A helpful answer to this question must begin by holding at least that ‘it depends what you mean by ideology’ (let us ignore the other words and concepts in the question). Confining ourselves only to the meaning attributed to the concept by philosophers—social, political, moral, and ‘at large’—it seems that they use it in two quite different ways. Charting these different meanings is a problematic and time-consuming business, thus raising the question ‘why bother?’ What, after all, has ideology to do with law and adjudication? Many—among whom we must include the founders of the social sciences—have thought there was a close link here and Duncan Kennedy is the latest of a long line of scholars to examine it. His book, *A Critique of Adjudication*,¹ is the occasion for our analysis of the concept of ideology for it is the lodestar of the work. The illumination provided by it is, however, beguiling, since the substance of Kennedy’s critique of adjudication can stand without recourse to his account of ideology. That, at least, is what this essay aims to show. Along the way, we will have occasion to raise another question: to what extent does Kennedy’s apparently ‘critical’ or ‘heretical’ approach to legal scholarship generate an account of adjudication significantly different from the supposedly non-critical, ‘orthodox’ accounts offered by, *inter alia*, Ronald Dworkin, Neil MacCormick, and Joseph Raz?²

Answering this question assumes there is at least a putative distinction between these two approaches. Yet elucidating the contours of the distinction is hazardous for at least two reasons. First, because self-professed heretics and defenders of the orthodoxy have been loath to take each other’s arguments seriously. The preferred mode of engagement is name-calling: dangerous ‘nihilists’ threaten the integrity of the law school while ‘toady ing jurists’ prop up the status quo.² This is not a helpful way of clarifying the issues at stake. Second, the sheer diversity and quantity of work, both heretical and orthodox, makes taxonomy difficult and dubious. With these caveats in mind, we will nevertheless hazard the following distinction. With regard to adjudication, the orthodox are those who hold that appellate court judicial decision-making is (i) generally legitimate; (ii) reasonably determinate; and (iii) fairly predictable, at least in relation to the

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² Law School, University of Hull. Professor-elect, Department of Law, Keele University.
² Hereinafter quotations from the book will be cited as *CA* followed by a page number.
outcomes generated and sources considered. That adjudication displays these three qualities is often taken to be a consequence of the fact that judges use a limited range of arguments to justify the decisions they make, although the orthodox often disagree as to how these argument are best categorized. As a matter of temperament, the orthodox believe in law and adjudication, regarding both as a good means of ‘subjecting human conduct to the governance of rules’. By contrast, the temperament of heretics is sceptical; they have many doubts about the utility and desirability of law as means of organizing human interaction. When they turn minds and pens to the topic of adjudication, heretics reject two of the three claims that the orthodox make. That is, they hold that judicial decision-making is (i) rarely legitimate and (ii) often and perhaps even always indeterminate, although they accept (iii) that the outcomes reached are fairly predictable. There is no tension in the heretics’ affirmation of (ii) and (iii) once it is accepted that in saying that judicial decisions are indeterminate they usually mean: the reasons judges offer to support their decisions rarely actually completely support or compel those decisions. This can be true in conjunction with the truth of (iii), since what makes the outcome of judicial decisions predictable is not the arguments judges use to justify their decisions but a set of implicit social, cultural or political assumptions judges hold.

1. Adjudication

Picture what might pass for an ideal judicial decision within Anglo-American legal culture. It will surely have been arrived at within a political context in which the legitimacy of the process of judges deciding cases—and perhaps thereby to some extent changing existing law and creating new law—is beyond question. There will be a clear and generally accepted answer to the question: why should judges rather than mediators, citizen forums or the whole of the enfranchised population resolve important disputes? In addition, the decision would have what could be called the maximum rationality quotient. Suppose that the most rationally powerful judicial decision is one in which the reasons for the decision have maximum weight and let us signify this in numerical terms: in such decisions the weight of the reasons for the decision and the directive

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4 The phrase belongs to L. Fuller, The Morality of Law (revised edn, 1969) at 96. Could sceptics about law use titles like Law’s Empire and Freedom’s Law for their books?


that flows from it is 100. In such a situation, the reasons supporting the decision reached (for reasons s, p and q, X has breached a duty of care to Y and has thereby caused Y loss) and the directive that issues from it (therefore X must pay Y damages in the amount of Z), actually compel the decision. The reasons for the decision and the directive are the most powerful available in that situation. If it is also assumed, somewhat contentiously, that reasons determine action and decision, then, ceteris paribus, any judge knowing the reasons applicable in this case would decide it in the same way.

Imagine now a judicial decision different from the ideal only because the reasons supporting it are not compelling. In our somewhat artificial terminology, the rationality quotient of the decision is less than 100, say about 70. The decision has been made and the directive issued so the fact that it carries less than the maximum rationality quotient has not impeded the court that made it. But the fact that the reasons supporting the decision are not completely compelling suggests a number of questions. Was the court simply mistaken as to the weight of the reasons it adduced? Do judges ever bother to achieve the maximum rationality quotient for their decisions? Indeed, is this even possible? Furthermore, if it is not, and if reasons never completely compel judicial decisions, it is surely appropriate to attempt to determine what other factors do. This is where our odd numerical terminology helps: if the rationality quotient is 70 or less and a quotient of 100 compels us to decide in a certain way, what factors fill the gap, make up the missing 30 or more per cent? 

Ex hypothesi, these factors cannot be reasons or, more precisely, cannot be compelling reasons.

It seems to be the case that both orthodox and heretical legal scholars accept that hard case judicial decisions rarely if ever have the maximum rationality quotient. Many of the former do not see this as a problem, since they think the process of decision-making cannot be much more rational than it actually is; many judicial decisions rest upon incommensurable factors and although decisions based upon such factors are reasoned, they cannot be compelled by reasons. They cannot therefore have anything like the maximum rationality quotient. Heretics, too, accept this, but on grounds quite different from those which underpin the orthodox position. For many heretics, judicial decisions cannot have the maximum rationality quotient because it is true that both language and values are indeterminate, or that our lives and hence our laws are riven by some or other version of the fundamental contradiction. Other heretics (and sometimes the same ones) take up a more modest position: it is just a

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8 The classic version of this argument (given canonical status by many heretics) is found in Kennedy, above n 5. The argument has been put to work in a number of doctrinal fields: see, inter alia, G. Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 Harv L Rev 1276 at 1279; and C. Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 Yale L J 997 at 999–1010 and 1066–94. Kennedy has, of course, attempted to retract this argument (D. Kennedy and P. Gabel, 'Roll Over Beethoven' (1984) 36 Stanford L Rev 1 at 15) but it has often reappeared in subsequent works.
matter of fact that many judicial decisions are badly reasoned and hence not compelled by reasons. Hence, although they offer different reasons for their respective positions, both orthodox and heretics reach the same conclusion.

What, then, do they disagree about? At least this: the orthodox regard judicial decisions that lack the maximum rationality quotient as unproblematic, whereas heretics think they generate a host of profound difficulties. Heretics hold that such decisions call into question some of the most important tenets of orthodox legal thought. One such tenet is that there is a crucial distinction between law and adjudication as a means of resolving disputes, on the one hand, and other conceivable means, such as collective choice or mediation, on the other. Often this is put in terms of a law and politics divide, the distinction being thought to rest in the greater rationality of the former as a means of resolving disputes. But if judicial decisions are not compelled by reasons, this distinction is difficult to sustain. Another tenet is that of judicial impartiality, which at its most minimal holds that judicial decision-making should not improperly benefit particular groups in the polity. Yet if it is true that judicial decisions are not compelled by reasons, it seems quite possible that other factors—forms of political partiality, bias or whatever—can and do so compel them. Kennedy challenges both tenets. His challenge is distinctive because it appears to be entirely reliant upon an account of the nature of ideology. This account therefore demands a good deal of attention.

2. Ideology: Critical and Non-Critical Accounts

The core claim of some accounts of the nature of ideology is that it is possible for agents to be systematically misguided about either (i) aspects of social reality or (ii) the consequences of their beliefs. Hence agents’ views about the nature of the institutions or practices in which they participate constitute a dubious foundation for a social-theoretic description and explanation of that institution or practice. This emphasis upon the obfuscatory nature of certain beliefs and propositions ensures that the type of account of ideology we are dealing with here is critical. It holds that ideological beliefs and propositions are suspect, although it would be a mistake to assume that critical accounts of ideology agree as to why such beliefs and propositions are suspect. There is disagreement as to what exactly ideology obscures: the real interests of a particular group, or the dominance of another group, or both? Alternatively, which consequences of which beliefs and practices

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9 CA at 89. Kennedy now renounces the view that determinacy is impossible (CA at 86, 92, and 276) as does R. Unger, although it is unlikely he ever affirmed it: see his What Should Legal Analysis Become? (1996) at 120.

10 I hope the bi-partite formulation broad enough to cover most of the major critical accounts of ideology. Important statements of such accounts are found in some of Marx’s work—see Capital I, Vol. 35 of the Marx–Engels Collected Works (1996) at 81–94, 185–6, and 557–42; Capital II, Vol. 36 of the Collected Works (1997) at 227, and Capital III (1974) at 209—and also in D. Meyerson, False Consciousness (1991) and in J. Thompson, Ideology and Modern Culture (1990) chs 1 and 2. Both Thompson (ibid at 31–3 and 55) and H. Williams, Concepts of Ideology (1988) at xi, claim Napoleon was the first to state a (admittedly not very developed) critical account of ideology.
What is Wrong with Ideology?

does ideology blind us to: are we in the thrall of ideology when we cannot see the use of symbolic forms in upholding an asymmetrical distribution of power in society, or just when we mistake the socially created and contingent for the natural and immutable? Whatever it is that ideology obfuscates, such obfuscatory ideas and beliefs are, on critical accounts, clearly a bad thing; lives and polities would be better without them. That being so, critical accounts agree that ideology can be overcome and, further, that not all propositions and beliefs are ideological. Hence the malady is neither without remedy nor does it infect every part of the body politic, cultural, or social.

The two limbs of the core claim are often run together even though each has quite different implications. The first has an epistemological dimension that the second does not, whereas the second has a consequentialist dimension the first lacks. The first limb accepts the possibility of agents being systematically misguided about aspects of social reality and it must therefore entail a commitment to the existence or possibility of a better, more accurate account of that reality. It must accept that our understanding of the social can become less corrigible, that we can know it better and more accurately. Hence, this limb is epistemological: it suggests that our knowledge and beliefs about the social world can be improved and that some existing beliefs are suspect when judged against some standard of accuracy or truth. The second limb of the core claim need not carry this epistemological commitment. Its thrust need only be consequentialist, since it holds that some of our beliefs about the social world—regardless of their truth value—have bad consequences in the world. The idea is that some of our beliefs and patterns of thought inform our actions, practices and institutions and can thus cause harm to those who are affected by those actions, practices and institutions. This is quite different to, but not necessarily incompatible with, the epistemological thrust of the first limb. What both limbs share is the claim that agents can be systematically misguided.

Many American legal scholars who, like Kennedy, were associated with the first wave of Critical Legal Studies, invoked a critical account of ideology as part and parcel of their critique of law. They differed only in the emphasis given to each limb of the core claim: some highlighted the epistemic limb while others concentrate upon the consequentialist.11 Most, however, emphasized both. The epistemological limb of the critique has long been propounded by Peter Gabel. According to Gabel and Jay Feinman, ‘contract law today constitutes an elaborate attempt to conceal what is going on in the world’.12 They maintain that in the aftermath of major economic and social changes, such as the transition to capitalism:

11 Gary Peller makes most of the first: see his ‘The Metaphysics of American Law’ (1985) 73 Calif L Rev 1152. Hence, he claims that the ‘error of mainstream legal thought . . . [is] the mistaking of particular myths about the world for neutral and necessary truth’ (ibid at 1157; see also at 1156–7 and 1285). For his occasional invocations of the second see ibid at 1176 and 1177–81.
The law of contracts ... generated a new ideological imagery that sought to give legitimacy to the new order. To speak of ideological imagery is to imply that there is a reality behind the image that is concealed and even denied by the image. The reality was the new system of oppressive and alienating economic and social relations. Contract law denied the nature of the system by creating an imagery that made the oppression and alienation appear to be the consequences of what people themselves desired.13

Now there is undoubtedly a consequentialist dimension to this critique because contract law has a clear legitimating role. In portraying existing practices and institutions as fair and of universal benefit, it limits the likelihood of them being challenged and hence changed. But the main thrust of the critique is the falsity of the beliefs and propositions about the social world contained in the law of contract. Those beliefs and propositions conceal the real picture; they propagate an almost entirely false image of the social world. Hence, '[c]ontemporary capitalism bears no more relation to the imagery of contemporary contract law than did nineteenth-century capitalism to the imagery of classical contract law'.14

An early and typically lucid statement of both limbs of the critique was offered by Robert Gordon. He claimed that '[l]aw, like religion and television images, is one of the [...] clusters of belief ... that convince people that all the many hierarchical relations in which they live and work are natural and necessary'; such clusters of belief 'are profoundly paralysis-inducing because they make it so hard for people ... even to imagine that life could be different and better'.15 The epistemological dimension of Gordon's claim resides in the suggestion that it is a mistake to think existing social structures are indeed 'natural', 'objective', and hence beyond our control. The correct view, says Gordon in an oft-repeated heretical refrain, is that such structures are the work of our hands and we can therefore remake them. ‘Though the structures are built, piece by interlocking piece, with human intentions, people come to “externalize” them, to attribute to them existence and control over and beyond human choice; and, moreover, to believe that these structures must be the way they are’.16 The consequentialist dimension occurs in the observation that thinking this way—mistaking the socially created and contingent for the necessary and unavoidable—blinds us to how things could be different. It limits our perception and reduces the vista of possible, alternative ways of organizing our collective life: it is ‘paralysis-inducing’.

Non-critical accounts of ideology deny that ideology is itself either objectionable or avoidable. Ideology can refer to something as broad and abstract as a congeries of beliefs, attitudes, and values constitutive of a ‘world-view’; or to the political stance—party political or more general—of a group or class; or to the more mundane economic and social interests of a particular class or group. On this account almost all beliefs and propositions could be ideological, insofar as they

13 Ibid at 175.
14 Ibid at 183.
16 Kairys, above n 12 at 288.
embody and propound the beliefs, attitudes, values, and interests of a particular

group, and many ideologies can co-exist within a single community, state or
group.17 Furthermore, the effects of invoking a non-critical account are quite
different to those that flow from a critical account. To highlight the presence of
ideology on a critical account is to point to a baleful situation; to offer an account
of an action, practice or institution that invokes participants ideological views is
to perpetrate obfuscation. A non-critical account does not carry this obviously
negative connotation, for ideology is not, on this view, automatically ob-
jectionable. Showing ideology is in play in any action, practice or institution is
often simply an illustration of the inevitable, serving to remind those prone to
overlook ideology that it cannot be forgotten.18

This is not to say that a non-critical account (despite its name) lacks critical
power. In the context of adjudication such an account derives critical power not
from the claim, made by a critical account, that judicial decisions peddle in
myth and obfuscation, but rather that they rest upon considerations which
orthodox legal thought regards as illegitimate. As we have already stated, it is
alleged that some version of the law/politics distinction and a commitment to
judicial impartiality are two key tenets of orthodox legal thought. Taken in
conjunction, both tenets entail that some kinds of consideration ought never to
inform judicial decisions. And it is just these considerations—considerations
such as the class, party political, or interest group consequences of a decision—
that some heretical proponents of non-critical accounts of ideology maintain do
determine some judicial decisions.

A Critique of Adjudication undoubtedly embodies a non-critical account of
ideology. Kennedy holds, albeit obliquely, that there is a plurality of ideologies
in the world—‘there are several boats out in the ocean at the same time’ (CA at
43)—and that ideologies are all-pervasive. He poses the question ‘[i]s there a
critical position “outside ideology”? and abruptly answers ‘[o]f course not’ (CA
at 57; emphasis omitted). Just as judges cannot, despite their denials, decide
cases without taking up ideological positions, neither can theorists offer accounts
of that practice independent of ideology. Kennedy approaches ‘this study from
my own left . . . ideological point of view, with the blinders that go with that
position’ (ibid). Indeed, what else could he do, since there is no critical—or, it
seems, any other—position outside ideology? Since on this account ideology is
pervasive and inescapable, Kennedy cannot plausibly regard ideology as
objectionable per se. The presence of ideology cannot, on this account, be a
baleful situation. Lamenting its existence is therefore akin to lamenting the
condition of man after original sin. Since the latter ensures that our condition

17 Some claim Marx espoused such an account but he probably only did so, if at all, in segments of some early
work: see the 1859 Preface to the Critique of Political Economy in Early Writings (1975) at 426 and The German
Ideology (1965) at 30–40, 260, 190–9, and 579–80 (although there are many remarks in the latter suggesting Marx
avouched a critical account). Many in the Marxist tradition have developed non-critical accounts: see V. I. Lenin,
What is to be Done? in Vol. 5 of the Collected Works (1961); L. Althusser, For Marx (1969) ch 7; Essays on Ideology

18 Thus critical and non-critical accounts cannot be consistently combined. For examples and further argument
see my Understanding and Explaining Adjudication, above n 5 at 232–3.
in this world will always and ever be sinful, what point is there in criticizing or complaining about this?

Kennedy defines ‘an ideology as a universalization project of an ideological intelligentsia that sees itself as acting “for” a group with interests in conflict with those of other groups’. He specifies ‘liberalism and conservatism as two primary examples of American ideology’ (CA at 39; notes omitted). Note that liberalism and conservatism are only primary examples of American ideology; there are other ideologies of which Kennedy’s left-wing position is but one. Furthermore, it is probably the case that there are as many ideologies as there are groups with competing interests. This is because Kennedy defines interests as a group’s orientation towards a particular resolution of a conflict (CA at 40) and then defines ideology as group interests portrayed as if they were the interests of all (this is what he means by an ideology being a ‘universalization project’). It should not be assumed that Kennedy objects to ideology because of the latter feature, namely, its apparently false portrayal of group interests as if they were universal interests, and is thereby committed to a critical account of ideology. For, to say ideology portrays group interests as if they were universal is not quite right: Kennedy concedes that an ideological conflict ‘has to implicate the interests of many people’ (CA at 41; emphasis mine). So, while particular group interests may not be completely universal, they might nevertheless resonate with, and be an influence upon, many agents beyond the particular group. Also, taking the ‘as if’ dimension of ideology too seriously, seeing it as implicating a critical rather than a non-critical account, ignores the fact that Kennedy’s account of ideology ‘reject[s] the idea of simple illusion or false consciousness’; his account is stripped ‘of pretensions to truth’ (CA at 19).

If there is nothing objectionable about ideology in itself on Kennedy’s account, why does he think highlighting its presence in adjudication is a worthwhile criticism? After all, is it in fact a criticism to show that judges do what they cannot avoid doing, namely, decide cases in an ideological way? Kennedy’s answer to the latter is an affirmative and relies upon the following steps. First, he maintains that the orthodox affirm a distinction between law and politics and that, however this is unpacked, one of its consequences is that factors on one side of the divide—the ‘political’—are not a legitimate basis for adjudication. He also asserts that ideology as he understands it resides on the political side of this divide. His second step consists of the attempt to demonstrate the ideological stakes in judicial rule application and interpretation. That is, whenever judges apply and interpret rules in hard cases, that process ‘dispose[s] significant ideological stakes either intrinsically or instrumentally’ (CA at 64). When disposing ideological stakes intrinsically:

The rules of law—the formal contents of the legal system—affect behaviour that is good or bad; right, wrong or indifferent; and fair or unfair, all according to one’s ideological position. . . . When the legal stakes in an appellate lawsuit include the choice between definitions of a rule of law, and the rule choice concerns behaviour about
which there is ideological disagreement, then the legal stakes are also ideological stakes (CA at 58).

In addition:

The rules of law affect behaviour in ways that in turn indirectly affect the distribution of the good things in life other than compliance or non-compliance with the rule in question, good things in life whose distribution is a matter of ideological dispute. . . . The rules affect outcomes that ideological intelligentsia care about by changing the balance of power between groups, their ability to get more for themselves in their relations of conflict and cooperation (CA, ibid; emphasis in original).

When operating thus, rules of law and the process of their application and interpretation, are disposing ideological stakes instrumentally.

Third, Kennedy attempts to establish the following alternatives. First, that judges’ arguments in hard cases do not determine their decisions; it is thus appropriate to find the factors that must or could have determined them. One plausible factor, he suggests, is ideology. In the face of indeterminate judicial reasoning, ‘the only rational basis for making a decision seems to be to consider and evaluate [its] . . . effects on ideologized group conflict, and to choose between the arguments of the two ideological camps present’ (CA at 85). Second, that judges’ decisions in hard cases are determined, but only by invoking policy arguments. These are a “‘Trojan Horse’ for ideology’ (CA at 97). The truth of either alternative, combined with the truth of the second step, guarantee that the distinction identified in the first is untenable. And this provides part of the force of Kennedy’s critique. He argues that orthodox thought and practice cannot be true to its ideals, cannot uphold what it takes to be a vitally important distinction, namely, that between law and politics. Hence, the presence of ‘ideology in adjudication . . . [ensures] the interpenetration of [the] . . . specific, technical rhetoric of legal justification and the general political rhetoric of the time’ (CA at 1).

Kennedy’s argument also derives some critical force from the notions of bad faith and denial. As we have seen, if his argument is successful it shows that ideology is indeed in play in adjudication. He notes that orthodox judges and scholars deny that this is so—they seem unable to acknowledge or perhaps even to conceive that ideology is in play. They are, says Kennedy, in a state of denial (CA at 192–212). It is again important to appreciate that the notions of bad faith and denial do not commit Kennedy to a critical account of ideology. For, it is not ideology, on Kennedy’s account, that is the cause or source of denial—ideology, for him, is not obfuscatory. Denial becomes necessary as a consequence of the presence of ideology in adjudication when combined with the belief, which is an important part of the orthodox conception of the judicial role, that ideology has no place in adjudication. This dissonance gives rise to denial. In many other contexts, where the role and beliefs in question are different, the presence of ideology does not require an account of denial or bad
faith. For there is no necessary connection, on a non-critical account of ideology such as Kennedy’s, between the two.

3. A Critique of Ideology

The argument here is that Kennedy’s non-critical account of ideology is untenable; more precisely, that it is redundant. Redundancy sets in because the critique of adjudication this account of ideology is supposed to support can proceed equally well without it. This specific form of redundancy is but an instance of the general redundancy of all non-critical accounts of ideology, although this cannot be shown here since the variety and number of such accounts is vast.19 What can be done, so as to make this position a little more plausible, is to show that a few of them appear to suffer from such redundancy. This means that the non-critical conception of ideology adds nothing of significance to the observations and arguments of the theories in which it is articulated. This is not to say that those theories are useless. Rather, they contain much that is important, but the force of the redundancy argument is that the notion of ideology does not make this so. Conceptually speaking, we already have a vocabulary for everything to which the non-critical notion refers; it confers salience on no ‘thing’ we would otherwise miss. This is surely the hallmark of conceptual redundancy. Pragmatically speaking, if the concept highlights nothing unfamiliar or new, nor provides greater insight than our existing language and its body of concepts, what is the point of invoking it?

Many in the Marxist tradition invoke a non-critical account of ideology to refer to either group or class interests. In so doing, they leave our pragmatic question unanswered. Taking ideology as proxy for group or class interests explains the apparently bizarre claim made by some of these thinkers that ideology will persist even when class society has been transcended. For Marxists committed to a critical account of ideology, class domination is one reason why ideology (understood as false consciousness or fetishism or reification) exists; transcending class conflict means transcending ideology. But, for Louis Althusser and others, ideology is neither a baleful situation nor is its existence purely a consequence of class conflict. Rather, ideology is simply taken to be the interests of any group or class in society. Even when class conflict has been transcended and we live in a classless or single class society, that class and segments of it will still have interests and aims. It will, therefore, still have an ideology in the non-critical sense.20 The crucial question, though, is this: what does the notion of ideology actually add in this context? Since it seems to be but a synonym for class or group interests, the answer is ‘nothing’. Althusser’s point about the

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19 For the relevant works of Lenin and Althusser see above n 17. See also A. Gramsci’s elliptical remarks: Selections from the Prison Notebooks, edited by Q. Hoare and G. Nowell-Smith (1971), part II. A non-Marxist account is found in M. Oakeshott, Rationalism in Politics (1967) and developed by his followers in D. Manning (ed.), The Form of Ideology (1980).

20 See Althusser, For Marx, above n 17 at 234–6; Lenin, above n 17 at 383–384.
variety and persistence of group and class interests can stand without invoking
the notion of ideology at all. The argument would lose nothing were every
reference to ‘ideology’ replaced with ‘class or group interest’. Of course, had
this been done, the rhetorical impact of Althusser’s work would have been
seriously reduced.

Similarly, the non-critical conception of ideology could be dropped from Karl
Mannheim’s work and nothing would be lost. For, although Mannheim also
invokes a critical account of ideology, his non-critical account is but a synonym
for the social construction of knowledge. In brutally simple terms, this captures
two thoughts. The first, seemingly denied by some early empiricist philosophers,
is that human beings lack any innate knowledge. Rather, our knowledge and
concepts are learned through language and that, obviously, is an intersubjective,
socially created medium. The second thought is that individuals share a pattern
of beliefs and experiences insofar as they are similarly placed in society and share
similar experiences. It is their social conditions that determine their experience
and, hence, their beliefs and attitudes. Now, much work has been done to
illustrate the processes by which knowledge is socially created, how those
processes are determined and what, if any, are the epistemological and other
implications of this claim. And a good deal of this work takes Mannheim as a
starting point. Yet the redundancy argument is as powerful here as it is in relation
to Althusser’s work. Nothing Mannheim says about the social construction of
knowledge would be lost, or become oblique or silly, were the notion of ideology
dropped. Indeed, it seems Mannheim himself was aware of this. If it is true
that there is a potentially debilitating confusion in Mannheim’s work, brought
about by his invocation of both a critical and a non-critical concept of ideology,
then the latter must surely be dropped. It adds nothing to the argument about
the social construction of knowledge, as Mannheim hinted, and puts in peril his
other, quite valuable claims, many of which depend for their power upon a
critical account of ideology.

Kennedy’s non-critical account of ideology courts redundancy in exactly the
same way as those non-critical accounts developed beyond the context of
adjudication. So, just as ideology operates in some of those accounts as an
unnecessary synonym for other, perfectly intelligible and helpful notions like
class interests, it functions in Kennedy’s critique of adjudication as a pointless
synonym for ‘political factors’. The critical force of the argument is not, remember,
derived simply from establishing the existence of ideology in adjudication, for
on this account ideology is not in itself objectionable. Rather, as we have
noted, there are three vital steps in Kennedy’s critique. The first consists of a
demonstration that the orthodox affirm the law/politics distinction, which entails
that ‘political factors’ are never a legitimate basis for judicial decisions. The

21 As anyone familiar with K. Mannheim, Ideology and Utopia: An Introduction to the Sociology of Knowledge
(1936) will know, a paragraph cannot do justice to the complexity of this work.
22 See his remarks about displacing the non-critical concept of ideology with the idea of ‘perspective’: ibid at
69 and 238–9.
second is an argument showing that judicial rule choices dispose ‘significant ideological [political] stakes’ (CA at 64). And the third, an argument showing that hard case judicial decisions are indeterminate such that only policy, which is a Trojan horse for ideology (political factors), or ideology plain and simple (political factors), can determine the decisions actually reached. The power of this argument is not increased by the non-critical notion of ideology since it is but a proxy for ‘political factors’. After all, the main American ‘ideologies’ that Kennedy claims are in play when judges decide hard cases are liberalism and conservatism. What are these but more or less abstract political programmes? Is anything gained by calling them ideologies?

Perhaps we are being hasty. Redundancy might be denied by the suggestion that Kennedy’s argument would, after all, be weakened were the non-critical concept of ideology dropped and the notion of ‘political factors’ put in its place. However, arguments to this end seem to lack plausibility. Could it be argued, for example, that the notion of ideology, given its connection in Kennedy’s account to group or class interests and conflict, is a more refined and thus more useful concept than ‘political factors’? It could, but the argument ignores the most obvious way in which to elucidate the nature of the ‘political’, namely, by reference to the relationship between the interests and wants of particular groups, on one hand, and the exercise of power, on the other. This account of the political can easily provide a list of ‘political factors’ which should not play a role in adjudication and it need not, in order to generate that list, invoke a non-critical account of ideology. What, then, of the close link between Kennedy’s account of ideology and the idea of a ‘project’: does this ensure that the former is a valuable notion? Unfortunately not. ‘Ideology is a project’, Kennedy writes, because ‘it is a mediation between interests and universal claims’ (CA at 42).

The process by which one group’s interests come to serve the interests of other groups is not one, on a non-critical account, that entails any kind of misrepresentation or obfuscation. Like Antonio Gramsci, Kennedy seems to envisage a genuine unity of interest arising here which, in order to be possible, militates against the groups involved ruthlessly and single-mindedly pursuing their self-interest.24 In order for there to be genuine mediation, that is, mediation in absence of misrepresentation or coercion, there must be some degree of compromise and cooperation. Now, there is no denying the value of the Gramscian account of this process of interest articulation and mediation, nor should the significance of Gramsci’s notion of hegemony, which describes aspects of this process, be understated. But, this account of mediation is quite transparent, and clearly a potential advance in our understanding of the social world, without any recourse to the notion of ideology. What power does this account of interest mediation and articulation gain from the notion of ideology? Does labelling this process ‘ideological’ cast more light upon it than exists without that label? If the

24 Gramsci, above n 19 at 181.
description of that process just given, which eschewed any reference to ideology, is both accurate and intelligible, then the answer must be ‘no’.

Finally, it might be said that the value of Kennedy’s non-critical account of ideology lies in the fact that it highlights a conflict we would otherwise miss. ‘What gives ideology its particular character is the tension between group commitment . . . and the [ . . . ] requirements or directions or suggestions of the body of texts’ (CA at 41). If ideology names this conflict then it does work that concepts such as class or group interests, mediation or political factors, do not already do. It apparently performs a useful role. Yet note what an odd usage, even when assessed from the perspective of non-critical accounts, this is. It confines the concept to an exceptionally narrow role having salience only when there is a very specific kind of conflict, namely, between group interests, on the one hand, and a textual tradition, on the other. When group interests are either simply a product of, or deeply embedded in, that tradition—think, for example, of nationalist discourses and their perpetuation through an oral and written tradition of myth—ideology is impossible.

Furthermore, when Kennedy turns to examine the ideological stakes in judicial rule choices he plainly does not take ideology in this very narrow sense. Remember that when judicial decisions dispose ideological stakes either intrinsically or instrumentally they in fact benefit conservative or liberal political positions. In a different idiom, judicial rule choices have a displacement affect just like vessels floating on or moving through water. As the wake of a ship through a channel has certain consequences—such as the erosion of the shore on each side—so, too, do judicial decisions. Their effect, though, is upon one or other political programme and the logic of influence seems to be that one must be adversely, and the other beneficially, affected. One shore is eroded while the other is built up. When operating ideologically, then, judicial decisions do not elucidate a tension between a tradition, on the one hand, and group interests, on the other. Rather, the sense of ideology in play when Kennedy discusses adjudication is the sense in which ideology is but a proxy for political factors and, although redundant, this sense is most representative of Kennedy’s thought. He seems driven to use ideology to highlight the tension between group interests and a tradition only in order to capture the thought that the two are to some degree independent of one another: for example, he says the tradition, the body of texts and ideas, ‘has a “life of its own”’ (CA, ibid). However, something like Althusser’s notion of relative autonomy, despite its problems, would surely serve Kennedy’s purpose better.25

It seems that the non-critical notion of ideology adds nothing to Kennedy’s argument. The removal of any reference to ideology will not reduce the argument’s power. Its thrust—taken now to embody the contradiction between the orthodox affirmation that political factors play no role in adjudication, on the one hand, and the recognition that political factors must play a role in adjudication, on the

25 See Althusser, *For Marx*, above n 17 at 111.
other—is entirely unaffected by jettisoning the non-critical concept of ideology. The argument’s crucial steps—first, showing that the orthodoxy does indeed espouse an appropriate version of the law/politics distinction which, second, cannot in fact be maintained—do not depend for their success upon an (apparently redundant) account of ideology. Whatever insight the argument contains, whatever challenges it poses for the orthodoxy, can and should be presented, so to speak, in the raw, free from obfuscatory or pointless encumbrances. By contrast, if a critical conception of ideology were deployed, then there would be no question of redundancy. Critical accounts pick out some thing other than class or group interests, some thing other than the process by which these interests are mediated and some thing other than the abstract political programmes of certain groups. They promise to do useful work. They cannot be reduced to these other matters because they make a quite specific claim, namely, that it is possible for agents to be systematically misguided about either aspects of social reality or the consequences of their beliefs. Such obfuscation could arise within the context of the articulation and mediation of group interests yet it need not do so. It could also arise within judicial decision-making, but its presence would not guarantee that judicial decisions influenced particular political programmes. In each case the invocation of ideology triggers a distinctive claim; it adds something to the description which we might otherwise miss. Conceptually speaking, critical accounts are far from redundant.

4. Two Questions

A. Why hold back the tide?

Many will think that arguing in favour of a critical account of ideology is somewhat Canute-like. Such doubters might concede that the redundancy objection has some power against some non-critical accounts of ideology, but will maintain that these problems are de minimis compared with those that haunt critical accounts. Hence, Kennedy is right to prefer a non-critical account of ideology and it is wrong to foist a critical account upon him. While it is undoubtedly true that critical accounts of ideology are not currently popular, they are not insurmountably problematic. That, at least, is the thrust of what follows. If it is right, then a critical account of ideology is a live option for Kennedy.

At least three snags are assumed to discredit critical accounts of ideology.26 The first two parallel the two limbs of the critique. The first highlights the complexity of the issues involved in showing the corrigibility of some of our beliefs. The essence of the epistemological limb is that some of those beliefs misrepresent the world and this apparently implies a great deal. It seems to

26 These three arguments, plus one other, are examined in greater depth in Understanding and Explaining Adjudication, above n 5 at 239–48.
imply commitments to, *inter alia*, a theory of truth; an account of language such that it can in some way represent or mirror the world; an ontological claim about the constituents of the real world; and a methodological position designed to yield less corrigible beliefs about the world if not justified true beliefs (that is, knowledge). Each commitment requires a great deal of argumentation in order to be supported. However, when Gabel and Feinman rightly say that ‘to speak of ideological imagery is to imply a reality behind the image’, they seem unaware of what needs to be done to unearth that reality. They accept the possibility of non-ideological knowledge of the world—that is, knowledge that represents the world as it really is—but are non-cognizant of, or least never feel it incumbent upon themselves to articulate, the complexities of a theory of truth (it is sometimes wrongly assumed that proponents of a critical conception must endorse the correspondence theory of truth).27

The difficulties encountered but ducked by heretics in relation to the notion of truth are not unique. Nor are the other commitments supposedly incurred as a result of affirming the epistemological limb less difficult, demanding less effort to resolve or avoid. This is also true of the commitments incurred as a result of affirming the consequentialist limb of the core claim. The most obvious of these are the commitments to offer plausible accounts of both harm and causality. Neither notion is unproblematic and their difficulties have worried many. For example, the nature of harm to self and others—is it just a function of frustrating an agent’s expressed preferences or is it rooted in some account of an agent’s objective or real interests?—as well as questions of consent, are the fulcrum of traditional legal philosophical discussions about the limits of the criminal law.28

Equally, questions about harm and causality arise within analyses of the nature of actions and omissions and assume great importance in relation to the nature of violence.29 The very notion of causality itself is immensely difficult: does the constant conjunction—or the ordinary language—or the necessary connection—account of causality underpin the consequentialist limb?30 Again, the gripe here is not that heretics have failed to solve the problems within these accounts of causation or harm, but rather that they take up problematic positions—positions at least in need of *prima facie* justification—as if they were completely unproblematic.

The nature of these two objections is very limited: the argument amounts to little more than the somewhat patronizing, but nevertheless true, school teacher’s

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27 Hans Barth comes close to making this assumption: see his *Truth and Ideology* (1976) at 109. This assumption seems to inform Thompson’s attempt to steer his critical account of ideology clear of ‘the epistemological burden’ with which it has traditionally been associated: Thompson, above n 10 at 56. Some dislike critical accounts of ideology just because they connect with the notion of truth, however understood: see M. Foucault, *Power/Knowledge* (C. Gordon (ed.)) (1980) at 118.


29 An admirably clear but now somewhat dated contribution to this debate is J. Harris, *Violence and Responsibility* (1980) ch 2.

judgment of ‘must try harder’. To regard them as discrediting critical accounts of ideology is to fall victim to exaggeration, particularly once there is some appreciation of the complexity of the issues involved. A final difficulty that might be thought more powerful, but which again is somewhat hyperbolic, also concentrates upon the two limbs of the core claim. The first requires nothing less that an account of the true picture of social reality against which to judge existing beliefs and propositions. The second requires a causal audit of the effects of our belief and propositions. The harmfulness of these beliefs and propositions must be established. Now, notions such as ‘truth’, ‘representation’, ‘causality’, and ‘harm’ are the fulcrum of what those writing under the influence of philosophical deconstruction and postmodernism maintain is ‘the enlightenment project’. This project is supposed to have failed and that brings in its wake a number of consequences: ‘representation’ has become impossible, ‘truth’ is now a concept that simply masks the will to power, while philosophy and the social sciences are complicit in the legitimation and extension of bureaucratic power.31

These thoughts resonate with some of Kennedy’s remarks—he is nervous about ‘truth’ (CA at 19) and squeamish about claiming to be able accurately to ‘represent’ some aspect of the social world (CA at 15)—and he claims that *A Critique of Adjudication* is part of a modernist/postmodern social theoretical project (CA at 5–20, ch 14). Yet if Kennedy, too, makes this objection against critical accounts of ideology, he must appreciate the vast raft of argumentation upon which it depends in order to be plausible. Even if the obviously reductionist claim about there being a single, unified ‘enlightenment project’ is set aside, some account of the problematic nature of representation, truth, and the human sciences is required. Furthermore, these notions must be problematic in so precise a way as to invalidate critical accounts of ideology. Recourse to vague and suggestive claims about the collapse of meta-narratives should not be allowed to stand in lieu of argumentation on such important issues.

Nothing said here is meant to imply that such arguments cannot be found. Rather, the point is simply that developing a critique of critical accounts of ideology along these lines looks no more nor less problematic than those accounts themselves. Both tasks are problematic and demanding, but this fact cannot be taken to discredit one and not the other. It surely discredits neither.

B. Orthodoxy and heresy: what is the difference?

Kennedy’s critique of adjudication consists of two main claims: that judicial decisions are unavoidably ideological even though judges themselves deny this; and that this fact subverts the law/politics distinction and the commitment to judicial impartiality, both of which are supposedly central tenets of orthodox legal thought. If we are right, and Kennedy’s non-critical account of ideology is

redundant, then this statement of his argument should be amended thus: judicial decisions are unavoidably ‘political’ even though judges often deny this. The argument can still subvert the two tenets of orthodox legal thought: judicial decisions based upon what Kennedy calls ideology (henceforth ‘political factors’) transgress the law/politics divide and, given Kennedy’s definition of ideology, benefit some groups in society and/or prejudice others. Therefore it seems that Kennedy’s account of adjudication is quite different from orthodox accounts. But a great deal depends upon our ability to distinguish Kennedy’s political factors and their role within adjudication from the kind of consideration that the orthodox claim holds sway in hard-case decision-making. For, the message of the last two decades of orthodox legal philosophy is that hard-case judicial decision-making is unavoidably value-laden, normative or political. Of course, the orthodox reach this conclusion in different ways—recall, for example, that MacCormick maintains hard-case adjudication ultimately rests upon subjective, incommensurable, consequentialist value-choices, while Dworkin tells us they turn upon considerations of fit and arguments that show the law in its best moral and political light—but the conclusion itself is uncontested.32 This conclusion is also apparently accepted by Kennedy. He is therefore right to worry that his account of law and adjudication may be indistinguishable from the orthodoxy (‘Oh my God, am I really just a Hartian?’ (CA at 177)).

This may be too hasty, though. The kind of factors that Kennedy thinks determine judicial choices are political in the following sense. They are party political (the main ideologies in American are, remember, liberalism and conservatism) or either directly or indirectly benefit one group or segment of the community. By contrast, when MacCormick speaks of judges having to ‘exercise a partly political discretion’33 in hard cases, and when Dworkin takes them to be deciding cases on the basis of a reading of the community’s institutional political morality, they must make two assumptions. First, that the realm of the ‘political’ transcends party politics or interest group conflict; second, that the kind of higher level or more abstract political choices judges make transgress neither the law/politics divide nor the requirement of judicial impartiality. If these assumptions are made, then there is clear daylight between orthodox accounts of adjudication, on the one hand, and Kennedy’s account, on the other.

The argument between them, then, is this: how are the factors that determine judicial decisions best characterized? It is very difficult to imagine how this question might be answered. The judgments themselves are not a good guide if judges rarely explicitly articulate the nature of the factors that have influenced their reading of the law. And, even if judges are explicit in this way, their assessments can be set aside if determined by ideology (in the critical sense) or if judges are, as Kennedy would say, in ‘denial’.

Although this question is difficult to answer, it is at least helpful to know that it is the fulcrum of the current dispute between orthodoxy and heresy (taking

32 See MacCormick, above n 3; Dworkin, above n 3.
Kennedy as a reliable representative of the latter). The question also highlights a range of other important issues. If Kennedy’s answer to it is correct, then he thinks the orthodox must give up on two prized commitments (impartiality and the law/politics divide). He is right about this, and right about how destructive this consequence is for the orthodox. But we must again emphasize that the orthodox do not regard things as this parlous, do not accept that the consequences of judges exercising a ‘partly political discretion’ are harmful. This is because they employ a different account of what it is for a judicial decision to be ‘political’ and/or reject the law/politics distinction. While the first option is prima facie plausible, the second is extremely dangerous. For if the orthodox accept that no case can be made to show that law is a better (more rational, more determinate, and highly legitimate) means of resolving disputes and subjecting human conduct to the governance of norms than ‘politics’, then upon what foundation does their faith in law rest? If they renounce ‘a commitment to, and therefore a belief in the possibility of, a method of legal justification that contrasts with the open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical or visionary’, then how can they speak up for law and adjudication?

Kennedy is to be commended for isolating the question that now sets orthodoxy and heresy apart. In so doing, he throws a range of other important questions into relief. The fact that his own description of his central argument may be redundant ought not to detract from the force of the argument itself. Along the way, he touches on many, many issues that cannot be discussed here. The book is rich in ideas and engagingly written. Its greatest advantage is to attempt to engage with the orthodoxy, to chart a position on adjudication that is cognizant of, yet distinct from, the alternatives. Something odd is happening in the dispute between orthodoxy and heresy: name-calling is on the wane and dialogue is breaking out. While *A Critique of Adjudication* is not the first step in the dialogue, it is undoubtedly an important one.

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34 Unger, above n 2 at 1.