerns being to weigh the benefits of decentralized competition against those of integrated coordination.[201]

Within each field, in turn, we can identify three distinct types of considerations or buckets of arguments: (a) *substantive aims;* (b) *administrability considerations;* and (c) *procedural equity.* It is these three types of considerations—to some extent cutting across legal fields, but also to some extent field-specific—that serve both to demarcate legal fields from political morality *simpliciter* while also bringing them into contact with politics in a manner that renders untenable any formalist cabining of law. *Substantive aims* pertain to the controlling purposes or driving aims of a field: what are we trying to achieve here? For instance, securing adequate prevention and compensation in tort law; balancing incentives and access in intellectual property (IP) law; weighing competition versus coordination in antitrust law. *Administrability considerations* go to how to achieve our aims effectively, given the institutional capacity of the tools at our disposal (such as rights and remedies administered by courts). Thus in tort law, evidentiary and floodgates concerns loom large; in IP, the tension between sector-specific flexibility and streamlined general rules; in antitrust, concerns of over- versus under-enforcement in the face of radical uncertainty in ever-changing market conditions. Finally, *procedural equity* asks how we can achieve our aims fairly as a matter of due process. Here enter the values of the rule of law (e.g., protecting settled expectations, treating like cases alike), democracy (e.g., legislative supremacy of majority will), and the constitution (supernormal constraints on normal political processes owing to …. ?).

What is important to emphasize is that there is no distinct fourth bucket called "precedent" or statutory or constitutional "text"—the common coin of (formalist) law school pedagogy and American public discourse on law. This is the central lesson of the dereification critique of legal reasoning: that some of the most commonly invoked arguments in law are *fetishisms of form*. "Formalism" on this account is just a strong (overly strong?) emphasis on the values of procedural

[200] To forestall misunderstanding, it is not being claimed that this is a somehow "neutral" *definition* of property, one that, say, captures the broadest range of existing usages or notions (or something similar). Rather, it is a substantive *conceptualization* of how the subject matter of property, as a field of law, is best thought of, in terms of organizing academic inquiry and legal practice, with "best" here referring to what most effectively serves our cognitive and practical purposes in branching off a field of law for specialized study. The aim is to specify focal points for such study that seem initially most fruitful, with the understanding that as analysis develops, so the focal points and subject matter may change accordingly. For an argument why "resources" better captures the relevant focal point of property analysis than the alternative candidates of "things" or "anything and everything," *see* di Robilant & Syed, *supra* note 156 at 5.4.1. Similarly for "production and distribution" as being the central guiding concerns for this subject matter: this too is not simply a neutral description, but takes up a stance as to what captures the most significant human concerns in this area. The argument against the key alternative here—"static allocation and dynamic production"—would be that this latter is unduly centered on market practices and metrics, without plausible substantive (explanatory or normative) or administrability warrant. Of course, those wishing to orient studies (such as casebooks) along the latter lines are free to do so, but the point of this exercise is then to urge clarity and explicitness in one's organization of a field's focal points—ideally, in a way that can allow joinder across different normative camps. Thus, for example, on the present view it remains an open question whether "adequate" production and distribution of resources should be thought of in terms of what is "efficient" versus what is "fair" versus what is "democratic," and so forth.

[201] As with property (*see id.*) so with torts and antitrust: the aim in each case is to capture the central topic and guiding concerns in a felicitous way, one that organizes inquiry around focal points on which scholars and practitioners may fruitfully join issue, despite having differing normative perspectives.

equity—as against those of substantive aims and administrability—masked by the fetishism of form, the taking as self-evident the authority of various "sources" of law and as given and fixed their "plain" or "original" etc., meaning.[202] But secular authority is never self-evident, nor practical meanings given and fixed. Thus, the constructive upshot of the dereification critique is to free legal analysis to consider forthrightly the mix of substantive, procedural, and administrability *reasons* at play in a given legal field or case—rather than hiding behind reified *meanings* of mystified *rules*.

Such field-specific considerations or concerns are of course value-soaked. Indeed, they are *nothing but values*. But we need to notice two important points about them. First, they are *field-specific concerns* or values—ones that develop *inside-out* by starting from within a specific setting with its distinctive subject matter and institutional tools. Thus, "prevention and compensation" as the field-specific substantive concerns in torts, "incentives and access" in IP, and "competition and coordination" in antitrust. And even when we turn to weighing the different buckets or types of concerns against one another, that is still a form of normative reasoning properly called "legal." Second, however, these field-specific concerns do not by themselves settle the matter of course: thus, do we want *fair* or *efficient* prevention and compensation in tort law, and if the former what do we mean by "fairness" (we all know what is meant by "efficiency")? *Efficient* or *adequate* production in IP, and *efficient* or *fair* access? *Consumer welfare* or *concentration of power* as our yardstick for weighing competition versus coordination in antitrust? And so forth.

At this point reasoning about values in law enters into, becoming continuous with, debates in political morality more generally, about a fair and decent society. But even so we should notice that it is still an *inside-out* entering into debates of political morality rather than an *outside-in* "application." The difference can be considerable: how value debates take place, what purchase or traction they have, depends greatly on their specific institutional setting. Value debates about "efficient" versus "adequate" production in IP will be differently oriented and constrained than value debates about "the right" and "the good" in political morality *writ* large. To be sure, the former can and should be informed, even oriented, by the latter, but being informed and oriented remains different from simple "top-down" application from the outside, which rarely "takes." For value debate to be effective, it needs a tractable institutional setting. And if we wish new values to take hold in law, we may need to reconceive the institutional settings of fields of law themselves.

This brings us then to political morality *writ* large, the values that both shape and reflect those within the specific institutional settings of law. Above it was argued that the CLS "internal contradictions" critique of liberal political morality is unavailing. This leaves LPE with two main options: (1) work within liberal political morality; or (2) develop an alternative political morality, say that of *democratic equality*—and then work to reconceive fields of law and political economy so that its values can "take" and develop in tandem with the internal development of the fields

[202] For a similar analysis of how the rational kernel of "the new formalism" is a strong proceduralism, *see* Grey, *The New Formalism*, *supra* note 6. While Professor Grey does not himself offer an explicit conception of formalism, his analysis of its attractions and drawbacks makes best sense if seen implicitly to rely on a conception similar to the one advanced here. In this respect it is interesting to note that the present conception departs significantly from Grey's and others' prior conceptions of formalism—as a view marked by excessive faith in the realizability of deduction from gapless rules—a view having uncertain provenance at best. *See* references cited in note 6. The merits of the present alternative conception are that it specifies a more plausible view, both in the sense of it being more widely held, at the time of the Realists and today, and it requiring a more powerful critique than the internalist ones of Realism/CLS, one based not on indeterminacy of the legal materials but rather on mystification of authority and reification of meaning.

themselves. The two projects are compatible to pursue side-by-side, since a plausible alternative political morality will likely only develop out of an engagement with (the limits of) liberalism. And so, for either project, a first step is to come to grips with the structure of liberal thought itself. It is here that a crucial legacy of CLS merits reviving and developing in new directions. This is the ideology critique prong of CLS, conceived now as the making of both a diagnostic *and* evaluative claim, about distortionary limits or biases of liberal thought that foster or sustain inequities.

To build on a version of the Crit ideology critique so conceived would mean developing it in two directions, one diagnostic, the other prescriptive. The former would build on the structural analysis of liberal thought first assayed but then abandoned by Roberto Unger in *Knowledge and Politics*;[203] the latter on the normative critiques advanced in various works by Morton Horwitz.[204] In the latter respect, ideology critique becomes continuous with political theory or philosophy.

The details of such an ideology critique will be postponed to Part V.B., but its two-fold conclusions may be distilled here. First, the overall (non-contradictory) *conceptual structure* of liberal commitments is best delimited in terms of aspiring toward *the equal freedom of persons as individuals*. It is within this framework that *all* debate within liberalism proceeds, between, say, libertarians, welfarists, and liberal egalitarians, or different theories of distributive justice or rights. Said debate turns on competing conceptions of *equality* applied to differing conceptions of *freedom* for *individuals*.[205] Second, what the critic of liberalism needs to show is that this entire framework has significant blind spots, and to do *that* persuasively means advancing competing conceptions and claims of one's own. And from the vantage of *democratic equality,* the key blind spots of liberalism are two-fold: (1) a failure to confront the social-structural generation of inequality, so that its commitments to substantive equity in theory rarely materialize (i.e., are *institutionalized*) in practice; (2) a failure to confront the social-structural shaping of freedom, so that its commitments to individual agency obscure the need for social judgments of the good. The upshot of both concerns, then, is a need for greater *social agency*—targeting social-structural generators of inequality and unfreedom—than is countenanced by liberal commitments on their own. Democratic equality may thus be conceived as aspiring toward *the equal freedom of persons as members of society.*[206] As departures from liberal political morality, its upshots are fundamentally

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[203] *See* text accompanying notes 64 and 79.

[204] *See* works cited in notes 68 to 69.

[205] I hasten to add that such an abstract characterization scarcely does justice to the richness of debates within liberal thought. Thus to take one example—that of debates concerning distributive justice—this would tell us very little about the subtle (and important) differences between, on the one hand, welfarists, resourcists, and capability theorists with respect to the apt "metric" or "space" of distributive concern, and, on the other, the differences between advocates of maximization versus equalization versus sufficiency versus noncomparative priority versus comparative priority as the apt "principle" of distributive concern to apply to one's chosen space. For a synthesis of these debates and defense of a distinct position within them, see Talha Syed, *Educational Accommodation and Distributive Equity: The Principal of Proportionate Progress*, 50 CONN. L. REV. 485 (2018). Yet even on this intricate terrain, it *is* illuminating to understand that debates *internal* to distributive justice theorists are about what kind of substantive equity should obtain in what space of effective freedom, while the debate *between* them and their libertarian critics is whether there should even be substantive equity at all (in the space of "freedom to"), or whether liberal commitments should remain strictly at the level of formal or procedural equality (in the space of "freedom from").

[206] I take the term "democratic equality" from Joshua Cohen, who uses it to emphasize that Rawls's liberal-egalitarian theory of distributive justice is, as Rawls himself states, a "democratic conception" of equality. *See* Joshua Cohen, *Democratic Equality*, 99 ETHICS 727 (1989); and JOHN RAWLS, THEORY OF JUSTICE 57, 63-73 (1999) (1971). *See also*

two-fold: (1) insisting on the centrality of the *social pursuit of substantive equity*, in both the micro-institutional frameworks of law and the macro-institutional ones of political economy; and (2) recognizing a greater role for *irreducibly social judgments of substantive goods* in such contexts.

What, finally then, *is* law? In modernity, it is prescriptions about social relations structured as rights. The prescriptions find their warrant in *reasons*, not rules (commands, standards, etc.) and these in turn come in three distinct buckets or types. Modern law, then, is *reasoning* about *social relations* that are *structured as rights*. More precisely, it is *a specific form of reasoning* about such social relations, a form derived from its institutionalized settings that generate specific constraints of having to attend to considerations of field-specific substance, administrability, and fair process.

### *C. Law is* a form of *Politics,* by other means

Is law simply politics? No, and it is unclear whether any Crit ever meant to put it quite that way, despite the common view that it is precisely this claim for which CLS is known,[207] or the assertion by Crits that its partial acceptance by the mainstream signals a partial CLS victory.[208] To say that law simply *is* politics—i.e., completely to collapse the distinction—is to render both concepts less useful than before. Which might be fine as a piece of rhetoric or metaphor ("life is death"), but as analysis any such collapse must always be given an extra measure of scrutiny.[209]

To illustrate, consider that the argument of this Part has insisted that there is no tenable form of law that isn't soaked in values—more precisely, that any attempt to keep values out of

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Elizabeth Anderson, *What is the Point of Equality?* 109 ETHICS 287 (1999) (advancing a "democratic equality" theory of distributive justice). In subsequent work, Rawls would emphasize that his was a *political* conception of liberalism, one fitted for a modern *democratic* society. *See* JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY xvii, 1-16 (2007); JOHN RAWLS, POLITICAL LIBERALISM (1993). The argument here builds on these theorists to advance two further points: (1) first, to take seriously the democratic commitments of such a theory, it is imperative to develop a fuller account of social structure, as the proper object of social agency; (2) second, having that object in view directly issues in an expanded scope for the institutional transformation of social life, both (a) for the purpose of exercising properly democratic social agency over that structure; and (b) for better realizing the aims of liberal equality itself, on its most persuasive conception: equitable access to the effective means and conditions for personal self-determination and agency (or the ability of persons to form reflectively and pursue effectively their life plans and preferences).

[207] *See* Tushnet, *Critical Legal Theory, supra* note 2, at 106-107. Note that Professor Tushnet himself distinguishes between three variants of the claim: (1) An "early" "most provocative" variant, one that was "widely—but perhaps understandably—misunderstood" to claim "that every [legal] decision could be accounted for in the same ["political preferences"] way." (2) Next, a "scaled-back" version of the claim which he associates with Duncan Kennedy's work: "that some decisions were so motivated, and that the ideology of legalism required that none were." (3) Finally, the version that he himself signs on to: "that legal reasoning has a form identical to the forms used in 'ordinary' political discussions." I return to the latter two versions below. *See* text accompanying notes 216 to 220.

[208] *See* Tushnet, *id* at 107; Duncan Kennedy and Corinne Blalock, *Provocation as Strategy: An Interview with Duncan Kennedy*, 121 SOUTH ATL. Q. 377, 382 (2022). Corinne Blalock has aptly sounded discordant notes on the intellectual and political significance of either variant of this "victory by partial incorporation" claim, suggesting that it feels quite "hollow" given the absence of questions of socio-economic transformation in the legal academy. *See* Blalock, *Neoliberalism*, *supra* note at 77-78; Kennedy and Blalock, *id.* at 382-383. I offer my sense for why that is in note 223.

[209] It is important to disambiguate two questions. One is whether "law is politics" on the present revisionary conception of law, stripped of all mystifying formalist errors. That is the question taken up in the present section. A second, very different, question would be whether "law is politics" when conducted by those in the continued grip of mystifying formalist errors. The answer to that would be, briefly: "yes but of a different sort than on the present conception and revised practice, since in that case judgments of political morality are muffled behind a game of pretend baseball, and as such may remain partly inchoate to the authors and hidden from other participants or the audience."

legal reasoning is just pointless mystification, pure and simple. Does this mean that law simply *is* values? So that we can simply collapse the law/values distinction? No. Why? Because from one side, there are surely values (say of friendship, thrill) outside of law, having little to do with it, and so to reduce our sense of "values" to "law" would be a considerable impoverishment of that sense. And, from the other side, there are other things in law besides values: the tools of legal analysis that are legal concepts and the tools of legal decision that are entitlements. In a nutshell, while law is thoroughly soaked through with values, to collapse the law/value distinction—to say that law simply *is* values—is unhelpful as analysis (however useful as provocation). Law is *one form of* values, pursued with its own particular means. A *form with a specific conceptual and institutional structure*—rights and remedies regarding distinctive subject matters—using *particular means of reasons*, going to field-specific substantive aims, administrability concerns, and procedural equity.

Similarly, law is *a form of* politics, *by other means*. Just as Clausewitz is held to have said that "war is politics by other means,"[210] so we might say about law: law is a form of politics, by other means. With all the interest lying in analyzing that specific form and specifying the particular means. Lest we now, following Foucault's famous purported reversal of Clausewitz—i.e., that "politics is war by other means"[211]—simply say that since not only "war is politics," but also "politics is war," then not only "law is politics" but, ergo, "law is war." Now, this may make sense if one holds to a Schmittian conception of politics, simply as—*being constituted by*—a relation of war: the famous friend/enemy distinction.[212] (Although we should note in passing that even for a Schmittian, such a collapse of war/politics/law in theory would, in practice, be a disastrously self-destructive form of unilateral disarmament of conceptual tools.) But it is hardly apparent why, outside of actual war-like exigencies, one would hold to such an—ideology-free, interest-free, identity-free—conception of politics.[213] The answer lies of course in the aestheticization of politics that is the hallmark of modern conservative thought: the valuing of politics as an end in itself, as a field of play for martial virtues given tighter rein elsewhere, or, simply, as the occasion for "events" of the sublime, understood as the sudden eruption of the incalculable, having awesome effect.[214]

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[210] CARL VON CLAUSEWITZ, ON WAR bk.1, ch. 1, s. 24 (1921 [1832]) ("War is a mere continuation of policy by other means […] War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means.") The hedging formulation in the text ("held to have said") owes to my present disinclination to address two questions of Clausewitz interpretation: whether he is better translated as having said war is "politics" or "policy" by other means and whether it is "by" rather than "with" other means—and whether either of these makes a difference.

[211] MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 15 (1997 [1976]) ("we can invert Clausewitz's proposition and say that politics is the continuation of war by other means."). The hedging formulation in the text ("purported") owes to my present disinclination to address questions of Foucault interpretation raised by this passage in the context of his project on biopolitics launched in his inaugural College de France lectures.

[212] *See* CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26-37 (1932). I speak advisedly of a "Schmittian," rather than Schmitt's own, conception. For the argument that Schmitt's friend/enemy distinction has been widely misunderstood to extend from foreign to domestic politics—a misunderstanding that is "easily refuted by reference to Schmitt's text," even if not sufficiently discouraged by Schmitt himself—see Ernst-Wolfgang Bockenfrode, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory* 10 CAN. J. L. JURIS. 5 (1997).

[213] We might also note that Clausewitz himself seemed to have in mind something closer to the opposite: not to conflate politics with war, as both equally about existential conflict, but, rather, to assert that war itself is the "continuation of *policy* by other means." But what Clausewitz "meant to say" is of course neither here nor there for present purposes.

[214] For perhaps the most penetrating analysis (from the inside) of conservative political thought in this vein, see FRANK R. ANKERSMIT, AESTHETIC POLITICS: POLITICAL PHILOSOPHY BEYOND FACT AND VALUE (1997). For a consilient account from the outside (one from the left, not liberalism), see COREY ROBIN, THE REACTIONARY MIND (2011).

Whatever its (undoubted, partial) attractions (to some, including myself), to be on the Left must surely mean that the politics of interests, ideology, and identity take center-stage over those of *agon* for its own sake. Moreover, and more particularly, my own specific conception of the Left is one that understands the appeal of politics to be not merely instrumental but also of intrinsic worth, although now less as a site of conflict than of enlargement, as a way of connecting up with and through others, not only for common purpose but also common meaning, as one chapter in the species' history.[215] Common with and to all? Surely not: conflicts over interests, identities, ideals will remain. But the point of the Left, on this particular view, is partly to expand the community of membership. And how that works, *in law*, is by the giving of reasons as an act of vulnerability and accountability to others in a political community. Without—*ever*—reifying the reasons.

How does this conception of law's *relation to* politics—i.e., of their strong overlap yet distinction—compare to the two main CLS variants on the theme?[216] It fully accepts one but then builds it out in a specific direction, insisting to push past its legal constructivism and any lingering indeterminacy thinking that may hobble its constructive development. And it fully rejects the other, as mistakenly adopting formalist premises as part of an internal critique from indeterminacy.

What it rejects is the version of the law/politics relation on the minimalist indeterminacy view, which claims that legal decisions in *some* cases (such as those with high stakes) are (often) underdetermined by the formal materials (i.e., the positive sources plus accepted cannons of construction and application), so as to open up space for political ideology.[217] It rejects this, first, because on the present view there are *no* legal decisions that are well thought to be "determined" by the formal materials—to think this is to be in the grip of errors of fetishism and reification. *All* legal decisions, plausibly understood, involve not only cognitive questions of meaning but also practical questions of value, and while such questions properly start out from field-specific purposes (e.g., prevention and compensation), pursuing these will require reflection not only on questions of procedural equity and administrability that too involve values but also larger questions of political morality (do we want *efficient* or *fair* prevention, and if the latter, what is the best conception of fairness here?). And it rejects this, second, because it finds untenable the migration of the anyway implausible indeterminacy view of concepts—itself spurred, again, by the posture of working within mistaken formalist premises, to mask a debate about values by trying to destabilize meanings—to the realm of values. Values may conflict, but then it is as much up to the critic as anyone else to get their hands dirty. Moreover, neither of the main arguments advanced for omnipresent value "indeterminacy"—the internal contradictions critique of legal liberalism or opposing pairs of stereotyped argument bites in legal policy—is successful. The former fails to wound at the abstract level it is pitched, while the latter is premised on a mode of legal reasoning that the present view precisely targets for revision: namely, a game where participants, feeling

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[215] *See, e.g.,* FREDRIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT 3 (1981) ("the essential *mystery* of the cultural past […] can be reenacted only if the human adventure is one; only thus—and not through the hobbies of antiquarianism or the projections of the modernists—can we glimpse the vital claims upon us of such long-dead issues as the seasonal alternation of the economy of a primitive tribe, the passionate disputes about the nature of the Trinity, the conflicting models of the polis or the universal Empire, or, apparently closer to us in time, the dusty parliamentary and journalistic polemics of the nineteenth century nation states. These matters can recover their original urgency for us only if they are retold within the unity of a single great collective story.")

[216] *See* Tushnet, *Critical Legal Theory,* note 2 at 106-107 and discussion in note 207.

[217] *See* text accompanying notes 51 to 54 (summarizing Duncan Kennedy's indeterminacy critiques). Mark Tushnet's similar characterization of this variant, which he also associates with Kennedy, is reproduced in note 207, *supra*.

constrained by various given materials (including now "funds" of policy argument), mechanically mobilize perceived "authoritative" sources as a distraction from making either mental contact with, or explicit to others, the genuine grounds for decision.[218] At bottom, the posture of the internal or indeterminacy critic with respect to values is that of the lab-coat wearing outsider, bemusedly looking upon the participants. It is the attitude of the skeptic, which is attractive because usually the stronger ground when it comes to value debate. An alternative attitude, however, is simply to accept the vulnerability that comes with the making of value claims, for the sake of the accountability it involves to others, in an inclusive practice of the giving and taking of reasons. To be sure, life is not about the giving and taking of reasons. But perhaps law in modernity is.

On the other hand, the present account fully accepts but builds out in a different direction the view articulated by Roberto Unger in 1983's *Critical Legal Studies Movement*, which criticized as formalist any view that took legal reasoning to be "clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, or philosophical, or visionary."[219] The present conception accepts two foundational aspects of Unger's position, while equally fundamentally rejecting two others. First it accepts of course Unger's conception (and critique) of formalism as any attempt to keep political morality out of law. Second, however, it rejects the view that there is no clear conceptual contrast between political morality inside and outside law. This fails to attend, as argued above, to the distinctive forms and means of law, such that normative argument working "inside-out" from within legal practice or a legal field, will likely *not* be the same as normative argument working "outside in" from some external place. Unger's account, on the present view, fails to take seriously law's *distinctive conceptual and institutional structure*, as *one form* of social relations.[220] Likely, this is a result of the conceptual indeterminacy and legal constructivism that were a strong component of Unger's earlier positions, and linger even today, albeit in weaker form.[221] Fully jettisoning these, the present argument has insisted, is a

[218] Further, on a more technical level, the "semiotic" argument for the existence of opposing pairs of argument bites arrayed in the form of structured contradictions simply fails to go through. The fact that *concepts* are inter-related tells us little to nothing about "words" or the "word-concept" relations that are the main focus and source of analogy for this line of argument in the CLS literature (see Kennedy, *supra* note 52 at 95, 108; Balkin, *supra* note 57 at 1121). More importantly, the relational character of concepts does not license any view regarding the relational or otherwise character of *propositions*, which is the focus of this semiotic analysis. Finally, even if propositions were, like concepts, fully inter-relational, this would tell us nothing about their necessarily structured binary character, as opposed to, say, continuum-like character; or, further, about their necessarily contradictory character, as opposed to their character as abstract contrasts amenable to contextual resolution. For instance, to take a central illustration of this line of analysis—the law of accidents (see Kennedy, *id.*; Balkin, *id.*)—alongside "no liability without fault" (as the basis for negligent liability) and "between two innocents" (as the basis for strict/enterprise liability), we may have two others at either end of the continuum: "no liability, period" for mere accidents (as the basis for "state of nature" privileges), and "we're all in it together" (as the basis for social insurance); and while each of these presents an alternative to the others in the abstract, there is no reason to believe—at least, none supplied in the CLS literature—to think that the case for each is as equally persuasive as the others, either as a general matter or in specific contexts.

[219] Unger, *CLS Movement*, *supra* note 83 at 564. This is very close to, but perhaps not the same as, Mark Tushnet's characterization of the second Crit conception of the law/politics relation (which Tushnet embraces as his own): "that legal reasoning has a form identical to the forms used in 'ordinary' political discussions." *Id.* I take up this alternative formulation at note 220, *infra*.

[220] For this reason I would also demur, now a bit more strongly, from Professor Tushnet's version that the forms of normative argument inside and outside law are "identical"—this being a bit stronger than Unger's "no clear contrast."

[221] *See supra* text accompanying notes 83 to 86 (discussing Unger's strong indeterminacy and legal constructivist views in *CLS Movement* and POLITICS) and notes 186 to 187 (discussing Unger's weaker, but still lingering, forms of both views in his more recent work as evinced in his 2015 forward to the reissue of *CLS Movement* and his unpublished 2017 essay on "The Universal History of Legal Thought.")

prerequisite both for taking law seriously as a discipline of micro-institutional analysis and for properly relating it to political economy as macro-institutional analysis.[222] But, third, insistence on the distinctive institutional form of law does not mean drawing any sharp line between arguments of political morality within and outside law—in Ungerian terms, legal policy arguments may "escalate" in any given instance into more open-ended arguments of ideological contest.[223] However, and finally, in 1996's *What Should Legal Analysis Become?* Unger seemed to have partly drawn back from this view, now seeking to cabin legal reasoning in adjudicatory contexts, via appeals to "literal meanings," "shared expectations," and arguments from "analogy."[224] But this is implausible: if we wish "to bind judges hand and foot" we'll need to confront a fundamental challenge for any theory of democratic law-making in modernity: how best to carry out the ongoing, and unavoidably partly decentralized, process of the political reconstitution of society.[225]

Finally, how does the present conception of legal reasoning and the law/politics distinction relate to the views of Ronald Dworkin, the closest post-Realist rival to CLS?[226] A full answer to that lies beyond the present scope, but an answer in brief may be given by distinguishing between

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[222] *See also* the following footnote.

[223] Even here, however, there is an important pushback. Unger equates escalation of normative argument in law into full-blown political morality, with escalation of institutional argument in law into full-blown structural reconstruction. Unger, *CLS Movement*, *supra* note 82 at 579 ("The focused disputes of legal doctrine repeatedly threaten to escalate into struggles over the basic imaginative structure of social existence.") and 580 ("No clear-cut contrast exists between the normal and the visionary modes of argument, only a continuum of escalation.") While I accept the point regarding normative argument, the one regarding institutional argument is I think overstated. My own view of the way in which institutional argument in law can and should proceed, within a continuum while still recognizing crucial points of disjunction that may often be implausible to imagine would be judicially administrable, is set out in V, *infra*. For both theoretical and practical reasons, I believe institutional argument must proceed both inside-out from within law *and* outside-in from within political economy. Unger's position here strikes me as excessively voluntarist re law's role in structuring social relations, likely owing to the unduly "internalist" Crit view he adopts toward doctrine in *CLS Movement*, with its signal method of selecting and developing from within existing argument funds the suppressed pole ("deviationist doctrine"). As stated above, I believe this is excessively legal constructivist in its understanding of social structure and results in both explanatory deficits and undue programmatic voluntarism ("imagination" replacing "analysis"). *See* note 188, *infra*. This also may help explain Corinne Blalock's disquiet at the "hollow" feeling of any victory associated with a mainstream adoption of a close proximity between law and politics, owing to its absence of significant implications for questions of socioeconomic transformation. *See supra* note 208. The reasons lie, I believe, in the fact that even a full-scale continuity between law and politics or political morality would leave socio-economic relations largely untouched by law, absent a reconceiving of the *institutional structures* of legal fields themselves, as the micro-institutional counterpart to the reconceiving of *social relations* within the macro-frameworks of political economy. Only this sort of mutually reinforcing inside-out and outside-in work in the two areas can yield the explanatory and programmatic insights regarding socio-economic relations that are necessary for their transformation.

[224] UNGER, LEGAL ANALYSIS, *supra* note 185 at 114 (1996). I should clarify that this disagreement with Unger's answer to the question of "how should judges decides cases?" does not imply *any* disagreement with his distinct and very important point that, in any case, this question must itself be demoted from its present centrality in law, if legal analysis is to realize its potential as a field of institutional analysis. *See id.* at 110-113 ("Putting adjudication in its place").

[225] My own initial efforts in this vein, developed through an immanent critique of Ronald Dworkin's theory of statutory interpretation in *Law's Empire*, are in Talha Syed, Law's Empire *or Its Dereification?* (draft).

[226] *See* KENNEDY, CRITIQUE, *supra* note 5 at 37 (stating that Dworkin's theory is the closest to the CLS view of adjudication set out therein). For three searching examinations of the relation between Dworkin's views and those of CLS, *see* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986); J. M. Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 UMKC. L. Rev. 392 (1987); and Jeremy Waldron, *Did Dworkin Ever Answer the Crits? in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 155-182 (Scott Hershovitz, ed. 2008).

three phases in the development of Dworkin's views.[227] First, there is no place here for any strong distinction between (permissible) "principle" and (impermissible) "policy" considerations in adjudication, per the early Dworkin of *Taking Rights Seriously*[228]—a distinction that Dworkin himself seemed to relegate in significance in *Law's Empire*.[229] As for the mature theory in *Law's Empire* itself, there is again no role here for the "integrity" of law on the model of a "community personified," so as to operate as a special constraint on legal reasoning over and above considerations of due process, democracy, and substantive justice[230] and thereby distinguish such reasoning from political morality *simpliciter*, so that legal argument in the United States can draw upon the political moralities of liberalism and conservatism but not, say, socialism (Dworkin's example)[231] or, what was specified above, democratic equality.[232] Finally, turning to the late Dworkin of *Justice in Robes,* there again Dworkin seemed subtly to replace, now, "integrity" with "the value of legality,"[233] whose central concerns fit squarely within what was specified above as the values of procedural equity. These, as stated above, certainly do need to be taken into account in legal argument, alongside considerations of substantive justice and administrability, but doing so does not work to delimit legal reasoning from political morality in the manner sought by *Law's Empire.* And, perhaps by the end, Dworkin himself agrees, speaking in *Robes* of the "justificatory ascent" of legal argument into political morality,[234] in tones similar to Ungerian "escalation."[235]

## V. THE CRITIQUE OF POLITICAL ECONOMY AND THE LAW/SOCIETY DISTINCTION

What is the relation of "law" to "society"? A crucial premise of the present argument is that this question should not be asked, and cannot be answered, as an ahistorical abstraction. Thus, in Part IV, the analysis was not of "law" in general*,* but of *modern law*, or the forms and means that law takes in modernity: the structuring of social relations as rights, via reasons. Similarly, the analysis here will not be of how law so conceived relates to "society" in general but, rather, of how it relates to a distinctive *modern form of society*, namely capitalism. Specifically, the analysis will be of how the micro-institutional structures of the social relations of law—as rights—relate to the macro-institutional structures of the social relations of political economy, as market-dependence.

The argument proceeds in four stages. The first underlines the limited character of Realist and CLS critiques as denaturalizations of mainstream views in political economy, in view of the

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[227] A fuller answer—one pivoting on two key mystifying reifications in Dworkin's own theory in *Law's Empire* (the one concerning "law" as an object, the other concerning "community" as personified)—is developed in Talha Syed, Law's Empire *or Its Dereification?* (draft).
[228] *See* DWORKIN, TAKING RIGHTS SERIOUSLY*, supra* note 192 at 81-130 and 294-330.
[229] DWORKIN, LAW'S EMPIRE *supra* note 120 at viii (disavowing any "effort to discover how far this book alters or replaces positions I defended in earlier work," but still singling out two earlier claims that *will* continue to be defended, albeit in altered form, in the new work—the "phenomenological" critique of positivism and "the right answer" thesis—without mentioning the "principle" versus "policy" distinction that had garnered similar critical attention); and at 160-164 (foregrounding, in the case against pragmatism, the contrast not between "principle" and "policy" but that between backward-looking "integrity" and forward-looking judgments of what is best and fairest, all things considered).
[230] *Id.* at 164-168.
[231] *Id.* at 407-08.
[232] *See* text accompanying notes 205 to 206, *supra*.
[233] Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. L. STUD. 1, 23-31 *reprinted in* RONALD DWORKIN, JUSTICE IN ROBES 140 (2006).
[234] DWORKIN, *id.* at 54.
[235] *See* references and discussion in note 223, *supra* and accompanying text.

fact that post-classical liberal theory, both in welfare economics and Rawlsian political philosophy, anyway concerns itself (even if only in theory) with the equity of the outcomes of market processes irrespective of the role of the state.[236] The second points to the even greater constructive limits of Realism/CLS, in terms of providing tools for explanatory and programmatic analysis in political economy that may orient effective institutional interventions to correct for the equitable defects of market processes. I then offer a single alternative framework on both fronts, one that builds upon the denaturalization-of-the-market impulse of Realism/CLS, but pushes past simply invoking *the state* as against the *individualism* of classical liberalism and neoclassical economics—by outlining a theory of markets as historically-specific *social relations*. That same (Marx-Polanyi) framework, in turn, furnishes the tools for an explanatory and programmatic frame going forward, one that understands capitalist dynamics as springing from *market-dependent* social relations, and thereby helps to orient a program of systematic institutional transformation, in the direction *embedding* of markets within successively expansive *market-independent*, or decommodified, *social relations*.

In the course of developing these arguments, I will also address the key CLS objections to any such "external" social analysis, those from the constitutive and indeterminate character of law, as well from problems with functionalist social analysis. Doing so will also allow us to take up a final important theme not yet broached, but one central not only to CLS but also to general debates on the relation of law to society: the thesis of the "relative autonomy" of law.[237] While this thesis, of the partial or otherwise autonomous character of law in relation to other social factors, is distinct from that of the constitutive or otherwise role of law in relation to such factors, below it will be argued that an answer to the former only gains significance in light of an answer to the latter.

At the outset, it may be helpful to try to defuse three (understandable) bugaboos that often attend the mere mention of the term "capitalism." First, nothing in what follows will appeal to "material" factors such as technological development or economic interests as the real determinate forces of social dynamics. Rather, the locus throughout will be historically-specific *social relations* as the fundamental unit of analysis, with these conceived to be as political as anything in law.[238] Second, not only is "materialism" being left behind here, so too is any notion of "determinism" by some "thing" called a structure of capitalism: the focus here is on an *ensemble* of social relations, which, as such, are of course human artifacts rather than things "out there." The point, however, is that such relations, once instituted, *do* tend to generate systematic dynamics that require effectively targeted *social agency* to transform. Finally, the orientation for transformation here has

[236] To be sure, this concern is often *only* in (normative) theory, with little operationalization in (institutional) practice. But it is unclear to what extent that distinguishes these approaches from Realism/CLS, whose own critique is more of an in (critical) theory one, with less-than-clear implications for a program of institutional practice: *see infra* V.1.

[237] *See* Christopher Tomlins, *How Autonomous is Law?* 3 ANN. REV. L. & SOC. SCI. 45 (2007) (observing that "socio-legal scholars forever debate" the question of "how autonomous is law," and providing a masterly review of the central contours of that debate, and of key positions taken within it, in modern Anglo-American and European scholarship).

[238] To put the point in the strongest terms possible, on the present argument the *materialist conception of history* should be inverted to a *historicist conception of materialism.* The fundamental flaw of classical Marxism or "historical materialism" was its mistaken projection onto history as a whole of what are historically-specific products of capitalist *social relations*, such as a strong tendency toward "autonomous" (sic) technological development. In fact, such technological trajectories are *historically-specific* to capitalist social relations. For key contributions on this front, see Ellen Meiksins Wood, *Marxism and the Course of History*, I/147 NEW LEFT REV. 95 (1984); Robert Brenner, *The Social Basis of Economic Development, in* ANALYTICAL MARXISM 23 (John Roemer, ed. 1986). I hasten to add that neither Wood nor Brenner do (nor likely would) go so far as I do to suggest that "historical materialism" should be jettisoned as a label for their highly heretical—and *deeply* pathbreaking—brand of "political" Marxian analysis.

little to do with "socialism" on its standard conceptions. The aim is not to socialize ownership of the (somewhat nebulous) "means of production." Nor is it to push for a major role for "central planning." Rather, the aim is to expand *freedom in* the market, by expanding *freedom from* the market. The aim, that is, is to reduce market-dependency, so as to transform markets from realms of (socially-instituted) imperatives toward realms of (socially-instituted) opportunity.

### *A. The Limits of Legal Constructivism*

#### 1. The Limits of the Public/Private Critique: Liberal Ontology

The central lesson of the Realist critique of laissez-faire may be seen from either of two vantage points, related but distinct: on one, the point is that the *state structures liberty;* on the other, that the *state shapes distribution*. On the first, supposing our main concern is with *negative liberty*—meaning here "freedom from" coercive interference—the point is that the state burdens this liberty more pervasively than is commonly thought, due to the normal operation of laws such as property and torts in protecting individuals' interests in their person and resources, with many decisions concerning these not resolvable solely through recourse to highly abstract legal concepts anchored in principles of "natural rights."[239] The upshot? Even if we cared only about negative liberty, we need to recognize that its enjoyment has an inherently *distributive* aspect, one strongly shaped by state decisions.[240] This insight—that state decisions shape the distribution of negative liberty—then paves the way to another: the state shapes outcomes more generally, including the *distribution of resources*, and these decisions are similarly under-determined by considerations of natural moral right such as "desert."[241] The point? That once we absorb the extent of the state's role in shaping the distribution not only of negative liberty but also of resources, it becomes unclear *why* we should concern ourselves only with negative liberty, since its much-touted distinction with

[239] Two illustrations: (1) In deciding whether *A* may build their home in a manner that obstructs neighbor *B's* view (or whether *A* may play music in a manner that interferes with *B's* "use and enjoyment," etc.), recourse either to legal conceptions of "ownership" or natural-moral principles based on physical notions of "possession" or "invasion" will be of little avail. (2) In deciding whether *A* should be liable for severe injury to *B* from an unavoidable risk associated with *A*'s activity or instrument, recourse solely to abstract legal conceptions of "harm" versus "fault" or natural-moral principles of "security" versus "liberty" will not suffice. In such cases, the irreducibly competing claims of the parties require a weighing of substantive interests for which appeal solely to abstract legal concepts and associated natural-moral principles will be question-begging, if not circular. The generalization of such cases leads of course to modern zoning and health and safety regulations. For the cumulative pressure of such cases in shifting the position of perhaps the most prominent classical liberal or libertarian scholar in the legal academy, *compare* Richard Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 160-189 (1973) (seeking to defend, in the face of Coasean attack, physicalist notions of "cause" to shore up "common sense" notions of "rights" and "harm"), *with* Richard Epstein, *A Last Word on Eminent Domain*, 41 U. MIAMI L. REV. 253, 256-57 (1986) ("What is increasingly clear to me is that natural rights theories, as opposed to consequentialist ones, have never been able to carry the burden of justification demanded of ethical theories generally. All too often they quickly become assertions based on intuitive or self-evident truths, which can only be perceived, but never challenged or explained. […] When speaking of the ultimate justification of legal rules, it is rare that the discussion does not turn into one about social consequences, and on balance that is a good thing.") For a discussion of how Coasean "reciprocal causation" is a revival of Hohfeldian correlativity analysis, but in a way that simultaneously disarms Realist insights for the economic analysis of law, *see* Syed, *LPE Today*.

[240] *See* Hale, *Coercion and Distribution, supra* note 34; FRIED, *supra* note 34 at 43ff.

[241] A shift in emphasis from "negative liberty" to "distribution" in general may be associated with the CLS retrieval of the Realist critique. *See* Kennedy, *Stakes of Law supra* note 34. For an argument concerning how legal decisions shaping distribution are pervasively under-determined by desert-type considerations—and the implications of this for libertarian variants of classical liberal commitments—*see* Barbara Fried, *Wilt Chamberlain Revisited: Nozick's 'Justice in Transfer' and the Problem of Market-Based Distribution*, 24 PHIL. & PUB. AFF. 226 (1995).

*positive liberty*—meaning here "freedom to" realize one's ends, requiring not only the absence of coercion but also the presence of effective means—seems considerably attenuated in force.[242] Or, to put the point in terms of equality rather than freedom, a shift in concern seems called for—from one only with *formal equality* (in the space of freedom from) to one also with *substantive equity* (in the space of freedom to)—as unavoidable in many cases and perhaps simply merited in general.

The Realist critique played, then, an important role in legitimating the conscious pursuit of distributive equity in law and policy—and the New Deal welfare state in general—in ways that should not be understated.[243] But neither should the considerable deficits of the critique, in terms of both its critical blinders and constructive gaps.[244] By remaining within classical liberal premises, the Realist critique serves in fact to reinforce those premises, as if the only way to show something wrong with market processes is by revealing the "hidden hand" of the state. But banging on about "the state" serves to re-naturalize (indeed valorize) the market, as a realm of "natural liberty" or "private ordering" absent some showing of "state action." And if the reply forthcoming is "but the market is *always* constructed by the state," that answer both proves too much and shows too little. It proves too much by simply obliterating the distinction between market-based processes—of price-mediated exchange—and those involving state decisions. And if the reply is "no, of course, we can and do distinguish between market processes and state decisions," then the commitment to always pointing to the role of the state as a precondition for critiquing market outcomes shows too little: it radically blinkers our critical faculties—as if market processes may not themselves lead to undesirable social outcomes—and denudes our constructive ones, robbing us of any ability to analyze market processes except through the lenses of legal categories and state decisions.

To illustrate, consider the likely Realist/CLS reply to the following argument by Hayek as to why pursuit of distributive justice is illegitimate (indeed, a "mirage"): "only situations created by human will can be called just or unjust," so that "if it is not the intended or foreseen effect of

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[242] Indeed, in the touchstone modern essay on "negative" versus "positive" liberty, Isaiah Berlin himself implies that the freedom "from" versus "to" contrast may be of little significance, due to Realist-type reasons regarding the state's role in shaping both. *See* Berlin, *supra* note 102 at 194-95. Berlin then canvasses a different distinction, between a "freedom of means" and a "freedom of ends." On this alternative contrast, negative liberty includes *both* freedom from and freedom to (or *voluntariness* as the absence of coercion and *agency* as the presence of effective means to pursue one's ends), while positive liberty pertains to *self-determination* and, perhaps, *self-realization* (or having one's ends be reflectively held and hence truly one's own and, perhaps, objectively valuable). *Id.* at 203-05. Yet it has to be said that Berlin's discussion is marked throughout by ambiguities and vacillations, and perhaps as a result the freedom "from" versus "to" interpretation of the distinction has become lodged as the dominant one, despite its lack of either strong substantive import or interpretive support in Berlin's (admittedly unclear) text. *See, e.g.,* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 177 (2001) (citing Berlin in distinguishing between "negative" versus "positive" liberty in terms of "freedom from" versus "freedom to"). For an "ideological" diagnosis of the strains in Berlin's text, *see* Perry Anderson, *Components of the National Culture*, I/50 NEW LEFT REV. 3, 19, 26 (1968).

[243] *See infra* notes 263 and 268 (documenting role of Realist-type reasons in legitimating pursuit of distributive equity).

[244] The present discussion is focused on the Realist critique as a critique of laissez-faire in political economy. A more comprehensive account of the critique, now of the public/private distinction *writ* large, is offered in Syed, *LPE Today*, *supra* note 94. With this wider lens, the achievements and promise of the critique loom larger, especially with respect to its contribution to the fundamental redrawing of "public" and "private" lines in American law and life achieved by the Civil Rights Revolution of the 1950s and 60s, feminist revolution of the 1970s and 80s, and their follow-on effects for subsequent waves of anti-discrimination and public accommodations law for sexuality, disability, and gender identity. Of course there also remain, I point out, some difficult questions not solved by any simple "deconstruction" or collapse of the distinction, as opposed to a continuumization of it in relation to distinct substantive interests.

somebody's action that A should have much and B little, this cannot be called just or unjust."[245] The Realist/Crit will, we can predict, immediately latch onto the phrase "somebody's action" to search out some legal rule or state decision that, however remotely, played a role in shaping the outcome, the effect of which a state official may now be held, however implausibly, culpable for having at least foreseen (or failed to), if not intended. More generally, against Hayek's claim that the market is a "catallaxy"—i.e., a spontaneous order emerging from behind the backs of its participants—that should not be subject to conscious social evaluation,[246] comes the Realist/Crit insistence that, in fact, the market is all too clearly a conscious state construct. But do we really mean to say that when economies of scale lead to a firm enjoying incumbent monopoly advantages in a given market, that this must be traced back to some government (in)action that failed to anticipate this result, before we have a legitimate basis for policy intervention? And, further, that it is *that* "culpable" state decision, rather than a forthright assessment of the consequential effects of the monopoly (along with the administrability and procedural equity of any proposed remedy), that provides the orienting framework for constructive analysis of any policy solution? *Really?*

The limits of such an internal critique are perhaps best illustrated by contrasting it with two forms of post-classical liberal theory—welfare economics and Rawlsian political philosophy—that each allows itself (at least in theory) directly to evaluate the substantive equity of market outcomes, without being held hostage to classical liberal or libertarian premises about when and how it is legitimate to query market processes. In economics, this takes the form of the "second fundamental welfare theorem," which explicitly affirms the legitimacy of evaluating and revising the outcomes of even perfectly competitive, efficient markets from a distributive point of view.[247] From where comes this adoption by economics of such a frankly consequential evaluation of social outcomes? Its roots likely lie in twin developments of the eighteenth century: a "utility" revolt against natural rights theories of the seventeenth and, proceeding hand-in-hand, the emergence of "political economy" as a distinct discipline.[248] That is, as a positive analysis of aggregate social

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[245] FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY VOL. 2: THE MIRAGE OF SOCIAL JUSTICE 33 (1976).

[246] *See id.* at 67-70, 107-114, 128-129.

[247] The theorem is one of three central to modern welfare economics that together hold, roughly speaking, that under certain highly idealized conditions: (1) competitive markets will lead to an equilibrium state (the "existence theorem"); (2) such a state will be Pareto optimal (the "first fundamental welfare theorem"); and (3) any Pareto optimum may be achieved by a suitable redistribution of income among market actors (the "second fundamental welfare theorem"). The historical roots of the theorems lie in the work of, *inter alia*, Adam Smith and Leon Walras, with their modern formalized treatments owing to the work of, *inter alia*, Edgeworth, Pareto, Lange, Lerner, Allais, Arrow, and Debreu. *See* Kenneth J. Arrow, *An Extension of the Basic Theorems of Classical Welfare Economics*, 2 BERK. SYMP. ON MATH. STAT. & PROB. 507 (1951); Gerard Debreu, *The Coefficient of Resource Utilization,* 19 ECON. 273 (1951); Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECON. 265 (1954); Darrell Duffie & Hugo Sonnenschein, *Arrow and General Equilibrium Theory*, 27 J. ECON. LIT. 565 (1989). The policy stakes of the second welfare theorem, in terms of licensing pursuit of distributive concerns, were emphasized in Arrow, *id.* at 529 ("The […] hope of the type of analysis of which the present paper is a sample, the so-called 'new welfare economics,' is that the problems of social welfare can be divided into two parts: a preliminary social value judgment as to the distribution of welfare followed by a detailed division of commodities taking interpersonal comparisons made by the first step as given.") For doubts on this last front, see Duffie & Sonnenschein, *id.* at 582 ("As a policy tool for achieving efficient allocations that are also desirable with respect to income distribution, the second welfare theorem faces a (well-known) difficulty […] the process of redistributing units of account creates incentive problems.")

[248] Key steps in the process include: (1) Hume's "utility"-based critique of (Lockean) contract theory, alongside his "judicious spectator" view of impartiality in morality; (2) Adam Smith's development of the latter into the "impartial spectator" moved by imaginative sympathy, alongside his focus on the "wealth of nations" as the apt subject matter

patterns developed for the sake of grappling with a newly emergent order arising from "invisible hand" market effects that no individual intended, so a consequential form of normative analysis followed in its wake. The latter arose, in other words, partly to try to come to evaluative grips with the new spontaneous effects being explained by the former. With new facts came new values.

Now it needs immediately to be added that no sooner did economists concede in theory the need to reckon with distributive concerns than they threw up obstacles to its realization in practice. Indeed, an entire sub-history of the discipline may plausibly be told in terms of its metamorphosing reasons—shape-shifting in form but persisting in content—for why policy analysis must center on "efficiency" and shunt aside "equity."[249] Key landmarks here include: (1) Pareto's ban on interpersonal comparisons of utility, to disarm Benthamite utility of its egalitarian potential and install in its place the antiseptic notion of "Pareto optimality"—whereby a change is efficient only if it harms no one and benefits at least one—as the sole unimpeachable yardstick for the evaluation of economic outcomes.[250] (2) Kaldor's and Hicks' rendering of Pareto optimality safe for the real world—where policy decisions typically do impose harms on some and so require tradeoffs—with their "potential Pareto" criterion that holds a change to be efficient so long as its beneficiaries *could* out of their gains compensate those harmed up to a point of the latter's own (intrapersonal) indifference.[251] (3) Finally, in the face of the "new welfare economics" readmission of questions of interpersonal comparison and distribution,[252] a set of arguments advanced by legal economists for why, even allowing for interpersonal comparisons and distributive weights in theory, analysis of law and regulatory policy should in practice still focus single-mindedly on pursuit of Kaldor-

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for political-economic inquiry and policy; (3) the further development of these by Bentham into "utility" as "the sovereign master" of both humanity and social policy, in the place of rights as "nonsense on stilts." *See* David Hume, *Of the Original Contract, in* DAVID HUME, ESSAYS: MORAL, POLITICAL, AND LITERARY 465 (Eugene F. Miller, ed. 1987) (1741); DAVID HUME, A TREATISE OF HUMAN NATURE, bk III, pt. III, s. 1 (L.A. Selby-Bigge, ed. 1888) (1739-1740); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS, pt. I, s. 1, ch. 1-5 (D.D. Raphael & A. L. Macfie eds., 1976) (1759); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell et al. eds., 1976) (1776); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (J.H. Burns & H.L.A. Hart eds., 1996) (1790); Jeremy Bentham, *Nonsense upon Stilts, in* JEREMY BENTHAM, RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 317 (P. Schofield et al. eds., 2002) (1795). *See also* RAWLS, LECTURES ON HISTORY OF POLITICAL PHILOSOPHY, *supra* note 206 at 159ff (2007) (tracing the emergence of the utilitarian tradition to Hume's critique of Lockean contract theory), and 178-79 ("Hume's principles of justice are, in effect, largely principles for the regulation of economic production and competition between the members of civil society, as they pursue their economic interests"); RAWLS, TJ, *supra* note 206 at 161-64 (noting that "classical [utilitarianism] is closely related to the concept of the impartial sympathetic spectator" and tracing the development of that concept from Hume and Smith onward); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 52-57 (1979) (tracing the significance and impact of Hume's critique of Lockean contract theory through its influence on Smith and Bentham).

[249] With a prehistory lying in how Smith and Bentham themselves tended toward (at least in prominent parts of their works, but with important exceptions elsewhere) laissez-faire conclusions despite their consequential premises.

[250] VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY 452, 484 (A.S. Schwier trans. 1971) (1909); Allan Feldman, *Pareto Optimality, in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 5 (Peter Newman ed., 1998). An important sub-stage here was the further entrenchment of the ban on interpersonal comparisons by Lionel Robbins in the 1930s, who argued that the mere making of comparisons across persons—i.e., even without the assignment of any distributive weights to them—was an inherently "normative" rather than "descriptive" exercise and, as such, suspect on (positivistic) scientific grounds. For the conflations involved in this latter claim, *see* AMARTYA K. SEN, ON ETHICS AND ECONOMICS 30-31 (1982).

[251] Nicholas Kaldor, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); John Hicks, *The Foundations of Welfare Economics,* 49 ECON. J. 696 (1939).

[252] *See, e.g.,* the Arrow passage cited in note 247, *supra*.

Hicks or "wealth" efficiency, leaving questions of distributive equity to tax-and-transfer. These fall neatly within Albert Hirschman's triptych of the "rhetoric of reaction":[253] (a) *futility:* a first argument is that efforts to achieve desirable distributive effects through law may be ineffectual because undone by market transactions between the affected parties;[254] (b) *perversity:* next, to try to get around market "corrections" by compulsorily imposing desired terms on the affected parties raises the specter of "hurting the people you are trying to help," by securing them non-monetary benefits at a price higher than they themselves have shown to value them;[255] (c) *jeopardy:* finally, even in cases where distributively-aimed rules may be effectual and beneficial, nevertheless their pursuit via law or regulation may be too haphazard or costly,[256] and in particular will add a second "distortion" to efficiency than the same one incurred by pursuit of the goals via tax-and-transfer.[257]

The point here then is not that welfare economics provides effective tools for distributive interventions in market processes. It does not. Rather, the point is three-fold. First, the reasons for welfare economics' deficits in this regard have little to do with a failure to assimilate the lessons of Realism—on the contrary, unlike the Realist internal critique of classical liberal laissez-faire based on state action, welfare economics offers a more frontal rejection of classical natural rights, based on a straightforwardly consequential evaluation of outcomes and their equity. Nevertheless, and second, despite its clearer rebuke of classical liberal premises than Realism, as a constructive matter welfare economics remains as hampered in tackling distributive inequities through law as Realism was. Which brings us to a crucial third point: namely, that the Realists themselves *were* constructively hamstrung, lacking a serious program of distributively-sensitive private law, a point

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[253] ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991). Two predecessor law-and-economic arguments to those discussed in the text took aim, unlike the latter, at the legitimacy in principle of distributive concerns in law-and-economics, either as a matter of political morality *simpliciter* or, in a more limited vein, as a matter of legitimate *legal* policy. *See* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979) (defending efficiency on straight normative grounds); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (cabining, in the face of criticism, the case for efficiency to considerations of institutional morality specific to law).

[254] For an incisive summary of this debate, *see* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991). For some key moments in its development, *see* Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L. J. 1093 (1971); Neil Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L. J. 1175 (1973); Richard Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976); Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472 (1980); Duncan Kennedy, *The Effect of the Warranty of Habitability in Low Income Housing: "Milking" and Class Violence*, 15 FL. ST. U. L. REV. 485 (1987); Duncan Kennedy, *The Ex Post Distributive Case for "Insurance-Like" Compulsory Terms in Consumer Contracts* (1998 working paper).

[255] *See*, in addition to references cited in *id.*, Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Torts Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Anthony Kronman, *Paternalism and Contracts*, 92 YALE L. J. 763 (1983).

[256] *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10, 153-155 (3rd ed. 2003).

[257] *See* Aanaud Hyllan & Richard Zeckhouser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design,* 81 SCAND. J. ECON. 264 (1979); Steven Shavell, *A Note on Efficiency vs Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AMER. ECON. REV. 414 (1981); Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

that has been long recognized—whether as lament by its sympathizers (such as Barbara Fried and Ian Ayres) or as celebration by its critics (such as Richard Epstein).[258]

What explains this consilience among Legal Realism and welfare economics, both lacking any constructive counterpart to their critical departures from classical liberalism's insensitivity to market distribution? It is their lack of any explanatory etiology of distributive inequities of market societies, in terms of the social relations that generate them. Absent such an account, we get highly truncated or incomplete views, focused on the interdependent effects of individual preferences and technology (welfare economics) or those plus "the state" (Realism). With the result that any prescriptions flowing out of a critical evaluation of distributive inequities will tend to be tightly hemmed in by perceived "hard" constraints of preferences, technology, and state capacities.[259]

Strongly reinforcing these points is a third comparison: Rawlsian political philosophy. Famously, Rawls, like welfare economics, accepts the legitimacy of distributive evaluation of market outcomes over and above the processes leading to them.[260] And almost equally notoriously, Rawls also, again like welfare economics, has little to say about how institutionally to realize his "difference principle" of distributive justice, outside of tax-and-transfer.[261] Yet the way these critical and constructive points work in the case of Rawls is importantly distinct from that of welfare economics, and the differences prove highly illuminating in the present context.

A first fundamental point to establish is the advance Rawls marks over Realism and welfare economics in his basis for departing from classical liberalism. Rawls offers three distinct bases for going beyond the classical liberal indifference to the equity of market outcomes apart from process, and for taking as "the subject of justice" the "basic structure" of society, which includes not only its political constitution but also its "principal economic and social arrangements."[262] The first tracks Realism's internal critique of seventeenth-century classical liberal premises: namely, that these arrangements are "the cumulative effect of social and economic legislation" and in regards to them "[s]ome decision […] cannot be avoided" nor "possibly be justified by an appeal to the notions of merit or desert."[263] The second tracks welfare economics' consequential repudiation of classical liberal premises, as developed in the eighteenth century: namely, that "the accumulated results of many separate and seemingly fair agreements entered into by individuals and associations are likely over an extended period to undermine the background conditions required for free and fair agreements."[264] Third, however, Rawls goes beyond the foregoing to advance a distinct new basis, one very different from, and more fundamental than, the others: namely, that persons are born into "a social world" that has a "profound and pervasive influence" on every

[258] *See* FRIED, *supra* note 34 at 199-204; Ian Ayres, *Discrediting the Free Market (Review of* Fried), 66 U. CHI. L. REV. 253 (1999); *and* Richard Epstein, *The Assault that Failed (Review of* Fried), 67 MICH. L. REV. 1697 (1999).
[259] I offer a fuller account of how Legal Realism's truncated vision of law—as bilateral disputes between individuals adjudicated by the state—paved the way for law-and-economics' further domestication of the analysis—as bilateral transactions between individuals to be facilitated or mimicked by the state—in Syed, *LPE Today*, *supra* note 89.
[260] RAWLS, TJ, *supra* note 206 at 267-273 (delinking distributive justice from questions of desert and related concerns).
[261] RAWLS, TJ, *supra* note 206 at 65-73 (setting forth the difference principle) and 246-247 (relegating its realization to tax-and-transfer). Rawls's reticence on wider institutional implementation of the difference principle is all the more striking given that he did propose institutional interventions into market processes for the sake of better securing his other two principles of justice, namely (the fair value of) equal basic liberties and full, fair equality of opportunity.
[262] RAWLS, TJ, *supra* note 206 at 6-7. *See also* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT § 4 (2001).
[263] RAWLS, TJ, *supra* note 206 at 229, 7.
[264] RAWLS, JF, *supra* note 262 at 53.

aspect of their lives, such that the structures of this world must be appraised from the point of view of justice.[265] As remarked by the sociologist Kieran Healy, "[t]he sociological tradition lies behind this acknowledgement."[266]

With this third basis, that is, Rawls has left the seventeenth- and eighteenth-century worlds of liberal individualism and entered that of nineteenth-century social thought, as inaugurated by Hegel and Marx and continued into the twentieth by Weber, Durkheim, and their successors. The point has been put with acerbic force by political philosopher Brian Barry:

> Rawls's incorporation of this notion of social structure into his theory represents the coming of age of liberal political philosophy. For the first time, a major figure in the broadly individualist tradition has taken into account the legacy of Marx and Weber by recognizing explicitly that societies have patterns of inequality that persist over time and systematic ways of allocating people to positions within their hierarchies of power, status and money. It is depressing evidence of the social scientific illiteracy of so many philosophers that someone like Nozick, who is in these terms the equivalent of a pre-Copernican astronomer, should ever have been taken so seriously.[267]

The Copernican revolution that Hegel and Marx wrought in the understanding of humans-in-society was three-fold. First, the human condition is irreducibly relational, with the foundational unit of analysis for society being neither "the whole" nor "the part," neither "the individual" nor "the group," but, rather, *the relation*. Second, such relations come in fundamentally two distinct forms: *social* or *institutional relations* consisting in *inter-related roles* and *semiotic* or *discursive relations* consisting in *inter-related concepts*. Finally, a *structure* is best understood not as some "thing" or underspecified "whole" or "totality" but, rather, simply as a *relation of relations*—and, as such, neither to be reified nor to be reduced to its component parts but, rather, *analyzed.*

The elaboration of these claims, and of how they are distinct from prevailing alternatives, will be postponed to the following section, where an analysis of social relations will be fleshed out in the concrete context of the market as a social relation, as the cornerstone of a broader analysis of capitalist social relations and dynamics more generally. For now, the foregoing suffices to round out our discussion of the critical and constructive deficits of Realism, Rawls, and CLS.

A first pair of points concerns Realism. To remain within the terms of the Legal Realist critique—i.e., to keep to an internal critique that accepts the premises of a seventeenth-century ontology of individuals plus the state—is, precisely, pre-Copernican in its failure to come to grips with the pervasive, if invisible, structuring effects of social relations. And, relatedly, to generalize the Realist critique into a full-blown legal constructivism is, to borrow Barry's term, a form of "social scientific illiteracy" in its failure to conceptualize and track the ways in which persons are always already enmeshed in social relations not of their choosing.

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[265] RAWLS, JF, *supra* note 262 at 55. *See also* R AWLS, TJ, *supra* note 206 at 7.
[266] Kieran Healy, *Sociology, in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 90, 100 (Robert E. Goodin et al. eds., 2nd ed. 2017).
[267] BRIAN BARRY, JUSTICE AS IMPARTIALITY 214 (1995).

In both respects, the contrast between Rawls and another liberal-egalitarian thinker, Ronald Dworkin, is telling. Dworkin motivates his own concern with distributive equity almost entirely on Realist-type grounds of the role of law in shaping market processes, as evinced by the following declaration on the first page of his book-length treatment of distributive justice: "the distribution of wealth is the product of a legal order."[268] This is briefly supplemented elsewhere by more consequential considerations against libertarian theories,[269] but overall the role of law looms large and in any case the role of social relations is nowhere to be seen. Indeed, the opening words of Dworkin's major work of legal theory exhibit a legal constructivism so full blown as to perhaps make some Crits blush—and hopefully rethink their own adoption of the liberal premises of individualism plus the state: "We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses[.]"[270] And again, the counterpart to these critical deficits is the lack of any constructive institutional program: in his political philosophy, Dworkin's prescriptions for distributive equity are largely limited to tax-and-transfer,[271] while in his legal theory, despite agreeing in principle on the implausibility of the efficiency norm for private law,[272] in practice his one extended discussion of the issue more-or-less embraces an economic interpretation of the Hand formula as the appropriate guiding beacon for common law adjudication of torts.[273]

Two questions would seem to arise at this point. First, if, as argued above, the constructive deficits of Realism, welfare economics, and Dworkin in tackling distributive inequities stem from their lack of properly social-structural accounts of their generation, then how come Rawls, who goes beyond them with his adoption of the "basic structure" as a basis for repudiating classical liberalism, nevertheless still lacks a plausible constructive counterpart? Second, in any case can it seriously be maintained that, Realism et al. aside, CLS was also wedded to a liberal ontology of individuals plus the state, failing to take on board the insights of social theory? Is it not more accurate to say that CLS was in fact *deeply steeped* in the European tradition of social theory, and that its posture toward social relations was not a *pre*-structuralist one of liberal individualism but, rather, a *post*-structuralist one informed by postmodernist currents of that tradition?

Turning first to Rawls: why, despite his taking on board the importance of social structures in framing the question of justice, did Rawls nevertheless lack any constructive program for institutionally addressing the distributive inequities they generate?[274] Two principal, and related,

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[268] DWORKIN, SOVEREIGN VIRTUE *supra* note 120 at 1.
[269] *See id.* at 87-89 and 110-112.
[270] DWORKIN, LAW'S EMPIRE *supra* note 120 at vii.
[271] DWORKIN, SOVEREIGN VIRTUE *supra* note 120 at 99-109.
[272] Ronald Dworkin, *Is Wealth a Value?* 9 J. LEG. STUD. 191 (1980).
[273] DWORKIN, LAW'S EMPIRE *supra* note 120 at ch. 8. Dworkin's embrace of the economic interpretation of the Hand formula is qualified by his insistence that what justifies that interpretation is, in fact, *not* the value of efficiency, but, rather, that it embodies a form of "equal concern" for all affected parties, against a fair background distribution. But this qualification in theory has little bite in practice, in terms of counseling specific departures from efficiency in legal decisions when the requisite background conditions do not obtain. Showing, yet again, the limits of any purely critical or normative concern with distributive inequities that lacks a constructive account of their institutional generation.
[274] This may be thought to overstate matters since, especially in his later work, Rawls did emphasize that his principles of justice could not be satisfied by welfare state capitalism but instead required institutional renovations in the direction either of what he called "property-owning democracy" (following J.E. Meade) or "liberal socialism" (i.e., a form of market socialism). But first, as mentioned above, the motivation behind these proposals was *not* to realize his difference principle of distributive justice but, rather, to better secure his two other principles, namely (the fair value

reasons would seem to be at work. First, Rawls's embrace of social theory was primarily a critical one, adopted mainly for the sake of justifying a more expansive interrogation of social inequities than countenanced by the classical liberal tradition, but put to little explanatory use. Indeed, when it came to analysis of the typical patterns and dynamics of market societies, Rawls was notoriously individualistic, more-or-less uncritically adopting neoclassical economic accounts on this front.[275]

As such Rawls was subject to precisely the critique levelled by Marx against all liberal attempts to separate out, from within capitalist social relations, questions of distribution from those of production.[276] Marx's argument in this respect was three-fold. First, that it was indeed capitalist *social relations* of production that generated the distributive patterns at issue, and not some *natural* laws or *individual* traits. Second, to try to tackle the distributive inequities while leaving untouched the underlying relations of production, would likely come to grief on one of two grounds: (a) first, as a matter of *social consciousness,* market social relations generate their own naturalizing mirage, whereby the relations are rendered opaque behind a veil of free exchange between "independent individuals," with the only relations perceived being material ones between goods exchanged;[277] (b) second, as a matter of *social being*, even if the naturalizing veil of illusion were pierced, the asymmetrical relations of power stemming from capitalist social relations of production would place severe limits on the political pursuit of any strongly redistributive program. Finally, and what is perhaps Marx's most fundamental criticism, a concern solely with distributive ills is in any case too cramped a critical and transformative horizon, leaving entirely out of view and off the table substantive questions concerning the shaping of persons and society by unfettered market relations.

Telling illustrations of these criticisms are provided by examples close at hand. For one, in elaborating on how sociological research can aid in the pursuit of Rawlsian justice, Kieran Healy focuses exclusively on how such research reveals systematic barriers to social mobility, which may then be more effectively targeted for the sake of better realizing equality of opportunity.[278] But a concern solely with equality of opportunity does not even rise to the level of distributive equity: rather, it remains at the procedural level of ensuring a fair process of market competition for jobs and their rewards, saying nothing about the resultant structure of the jobs themselves or distribution of their monetary fruits.[279] As such it falls short even of the horizon of Realism, welfare economics, and Rawls, who at least recognize in principle the need to redress substantive inequities apart from procedural infirmities in markets—even if they offer little for how to do so in practice. Finally, it must further be emphasized that even for Rawls, and *a fortiori* for Realism and welfare

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of) equal basic liberties and full, fair equality of opportunity. And second, in any case, Rawls's remarks on the required institutional changes remained at a highly abstract, sketchy level. *See* RAWLS, JF, *supra* note 262 at 135-140.

[275] *See, e.g.,* Barry Clark & Herbert Gintis, *Rawlsian Justice and Economic Systems*, 7 PHIL. & PUB. AFF. 302 (1978).

[276] *See* KARL MARX, GRUNDRISSE 87 (Martin Nicolaus, trans. 1973) (1857-8) (in their "crude tearing-apart of production and distribution," the "economists' real concern […] is […] to present production […] as distinct from distribution etc., as encased in eternal natural laws independent of history, at which opportunity *bourgeois* relations are then quietly smuggled in as the inviolable natural laws on which society in the abstract is founded.") (emphasis in original); KARL MARX, CAPITAL VOL. 3, ch. 51, 1017-24 (David Fernbach trans. 1981) (1894) ("Relations of Distribution and Relations of Production"); Karl Marx, *Critique of the Gotha Programme, in* THE MARX-ENGELS READER 531-32 (Robert Tucker ed., 1978 2nd ed.) (1875) ("Any distribution whatever of the means of consumption is only a consequence of the distribution of the conditions of production themselves.").

[277] KARL MARX, CAPITAL, VOL. 1, ch. 1, bk. 4, 163-177 (1867) ("The Fetishism of the Commodity and Its Secret").

[278] Healy, *supra* note 266 at 101-104.

[279] For elaboration of this point in connection with mainstream (liberal and Weberian) sociological analyses of class, *see* Yochai Benkler & Talha Syed, *Reconstructing Class Analysis*, J. L. & POL. ECON. (forthcoming).

economics, the substantive inequities here have *nothing to do*, even in principle, with the structure of jobs, or the market division of labor itself: all concern themselves *solely* with the distribution of income, or division of its fruits. How unfettered—i.e., capitalist—markets structure labor itself, as well as direct the social disposition of an expanding surplus, is simply off the table and out of view.

It may be interjected at this point that the foregoing seems to be premised on accepting that classical Marxist political economy is in good working order, which of course is something that neoclassical economists, liberal political philosophers, and (as we shall shortly see) critical legal scholars would all query, and so to base a critique of their limitations on its acceptance is question-begging to say the least, at least without an explicit defense of that premise. But nothing here—either in the above or below—is based on accepting any of the following classical Marxist theses: (1) a theory of "the laws of history" in terms of the succession of "modes of production" in accord with developing "forces of production"; (2) a theory of society in terms of "base/superstructure" dynamics determined, in the last instance, by "material" economic factors; (3) a theory of "the laws of motion" of capitalist society anchored in "the labor theory of value"; and (4) a theory of social change as the wholesale structural substitution of one mode of production (capitalism) by another (socialism), principally by the abolition of private property in "the means of production."

No. Indeed, a crucial aspect of the present argument is that, in fact, the classical Marxist tradition itself reflected a somewhat "pre-Copernican" understanding of the central contributions of Marx (and Hegel) to social theory. That is, that tradition—anchored, ultimately, in a *materialist conception of history* whereby "modes of production" rise and fall in accord with a *transhistorical* development of "forces of production"—failed to follow through on what is Marx's most truly breakthrough insight, namely that of *historically-specific social forms* as the foundational unit of analysis. Instead of "modes of production"—consisting of a union of material forces and social relations, determined in the last instance by the former—the relevant units of analysis are "social forms"—consisting of both institutional and discursive relations, shaped ultimately by a dialectic of (given) necessity and (earned) freedom—whose constitution is a matter of historical specificity. As opposed to a materialist conception of history, we need an *historicist conception of materialism.*

The development and documentation of these claims—regarding the distinctive insights of Hegel and Marx into the constitutive character of social forms and of their historical specificity, and how much (but far from all) of the received Marxist tradition submerged these insights under a crust of "materialist," "determinist," and "structuralist" overlay—will take place in the following section. For now, two points need to be made: First, it is *this* analysis, of the constitutive character of historically-specific social forms, that the present argument is claiming is missing in both Rawls and (below) CLS, and not one concerning transhistorical, materialist modes of production. Second, it is likely because of their desire to distance from the latter that they also failed to build upon the former, by not seeing its very distinctive status and character.

And this takes us to the second likely reason why Rawls failed to follow through on the insights of social structure in any explanatory or constructive vein, namely that his understanding of those insights was radically truncated or incomplete, partaking in the received understanding of Marx that the present analysis jettisons. Although *Theory of Justice* is clipped in its references to

social theory in the tradition of Hegel and Marx,[280] in his *Lectures on the History of Political Philosophy*—consisting of lecture notes from his Harvard courses where Rawls expounded on the background sources of his own political theory—Rawls provides a fairly extensive discussion of Marx's thought.[281] And that treatment reveals an understanding of Marx closely in accord with the classical interpretation, namely of a "materialist" analysis of capitalism centered on "exploitation" based in "the labor theory of value," and a determinist, structuralist account of its supersession by the successor "mode of production," socialism. Expressing some of the standard doubts about this account, Rawls nevertheless accepted its central focus on exploitation or distribution, saying little about Marx's equally (if not more) abiding concerns with the substantive shaping of persons and society in disfiguring ways by capitalist social relations of production ("alienation"). The result? A two-fold truncation: the former was retained in severed form, as a purely normative concern with distributive inequities detached from any account of their generation, while the latter, feared to be based on untenable materialist, determinist, and structuralist premises, was simply dropped.

2. The Limits of the Law-as-Constitutive Claim: Poststructuralist Unspooling

If in Rawls the desire to distance from untenable aspects of Marxian analysis and failure to build on its powerful insights into social forms resulted in a lapse into a pre-structuralist form of liberal individualism, in CLS it resulted in a tense combination of legal constructivism that reduces social forms to "the state" and a post-structuralism that unspools such forms into a laundry-list of descriptivist details, with little analytical traction and no explanatory or programmatic power.

In both key cases, those of Duncan Kennedy and Roberto Unger, and for each across both the domains of discursive and institutional forms, a similar three-part pattern unfolded: (1) each initially adopted heavily "structuralist" analyses of *discursive forms*, ones partly influenced by a Hegel-Marx tradition but without drawing out their distinct methodological lessons for the analysis of *relations*, rather than underspecified "wholes" or "structures";[282] (2) then partly to hedge against the question-begging character of such structuralist analyses each also adopted, either alongside or soon after, forms of phenomenological or existentialist subjectivism scarcely distinguishable from liberal individualism;[283] (3) finally, when it came to the analysis of *institutional forms*, both (a) exhibited a(n understandable) skepticism toward classical Marxism's transhistorical materialist determinisms;[284] (b) but without registering the distinctive character and status of an alternative Marxian legacy of historically-specific social forms; (c) so as to end up with social analyses that oscillate between (i) full-blown Realist-inspired legal constructivism;[285] and (ii) post-structuralist

[280] Thus while references to Hegel and Marx in *TJ* are sparse and thin, not only does the animating notion of a "basic structure" stem from their insights, but "the social bases of self-respect," which Rawls takes to be the most important of his "primary goods," bears strong traces of Hegel's "mutual recognition," while Rawls's declaration that "what [people] want is meaningful work in free association with others" can scarcely be improved upon as a formulation of core aspirations of Marx. It must immediately be added that for the social bases of self-respect, Rousseau's *amour-propre* also looms large: *see* RAWLS, LECTURES ON HISTORY OF POLITICAL PHILOSOPHY, *supra* note 206 at 197-200.
[281] *Id.* at 319-372.
[282] UNGER, KNOWLEDGE AND POLITICS, *supra* note 70 at 2-3, 7-12, 106-119; KENNEDY, RISE AND FALL, *supra* note 62 at 8-14, 22-36.
[283] Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-217 (1979); Kennedy & Gabel, *supra* note 56; ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY 33-34, 95-100 (1984).
[284] UNGER, SOCIAL THEORY, *supra* note 106 at 96-120; KENNEDY, CRITIQUE, *supra* note 5 at 281-289.
[285] Unger, *CLS*, *supra* note 83 at 567-570, 663-665; Kennedy, *Role of Law in Economic Thought, supra* note 34.

descriptivism,[286] and in either case fail to provide any significant explanatory or programmatic insight, as conceded explicitly by Unger[287] and implicitly by Kennedy, whose own analytic work defaults back into a neoclassical economic analysis plus Realism (individuals plus the state).[288]

In other words, CLS went from hedging against underspecified "structuralisms" with hand-waiving "subjectivisms"—this in a first phase; to, in a later phase, oscillating between two types of descriptivism: legal constructivist and post-structuralist. And this applies to the analysis of both semiotic (or discursive) and social (or institutional) forms. And in all cases the culprit was the same: a failure to absorb the centrality of neither "wholes" nor "parts" but, rather, *relations*.[289] In their keenness to distance from untenable forms of Marxist materialisms and determinisms, the Crits failed to absorb fundamental Hegelian-Marxian analytic insights concerning *social forms*. The result? A vacillation between a legal constructivism indistinguishable from liberal premises and a post-structuralist descriptivism similarly indistinguishable in its cult of complexity.

Finally, it needs to be added that while classical Marxism does face serious problems, these are not the ones identified by the Crits: namely, criticisms from law's autonomy, constitutive role, and indeterminacy. None of these stick against even classical Marxism, much less the significantly revised variant of Marxian analysis at issue here. Here an additional part of the story must be told: an undue law-centrism took hold, either as disciplinary compensation or as the only perceived way of denaturalizing the individualisms of classical liberalism and materialisms of classical Marxism. But once we understand the relevant unit of analysis to be social relations, then the role of law can be comfortably fitted in without any undue exaggeration or sidelining of its significance.

I develop this argument in two stages. First, I aim to show how a relational analysis of both *discursive* and *institutional* forms—here, of liberalism and the market—is superior both to early structuralist-subjectivist and later post-structuralist or legal-constructivist CLS efforts. A relational analysis overcomes the "too structuralist" worries facing earlier Crit efforts without lapsing into the descriptivism marring later ones. As such, it provides genuine explanatory and programmatic insights, specifying underlying generative factors and architectural building blocks of social and conceptual forms. Next, I flesh out the concrete implications of this with an analysis of capitalist social relations and dynamics, one that aims to show both the explanatory and programmatic power of a social-relational analysis and how it is not vulnerable to the CLS critiques of classical Marxism from legal constructivism, indeterminacy, undue functionalism, and the relative autonomy of law.

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[286] UNGER, FALSE NECESSITY, *supra* note 185 at 68-79; KENNEDY, CRITIQUE, *supra* note 5 at 293-296.

[287] *See* Unger, *Universal History*, *supra* note 187 at 3 ("We now lack a reliable way of understanding how the real structure of society gets made and remade in history.") *and* 4 ("We have been left […] with no reliable way of thinking about how the structure—in particular the institutional structure—of society changes and consequently no developed account of what it is."). *See also* his recent declaration in a lecture on "Progressive Alternatives": "It's not easy to develop an alternative way of thinking about structure, otherwise it would have developed—and we don't have it." https://youtu.be/1VrJZ3GZokY?si=vw3J-NxZkqhR7Vew&t=2998

[288] *See* Kennedy, *Left-Wing Law and Economics, supra* note 110. *See also* his recent affirmation of neoclassical tools of economic analysis over alternatives: https://youtu.be/btp9MxjfPCM?si=0j27Ijyi64I68okF&t=4600

[289] I hasten to add that, as will be elaborated below, the relations at issue here are *social* relations, *not* interpersonal ones. This requires emphasis because a—perhaps *the*—key mistake of CLS was precisely its conflation of social with interpersonal relations. This led to the opposing errors of exaggerating either the scope or limits of theoretical analysis. For a paradigm illustration of both errors, in dialogue with each other, see Gabel & Kennedy, *supra* note 56.

*B. The Denaturalization Critique: The Market as a Social Relation*

1. Social Relations in General

2. The Market as a Social Relation

*C. Law and the Social Relations of Capitalism*

1. Capitalist Social Relations and Dynamics

2. The "Relative Autonomy" of Law

CONCLUSION