

What is Right with Ideology?[†]

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The spectator's judgement is sure to miss the root of the matter . . . The subject judged knows a part of the world of reality which the judging spectator fails to see . . . ; and, wherever there is conflict of opinion and difference of vision, we are bound to believe that the truer side is the side that feels the more, and not the side that feels the less.¹

1. *Introduction*

In his essay 'On a Certain Blindness in Human Beings', William James focuses on the gulf between, and the resulting mystery attending, different visions of what is meaningful in human life. He stresses the humanistic values which he believes are at the core of bridging such gulfs, arguing that imaginative empathy, feelings, emotion and temperament are the intangible features that generate this kind of inter-tribal blindness, and also which allow us to overcome it. William Lucy's book on theories of adjudication is, too, a bridge-building endeavour. He unmasks unexpected commonalities between two warring factions in jurisprudential skirmishes, entering into what he labels 'a crusade, a war of opposing sects, a fight for hearts and minds' (p. 16) with deliberately deflationary intent. The war to which he refers is between orthodoxy and heresy in jurisprudence—or between critical legal studies and the 'mainstream' targets of their critique. Lucy's book aims to build bridges between these schools of thought, and in so doing, to build a further bridge between jurisprudence and the broader methodological conundrums facing the social sciences and humanities as a whole.

Lucy refers in his preface to the fact that this bridge-building book was written in a dental surgery. Though the actual pun is mine and not Lucy's, that he draws attention to this curious fact is indicative of the mordant and deflationary irony with which his arguments are generally inflected. This tone pervades the book, and while it undoubtedly succeeds in its enterprise of shedding clarity on terrain

† A review of William Lucy's *Understanding and Explaining Adjudication* (Oxford University Press, Oxford, 1999). The title is a riposte to Lucy's review of Duncan Kennedy in volume 20 of this journal, entitled 'What is Wrong with Ideology?'. All page references in the text are to pages in this book.

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¹ William James, 'On a Certain Blindness in Human Beings,' *Essays in Faith and Morals* (Longman, Green & Co., New York, 1943).

all too often characterized by hyperbolic caricature of alternative positions, the end result is primarily to temper the hostilities with the cold water of deflation rather than to ignite imaginative empathy between the disputants. While his argument deserves careful presentation and indeed admiration, I do eventually want to move past it to some friendly critique, inspired by the sense that more *is* at stake in the crusade for hearts and minds than Lucy is inclined to admit. This vision of the ‘more’ that is at stake depends in no small measure upon what may be a difference of faith or temperament between Lucy and me. William James infers that the stakes of intellectual commitments cannot be settled without an appreciation of aspects of engagement that may not easily—or perhaps at all—be reducible to the terms of analytical rationalism. Whether or not he is right, Lucy’s book contributes much to clarify the terms of engagement between critical legal studies and ‘mainstream’ jurisprudence, and yet still, for me, obscures their deepest fissures.

2. *The Terms of the Battle*

A. *The Nature of the Task*

The aim of Lucy’s book is to compare and contrast orthodox and heretical accounts of adjudication, and to elaborate their differences, to provide a ‘guide to the issues and arguments at stake between orthodoxy and heresy’ (p. 355). The nub of the book is put tersely in his concluding chapter: ‘Our overarching question—how different are orthodoxy and heresy?—received a deflationary answer, namely, “not very”’ (p. 351). The commonalities for which Lucy argues lie not in primary claims about the process and grounds of judging, (on which orthodoxy and heresy in fact differ significantly), but in second-order issues of method, accounts of causality and the place of values in adjudication. The book therefore proceeds on two levels. The first-order level is a descriptive account of the *differing claims* made by orthodox and heretical jurisprudence about the process and grounds of judging. The second-order level is a critical-analytical² account of the assumptions (frequently shared but in any event underpinning) of both orthodox and heretical jurisprudence in relation to method, accounts of causality and the place of values in adjudication.

Although this latter facet is termed (by Lucy himself, whose term I am using) a ‘second-order enquiry’, it is by no means of secondary importance. It is in fact the heart of the book’s contribution, and method, causality and value are ‘second-order’ only in the sense that they concern methodological issues or meta-jurisprudence. In Lucy’s own words, ‘the book examines *assumptions about the*

² Because the assumptions excavated by Lucy are partially inarticulate (precisely because they are assumptions), the work of bringing them to the surface is more analytical than descriptive. In addition to this (Herculean) task of analysis, Lucy also advances two principal contributions of his own to the questions of meta-jurisprudence which most interest him: he argues for a method which he labels ‘compatibilism’ and he suggests that moral realism or moral rationalism can adequately account for the place of values in adjudication. I shall return to Lucy’s contributions later.

nature of explanation and understanding made by heretical and orthodox scholars who turn minds and pens to the practice of adjudication' and is 'therefore . . . a second-order enquiry' (p. 16, emphasis added). The book is, in other words, more about the norms of map-drawing than the map itself (even while the map—contemporary jurisprudential theories—is itself an account of the norms of a practice (judging) rather than the practice itself).

This double level of reflexivity is both valuable and difficult. It is valuable because it links the sub-discipline of jurisprudence to broader arguments in philosophy and the philosophy of social science. In this sense, it provides a basis for legal scholars to reflect upon the pervasive and often intractable problems of social enquiry (method, causality and the status of values) that bedevil all scholarly attempts to explore social—and especially normatively saturated—practices. It is difficult because it makes for a very high level of abstraction. Lucy copes with this unavoidable difficulty admirably insofar as he provides a rigorous, multi-layered argumentative structure which is reiterated many times and heavily signposted at every available occasion. Though this may sound ponderous, and in ways it is, it is also necessary. Even with this amount of guidance, the reader is often induced to reread subsections to discover which limb of the many-headed hydra Lucy is in the process of subduing. All this is to say that the book is no easy read despite its page-by-page clarity: at almost 400 pages of meticulously careful prose, and with the objectives I have outlined, Lucy's book will be of interest primarily to readers already fairly well-versed in the subtleties and principal concerns of jurisprudence as a sub-discipline.

Readers who might bridle at the division of broad swathes of complex jurisprudential thought into just two categories, that of the 'orthodox' and the 'heretical' may rest assured. This is a book that takes more seriously than almost any other the duty to state fairly the positions of those whose theories are being discussed. Consistently with his early promise to do so (pp. 38–39), Lucy quotes at great length from the representative authors of orthodoxy and heresy and takes great care to substantiate his descriptive argument by reference to the actual words of theorists. Of course, every reviewer might put different glosses on the theories expounded by Lucy, but not to any greater extent than the inevitable fate of interpretative discourse. Then too, the point of grouping jurisprudence theories into two camps is to enable broad general descriptive claims to be posed with relative clarity. This is important since the claims made by jurisprudential theories are merely Lucy's raw data. His primary task, 'a journey into the philosophy and methodology of the human sciences' (p. 27) will unearth sufficient subtleties and ambiguities underpinning these claims such that the claims themselves must needs remain skeletal.

In what follows, I briefly outline the bare bones of Lucy's map of contemporary jurisprudential accounts of adjudication, trying to keep clear the distinction between first and second-order levels of analysis. My own analysis, which will inevitably add a third level of exposition to this dialogue, will be deferred to section 3 of the article.

B. The First-order Account: Differing Claims Made by Orthodox and Heretical Jurisprudence About the Process and Grounds of Judging

Orthodox jurisprudence, exemplified by the work of Joseph Raz, Neil MacCormick and Ronald Dworkin, is united, despite all its many internal differences, by four principal claims. First, judging is (relatively) constrained by (relatively) determinate standards. Second, the remaining choices and discretionary judgments are justifiable in principle (and often in practice). Third, the justification strategies of judges are constrained by the degree to which they 'fit' with extant legal materials, underlying values and consequentialist evaluation of a decision's effect. Fourth, and as a result of the first three claims, judging (and law by implication) is relatively certain and predictable. The emphasis of orthodox doctrinal analysis, in the context of these four constitutive commitments, is on rational reconstruction and a process of resolving tensions, securing consistency and coherence.

Heretical jurisprudence, in a strong contrast of temperament and tone, places much more weight on exposing contradictions and unearthing indeterminate and contingent reasoning patterns in adjudication. Nonetheless, Lucy argues, heretics (represented by Roberto Unger, Duncan Kennedy, Pierre Schlag and Drucilla Cornell in the main) largely agree with the third and fourth claims of justificatory constraint and outcome predictability shared by orthodox theorists. They support such claims, however, with very different reasons because they do not accept the first two claims of orthodox theorists. In particular, they deny that discretionary judicial choices are justifiable in principle, on the basis that any such justifiability cannot be maintained in the face of, first, language and value indeterminacy, and secondly, what Lucy labels the 'ideology critique'. The ideology critique points to a very different enterprise from that of rational reconstruction: that of 'purport[ing] to explain how what in reality is contingent, arbitrary and without justification comes to be regarded as natural, legitimate and correct' (p. 15). Lucy's ultimate conclusion is that the ideology critique has far more force than the indeterminacy critique and constitutes a genuine challenge to orthodox jurisprudence. I will return in detail to the question of ideology in section 3. I note here only that Lucy does not purport to resolve first-order debates between different strands of adjudication theory, though he does hint briefly at two commitments which he would consider necessary to do so (one to methodological 'compatibilism' and the second to a form of moral realism or moral rationalism). But since the aim of the book is to contribute to the norms of map-making and not to the map of jurisprudential theories themselves, these commitments are only presented in outline. In other words, Lucy wishes in this book to facilitate dialogue between orthodox and heretical approaches to theories of adjudication, rather than to contribute directly to the dialogue.

C. The Second-order Analysis: Underlying Assumptions of Orthodox and Heretical Jurisprudence in Relation to Method, Causality and the Place of Values in Adjudication

The weight of the book is, as I have stated, on the second-order enquiry regarding the norms of map-making: those meta-jurisprudential issues of method, causality and the status of values. The argument proceeds in layered slices that methodically address this trio of meta-issues first in orthodox jurisprudence (Part I), and subsequently in heretical approaches (Part II). At the same time, a cumulative argument builds. The book is exceptionally dense, and I can only try to convey in outline my own inevitably subjective impression of the effect of the whole. Readers may have encountered some of Lucy's arguments before, in this journal in relation to orthodoxy,³ and in the *University of Toronto Law Journal* in relation to heretics. The journal articles are, however, no substitute for the book even apart from the fact that they constitute less than half the overall presentation, for in any event, the effect of the whole is definitely greater than the sum of the chapters. The effect of the whole book, for this reader, fell into two broad swathes. First was a range of argumentation around the *methods* employed by orthodox and heretical theorists of adjudication. Second were arguments relating to the place of values in adjudication. I will deal with method first.

(i) *Methodological assumptions, including those about causality*

Lucy is very careful to disentangle method *per se* from assumptions about causality. Method involves two dimensions: *what* is the unit of analysis (individualistic versus holistic approaches are the main fulcrum of debate here) and *how* does one gather information about it (deductive or inductive versus interpretive approaches are the chief point of contention here). Causality debates, distinct from the above tensions, turn on a tussle between reason-based accounts of social practices and cause-based explanations. Although Lucy is, as I emphasize, very careful to treat 'method' and 'causality' separately, the two do tend to merge into a rough tension between interpretive reason-based approaches (favoured by orthodox theorists of adjudication) and deductive causality (favoured by heretical theorists). This is a fissure which Lucy challenges, but which nonetheless reflects a hoary debate in the philosophy of social sciences about the compatibility of hermeneutic and positivistic approaches to exploring social

³ Chapter Two appeared in briefer terms as 'Criticising and Constructing Accounts of Legal Reasoning' (1994) 14 *OJLS* 303–33, and Chapter Four appeared as 'Adjudication for Pluralists' (1996) 16 *OJLS* 369–405. Chapter Seven, 'Adjudication for Visionaries' appeared in very much the same form in (1998) 48 *University of Toronto Law Journal* 61–123, and parts of the argument of Chapter Five appear in summary form in 'What is Wrong with Ideology?' 20 *OJLS* 283–300.

practices; a debate which has often put 'understanding' and 'explaining' at odds with each other.⁴

Lucy roughly associates hermeneutic and positivistic approaches respectively with two types of theorizing, which he labels secondary and tertiary (p. 59).⁵ Secondary theory aims to articulate the conceptual schemes of those whose practices one describes from an internal point of view. Thus Lucy argues that orthodox approaches to adjudication such as those of Dworkin, MacCormick and Raz are concerned mainly with 'an elucidation of the patterns and types of reason and argument used by adjudicators to justify decisions' (p. 37). Tertiary theory, by contrast, seeks to explain practices, actions and conceptual schemes by reference to 'some corpus of supposedly law-like generalisations' (p. 59). Heretics such as Duncan Kennedy or Roberto Unger are associated with this, seeking to identify the causal genesis of the justificatory strategies that adjudicators use and to 'relate changes in adjudicators' patterns of reasoning to wider social and economic forces' (p. 47).

Lucy identifies these different methodological approaches as one source of the apparent tension between the different schools of jurisprudential approaches to adjudication, but argues that the two approaches are complementary rather than incompatible. Lucy shows this by dint of careful demonstration, and then adds his own contribution to the first-order debate by outlining a method of 'compatibilism' which would combine the two approaches to method and causality sketched above. His basic argument (p. 29) is that the interpretive approach *must* be taken up by both orthodoxy and heretics, at least as a starting point, but some cause-based accounts of social action and moderate deviation from methodological individualism can usefully supplement such approaches. Lucy aims to give us a guide as to precisely when cause-based accounts are appropriate for explaining and understanding social action, and when they are not.

This is no easy task, as Lucy implicitly acknowledges by citing Martin Hollis' trenchant observation 'that rational action is its own explanation and . . . departures from it have a causal explanation' (p. 32). His answer is in fact compatible with Hollis' aphorism. That is to say, he considers that the internal perspective (i.e. judges' reasons in adjudication) can either be regarded as part of the explanation of the actions, practices and institutions to which they relate,

⁴ See for example Murray Leaf, *Man, Mind and Science* (Columbia University Press, 1979); G. H. von Wright, *Explanation and Understanding* (London: Routledge & Kegan Paul, 1971); K-O Apel, *Understanding and Explanation* (MIT Press, 1984); Charles Taylor, *The Explanation of Behaviour* (London: Routledge & Kegan Paul, 1964); A Ryan, *The Philosophy of Social Explanation* (Oxford: Oxford University Press, 1973). 'Positivistic' here does not directly implicate legal positivism, but rather the broader social scientific methodological commitment that a complete explanation of social reality can be gleaned from objective empirical observation of social data.

⁵ Theories in the primary (or practical) sense refers roughly to the so-called facts of social action (in this case adjudication) itself, which Lucy argues cannot exist independently of theory. Thus, his sense of primary theorizing is that it is identified with the languages of self-description, explanation and justification of those acting in accordance with the practices and involved in the institutional structures of a community' (p. 55). He then argues: 'there is a sense in which these languages are theories or conceptual schemes: they provide agents with maps of the rules, practices and institutions in which they operate, showing them how to manoeuvre in social space' (p. 55). But for Lucy, these languages are the raw data of theories of adjudication and thus 'primary'.

or as part of that which *requires* explanation by reference to institutions or other elements of the social structure (p. 126). 'Whether participants' views feature as *explanans* or *explanandum* depends upon the degree to which the theorist has reason to question their corrigibility' (p. 126).

The following factors, Lucy argues, will cast doubt upon the reliability of participants' views as convincing explanations: the distance between one participant's view and those of the majority, the distance between it and the views of those to whom the practice is morally important, and the degree to which the view utilizes the rules of standard logic and inference. Failure to a significant degree on any of these standards will trigger the need to supplement interpretive accounts of judging with causal explanations. Here Lucy believes that heretics have generally done a better job of moving to this causal level than orthodox theorists. Thus he exhorts orthodox theorists to pay more conscious attention not only to the 'distinctive modes of justification for [judicial] decisions' but also to 'the factors that determine the salience of these kinds of arguments' (p. 131). Such factors include those which operate within the legal system (for example, the organization and education of the legal profession) and also those which operate upon the legal system from outside (for example, the wider pressures of capitalism that constrain the mode of professional education and organization itself).⁶

While praising heretical theorists for their sensitivity to these kinds of causal explanation, Lucy, always the devil's advocate, also urges that good reasons need always be given for ignoring or departing from participants' internal views of their practices, and remarks tartly that this is a principle honoured all too often in the breach by heretical theorists who routinely resort to a 'hermeneutics of suspicion' (p. 270). In this process of reminding each of the two 'schools' of jurisprudential thought to respect the methodological contributions of the other, though, Lucy has constructed an intriguing and convincing case that there is, from the perspective of methodology, an '*entente cordiale* between orthodoxy and heresy, and no insuperable divide on [such] matters' (pp. 282–83). Contrary to the perception of an unbridgeable gulf between critical legal studies and 'mainstream' jurisprudence then, Lucy argues that the two approaches are methodologically compatible, and he seeks in his deflationary goal to make visible these unwittingly shared commitments.

I do not necessarily share his optimism about this methodological comfort zone, but I will postpone consideration of this until after a second important axis of Lucy's argument is laid out. For Lucy, whether the hostilities between the schools are in the final analysis a phoney war depends not only on methodological debates, but also on the position accorded to values in adjudication. Here, it turns out, there is more to divide the orthodox and the heretics, though not perhaps as much as the fire and brimstone of the debate would suggest.

⁶ It should be noted that Lucy does carefully show that both schools of thought in fact *claim* to be 'compatibilists'; however he considers that, in general, orthodox theorists fail to live up to that claim or at least fail to pursue it to any extensive level.

(ii) *Values in adjudication*

The salience of values in theories of adjudication arises for Lucy from two directions, the first from an internal critique of orthodox approaches, and the second from the attack mounted on orthodox approaches by heretics. The internal critique of most force for Lucy is one he labels the 'plurality problem'; similarly, though heretics employ a range of different attacks on orthodoxy, Lucy accords greatest force to one only, which he labels the 'ideology critique'. The plurality problem and the ideology critique are related, as the remainder of this essay will show, but for the moment, I will confine myself to laying out the nub of Lucy's position on each, at the same time emphasizing the degree to which Lucy's own response to both critiques is rooted in a temperamental preference for rational consistency and closure.

The plurality problem

The nub of the plurality problem is simple. In a world where different groups of social actors hold a diverse range of moral commitments, then the relative constraint and determinacy implicit in orthodox theories of adjudication can rapidly become a chimera. This occurs because the methodological commitments of orthodox theories of adjudication entail an interpretive account of the point, purpose or goal of the social practice of judging, but it is plausible and indeed likely that among multiple participants in that social practice, there will be multiple reasons for accepting a practice (and consequently multiple accounts of its point, purpose or goal). Thus the plurality problem in a nutshell is the following: 'either accounts of the point, purpose or goal of social practices are constructed on the basis of (perhaps incommensurable) points of view; or one such point of view can non-arbitrarily be chosen' (p. 88).

Lucy argues that the plurality problem is one that orthodox approaches have not fully dealt with, and that the implications for their accounts of judging are severe. His own response is one which insists upon responding to the difficulty by way of what he concedes is an uncongenial account of moral knowledge. Early in the book he draws on Finnis' approach to the relationship between ethics and descriptive social theory as one response to the problem; in the conclusion he diffidently advances his personal response which rests on an account of moral rationalism or moral realism (pp. 362–72). Without going into the details of these responses, suffice to say that this is what they focus on: to avoid the plurality problem 'then ethics and political theory must be taken to yield determinative answers to questions about how we live and ought to be' (p. 78). Lucy even contends that moral realism or rationalism better accounts for the way in which heretics invoke values than any other meta-ethical theory (p. 27). His position is that the move to what he concedes is a 'foundationalist approach' (p. 36) is one heretics *must* make (p. 36) in response to the inadequacies of orthodox approaches, and one which they do implicitly make in their polemical arguments (albeit not in their self-conscious methodological stance). I want to

contest this interpretation of heretical approaches in section 3 of this article, but first I want to lay out Lucy's map of the (external) critique which heretics *do* (explicitly) mount against orthodox approaches.

The ideology critique

Lucy's distaste for indeterminacy and contingency surfaces again, rather more indirectly, in his account of a related clash between the orthodox and the heretics which he calls the 'ideology critique'.⁷ The core claim of the ideology critique 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' (p. 225). Once this claim is conceded, then it founds a position that the internal views of judges about the nature of adjudication constitute 'a dubious foundation for a social-theoretic description and explanation' of adjudication (p. 225). It is thus a deeper challenge to orthodox accounts of adjudication than the plurality problem: it would justify suspicion of internal accounts even when (perhaps especially when) relative consensus prevails amongst the participants in the social practice of judging.

Lucy considers that the above challenge is a serious one, but only if it rests upon a critical account of ideology. The core idea of ideology as presented above is, for Lucy, the element of myth, illusion or obfuscation. The internal viewpoint obscures something which is a truer, or more real representation, of the actual position at stake. Heretics, 'most [of whom] invoke a critical account of ideology' (p. 227) seek to expose the obfuscation executed by the patterns and justifications of legal doctrine by means of a causal analysis conducted from an external perspective. In so doing, Lucy argues, heretics committed to a critical version of the ideology critique are implicitly affirming a determinative conception of epistemological truth or a determinative account of consequentialist harm. Critical 'trashing' of legal decisions, in Lucy's view, shows that the rationalizations of existing doctrine 'are suspect when judged against some standard of accuracy or truth' (p. 227). Alternatively, heretics deconstruct traditional doctrine by 'posit(ing) a correct and proper picture of social reality' (p. 229).

Although Lucy concedes the force of this critical version of the ideology critique, his presentation of it undermines its status as a strong argument of *heretical jurisprudence*. This is because, as I will argue in section 3, at least some heretics do not support such determinative epistemological claims, and in Lucy's eyes, they *must* do so to retain the force of the critical version of the ideology critique. Lucy views the contingency, irresolution and indeterminacy of the social world so often emphasized by heretical theorists, as incompatible with the force

⁷ There is a second fissure between orthodox and heretics which is centred on the 'indeterminacy critique'. However, I do not deal with this at length because I agree with Lucy that the challenge of the indeterminacy critique is not a strong one. Indeed, it is increasingly conceded as minimal by heretics themselves (e.g. Duncan Kennedy in *A Critique of Adjudication (Fin de Siecle)*, Cambridge, Mass: Harvard University Press, 1997) who have begun to acknowledge that contemporary 'orthodox' approaches are far more intricate than the 'straw model' sometimes erected by the critical tradition.

of a critical account of ideology because in Lucy's view critical accounts of ideology are premised on implicit visions of 'true' reality. Notice how his expository claims are consistent with his own personal contribution to the plurality problem: that is, to solve the plurality problem by arguing in favour of moral realism or moral rationalism, views which 'hold out the prospect of determinate answers to moral questions which are to some degree independent of individual sentiments and interests' (p. 365). With the ideology critique, as with this response to the plurality problem, I wish to take issue with Lucy's characterization in section 3, but first I want to complete the survey of Lucy's cumulative bridge-building between orthodoxy and heresy. I do this to highlight Lucy's own final conclusions, conclusions which are in the main supplemented rather than obviated by my own contribution in section 3.

D. The Battle Deferred?

Lucy acknowledges that not all heretical theorists invoke a critical account of ideology. A non-critical account, rather than positing some truth behind obfuscatory myth, emphasizes that a position outside ideology is impossible. It is, in Lucy's view, tantamount to 'a "world-view", or to the political stance—party political or otherwise—of a group or class, or to the more mundane economic and social interests of a particular class or group' (p. 226). Non-critical ideology is pervasive and inescapable, and a heretical theorist such as Duncan Kennedy (whom Lucy puts in the 'non-critical' camp) firmly disavows any pretensions to truth (p. 230). Lucy considers that non-critical accounts of ideology lack any independent force deriving from the notion of ideology, because the force of ideology in such accounts is redundant (pp. 234–9). The work done by the concept of ideology can as well be done by the notion of political interests, Lucy argues. As a result, the real force of the non-critical ideology critique is 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' (p. 231). This Lucy leaves as heretical jurisprudence's most profound challenge to orthodox thought: one that suggests the orthodox must reject 'the exceptionally problematic quest for a special or unique legal rationality, thus giving up the idea that law is a particularly special or important means of resolving disputes . . . [for] law is no more rational nor legitimate a process for resolving individual disputes and social conflicts than many other actual or imaginable methods' (pp. 385–6).

In concluding thus, Lucy achieves admirably his cool, deflationary objective. Step by relentless step, he tempers what is at stake in the 'war for hearts and minds', showing at last that heretics and orthodox share far more assumptions about the jurisprudential enterprise than they usually acknowledge, differing only—though importantly—upon their concluding evaluations of law's position as a distinct (and distinctively legitimate) social enterprise. Lucy may convince many. He is, as he knows, a bridge-builder and his final conclusions assert an

unusual blend of heresy and orthodoxy—he seems, temperamentally, to prefer the closure, consistency, coherence and order offered by the vision of orthodoxy, and yet he gives most weight in the end to the challenge that he views heretics as offering to orthodoxy: the elision of the law/politics distinction.

Yet for me, there remained an uneasiness, a sense that one of the key challenges of heretical approaches has been sidestepped by Lucy. His careful respect for the terms of heretical approaches cannot be understated, but I still want to argue that he evades one of the deeper challenges of heretical jurisprudence. The terms of Lucy which devour, I would argue, the real challenge of heretics, are his preference for determinacy, closure and resolution, to which I have tried in the above account of the book to consistently point. A key challenge of ‘heretical’ jurisprudence is that it responds to Lucy’s intuitive sense of the need for a ‘ground’ for the claims of jurisprudence *in a manner which grants contradictions and contingency rather than trying to eliminate them*. Lucy’s approach is invariably to move towards elimination of contradiction and contingency. Take, for example, some of his statements relating to what he argues are the weaknesses of Roberto Unger’s approach: ‘[The] practice of ascribing normative force to particular practices . . . is only worth engaging in if the practice in question is not normatively objectionable. How is that determined? . . . [By] an attempt . . . to conceive of some forms of moral argument as context-and practice transcendent’ (p. 341) or elsewhere, ‘it is prima facie problematic to make normative claims . . . while acknowledging that the social world . . . is somewhat fluid and can be constantly remade and reimagined’ (p. 336). More indications of Lucy’s position will appear in the course of my own challenge to it, but for now, let me simply say the following. At least some strands of heretical jurisprudence insist upon a ‘ground’ that constantly shifts beneath one’s feet, yet still operates as a quasi-transcendent referent beyond the immediate social and political context: *this* is the contribution of heretical jurisprudence which Lucy’s critique sidesteps.⁸

3. *The Ground Beneath Judicial Feet*

What I wish to do in this Part is to take issue with Lucy’s rejection of the force of the ideology critique in a way which will ultimately, I hope, highlight some important dimensions of heretical jurisprudence which *cannot* be easily reconciled with orthodox approaches in Lucy’s deflationary manner. I will proceed in three steps. First, I wish to contrast Lucy’s definition of ideology with that of Susan Marks in order to argue that the distinction between critical and non-critical accounts of ideology is less salient than a different distinction: that between epistemological critique and power critique. Second, I will argue that this second distinction rescues ideology from redundancy and present three ways in which

⁸ Note that the constant circling back to foundationalism not only characterizes debates in jurisprudence, but also more institutionally embedded debates about constitutionalism and the legitimacy of various forms of administrative governance, all of which are still grappling with the fact that the ‘head of the king has been cut off’.

ideology does active (and arguably distinctive, at least in comparison to orthodox) work in heretical jurisprudence. Finally, I want to highlight a particular strand of heretical jurisprudence—of which, amongst the range of authors Lucy discusses, Drucilla Cornell is emblematic—that poses a genuine challenge to the methodological commitments of orthodox jurisprudence.

A. *Ideology: Epistemology versus Power*

I begin then by taking issue with the way in which Lucy has disarmed the challenge of the ideology critique. Lucy argues, as discussed above, that either the non-critical ideology challenge is redundant, or the critical conception presupposes epistemological commitments which heretics deny. I suggest, however, that Lucy's distinction between critical and non-critical versions of ideology is misleading, because critical accounts need *not* entail epistemological or value determinacy as Lucy assumes. Lucy's definition of (critical) ideology has two limbs, an epistemological and a consequentialist limb:

The former demands nothing less than an account of the true picture of social reality against which to judge our existing beliefs and propositions . . . The consequentialist limb requires a causal audit of the effects of some of our beliefs and propositions. The harmfulness of these beliefs and propositions must be established . . . [according to] some articulation—moral, political or otherwise—of what counts as “harm” (pp. 242–3).

Both limbs of Lucy's definition of ideology lead to the need for some determinative, fixed and possibly objectivist account of harm or truth.⁹

In respect of the epistemological critique, I would contrast with Lucy the definition offered by Susan Marks in her recent account of the ideology of democracy in international law.¹⁰ Ideology, she asserts, refers to ‘ways in which meaning (including techniques of legitimation, universalization, reification and naturalization) serves to establish and sustain relations of domination’. Notice how her definition retains a critical edge but not one that depends on epistemological or value determinacy. It is certainly true enough that many conceptions of ideology in the history of social thought have intended to evoke a quality of thought (especially social thought) that is illusory or distorted—and have thus implied some form of ‘truth’ as a counterpoint to the illusion or mask that ideology constructs. But Marks' definition builds on the notion of distortion without going that far. The deceptive aspect of ideology for her lies in its claim to represent the ‘general good’ when the material reality of asymmetrical power relations in particular social contexts means that benefits in fact accrue to a

⁹ In fact, there is no logical necessity that an objectivist version of harm be the response to the consequentialist limb. Various pragmatist accounts of harm or indeed truth may be offered, for example. However, Lucy spends reasonably significant energy rejecting Rorty's perspective (pp. 289–294) and ultimately does offer on his own account a solution founded on moral realism or moral rationalism. Thus my general point about a preference for objectivist solutions remains valid.

¹⁰ *The Riddle of All Constitutions: International Law, democracy and the critique of ideology* (Oxford: Oxford University Press, 2000) at 29.

limited subsection of society. This ‘power critique’ is as common an approach to ideology as the epistemological critique which Marx himself probably relied on. Alan Hunt, for example, argues that ideology ‘provides a justification or legitimation for the interests of the dominant class in society in terms of some higher and apparently universal interest of all classes’.¹¹ Distortion occurs in the move that is made from particular to general *in the context of advantages secured for those belonging to the particular class*.

Lucy’s approach to ideology equates the critical account of ideology with the epistemology critique and fails to pay sufficient attention to the power critique. Marks’ definition, by adding a material analysis of the comparative power of actors affected by ideological moves, lends a critical edge to the universalization dimension by constantly interrogating the ‘fit’ between claimed benefits and actually accruing benefits. If ‘truth’ is involved, it is not an epistemologically determinate system of truth, but the constantly dynamic empirical actuality of social facts invoked in the service of such an immanent critique.

Lucy, however, invokes two limbs of critical ideology, as I have already alluded to—not just the epistemological version rejected above, but also a consequentialist version. It may seem that even if strong truth claims need not be made in highlighting asymmetrical power relations, that some kind of objectivism is involved in categorizing the *consequences* of such asymmetry as harmful. Lucy ultimately does make this argument, asserting a necessary link between *value* determinacy (as opposed to truth claims) and the consequentialist limb of critical ideology. I want to argue by contrast that a critical account of social relations can be given in the context both of value pluralism and in the face of dynamic empirical actuality. The route towards such an argument involves taking issue with Lucy’s contention that *non-critical* accounts of ideology are redundant.

Recall that non-critical ideology for Lucy is ‘a “world-view”, or . . . the political stance—party political or otherwise—of a group or class, or . . . the more mundane economic and social interests of a particular class or group’ (p. 226). Lucy argues (pp. 234–9) that it amounts either to simple class or group interests or the social construction of knowledge, neither of which *need* be elaborated through the lens of ideology. On this basis he contends that ideology adds nothing to the arsenal of critical tools that ‘mainstream’ jurisprudence does not already possess. Let us say that the truth critique and the consequentialist critique limbs of ideology each interrogate the version of reality offered by an ideological move as corrigible—in the case of the ‘truth’ critique by ‘true social facts’ and in the case of the consequentialist critique by an account of the moral harm perpetrated by holding to the ideological position. One might say that some versions of socio-legal studies use orthodox social science to offer the former critique while ‘mainstream jurisprudence’ offers analytical moral criticism.

But ideology through the lens of a power critique is not quite doing either of these things. Rather than positing an alternative moral universe, or positing a

¹¹ Alan Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (New York: Routledge, 1993) at 121.

causal explanation of what is ‘really going on’ factually speaking, an ideological critique is a project of *iterative redescription*. By painting, over and over again, a picture of social reality from the viewpoint of those who do not secure the benefits that the ideological world view promises them, ideological critique seeks to unsettle taken-for-granted assumptions about moral positioning and empirical reality, rather than to correct them. It redescribes reality in a way that is neither exact repetition nor determinative correction.

Lucy cites as a key example of non-critical ideology, Duncan Kennedy’s approach, where Kennedy defines ideology as ‘a universalisation project of ideological intelligentsia that sees itself as acting “for” a group with interests in conflict with those of other groups’.¹² He insists that this is a non-critical account that does not imply any misrepresentation or obfuscation because Kennedy repeatedly commits himself to a stance that there is no position ‘outside ideology’. But Kennedy, while denying the possibility of ‘truth’ or any position outside ideology, *does* still see misrepresentation as relevant. He says: ‘in ideological dispute, each side tries to persuade some, “enough” of the others that what is involved is a misunderstanding rather than a “true” conflict of interests’. The key here, as I shall argue in more depth in the pages to come, is contingency. ‘Misunderstandings’ can be challenged *because* of value pluralism and the slippery nature of empirical observation, not despite them. In the context of the slippery, value-influenced character of empirical observation, its ineluctable interpretive edge, the salience of interests can be reframed in multiple ways. In the context of value pluralism, the normative force of the reasons given for a judgement or for an interpretation of the rule can be seen from multiple angles. An insistence on one angle over another, or the presentation of such an angle as ‘the truth’ may constitute a ‘misunderstanding’ (without relying on an actual theory of truth, or upon a final judgment of value, even though the judgment may be final in its instant practicality).

Let me illustrate these rather abstract points with a concrete example, drawing on an example Roberto Unger uses in his most recent monograph.¹³ Equal protection doctrine in US constitutional adjudication labels as a ‘suspect classification’ race, and to a lesser extent, gender. There has never been any doctrinal space for positing social class as a suspect classification. This conceptual inconsistency is explicable, according to Unger, by reference to the political fact that class is the reflex of institutional arrangements, and legal analysis, *for ideological reasons*, preserves the institutional structure of society and tries to redress only disadvantages arising more from physical characteristics. Thus the doctrinal landscape of equal protection law has an ideological character: it naturalizes social class as legally irrelevant to the aspirations of law to provide equal protection for all citizens, and this move justifies or legitimates the interests

¹² Duncan Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997) at 39. See also the extended treatment of Kennedy by Lucy in ‘What is Wrong with Ideology?’ 20 *OJLS* 283–300.

¹³ The example is based on a passage from Roberto Unger’s *What should Legal Analysis Become?* (London: Verso, 1996) at 83–104.

of the economically powerful in terms of the apparently universal values of the rule of law.

Now a ‘misunderstanding’ can be said to be involved here: from the perspective of the ideological critique the ‘misunderstanding’ is that social class should be treated as a cleavage of a kind distinct from that of race or gender. To that extent, the critique alleges distortion. But it need not follow that the critic must claim that it is objectively true that class is analogous with race and gender, nor that the defender of the status quo need argue that they are objectively (and truly) distinct. Indeed the very pervasiveness of value pluralism means that both arguments can and will probably be made. Race and gender are physical ascriptive characteristics, the status quo defender might argue, while class is not. The critic might respond that the meaning of race and gender is, like that of class, socially constructed in a particular institutional context, and that legal salience rests on meaning rather than physical characteristics. The co-existence of two such types of arguments can entail claims of ‘distortion’ levelled by the critics at the defenders of the status quo, without implying either epistemological or value determinacy. Instead the critical force flows from the obvious advantage gained by economically powerful classes by the doctrinal structure of the status quo, combined with the fact that the exclusion of class from the categories of suspect classification is *presented* as ‘true’, or at least as neutral.

Lucy might respond that all this mirrors one of his claims that ideology is redundant. He might point out that the exclusion of class from the categories of suspect classification is an analytical move reflecting the interests of economically powerful classes. He might then conclude that the ideological dimension of equal protection is no more or less than the ‘economic and social interests’ of economically powerful classes. I have, however, three positive arguments to show why a claim like this of redundancy is not warranted, and illustrate some of the active work that the notion of ideology does or can do in jurisprudential analysis.

B. Ideology: Against Redundancy

The first positive argument against the notion that ideology is a red herring in ‘heretical’ jurisprudence is that it captures a collective, shared dimension to social experience; a dimension elided by an aggregate notion of multiple individual political interests. There is much in the literature about ‘deliberative democracy’ that is familiar in this notion—the core idea being that the representation of meaning in a collective context can transcend the mere sum of the interests involved (or, if a trade-off be inevitable, a ‘split-the difference’ compromise).¹⁴ Thus the exclusion of class from the range of cleavages salient to the law of equal protection is not simply an analytical move reflecting the interests of economically powerful classes. It also expresses a conceptual framework that

¹⁴ See, e.g. Ayres and Braithwaite, *Responsive Regulation* (New York: Oxford University Press, 1992); Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge: Harvard University Press, 1990) at 32–73; Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (New York: Oxford University Press, 1999).

justifies the exclusion of class in terms broader than those of the interests of the rich, sometimes in 'universal' terms but at least in terms which are more inclusive than a crude reflection of those who gain from the rhetorical move. In particular, the ideological dimension of reasons given for a judicial decision, for example, will usually tie its normative force to shared values that are open-textured in a way that makes the possible range of those who benefit at least partially open-ended. Reliance, for example, on the basis of physically ascriptive dimensions of 'difference' as the reason for a decision under an equal protection clause will open not just race but also gender to the protection of that branch of law.

Though this understanding of capturing a dimension of collective value is a feature of civic republican strands of thought that do not involve ideological critique, it is also deeply connected to ideology. For it is this facet of ideology's appeal to the collective that it facilitates an understanding of the *structural* context of social practices such as adjudication. Over time, the iteration of ideology's normative claims about the collectivity entrenches key interests in ways which alter the 'taken-for-granted' background of, say, judicial decisions. The repetition of normative justification of the interests of particular classes in 'universal' terms eventually causes the ways in which the particular interests benefit to recede into the background, to appear 'natural' and simply part of the given structures within which choices and reasons are made and given.

It is implicit in the above that ideology, in capturing the collective dimension of social experience, does so by *justifying* the particular in terms of the general. This dimension of justification (or legitimation) is characteristic of ideology, and constitutes its second positive contribution to an analysis of adjudication. In being more than simply a proxy for particularistic interests, whether of individuals or groups, ideology *mediates* ideas and interests. It acts as a bridge between abstract norms and raw power, between reason and politics. Indeed, Duncan Kennedy's recent book, contrary to Lucy's claim, does actually emphasize this, asserting (p. 24) that 'ideology is a mediation between interests and universal claims . . . not just a translation of interests into another medium'. One important implication of ideology from this perspective is that it defines interests just as much as it might reflect them. For example, by justifying the reach of the law of equal protection in terms of a ban on discrimination which is based on physically ascriptive characteristics, the interests of the physically disabled become legally salient. They are thus, in the context of this particular legitimation strategy, newly defined in a way in which the interests of those below the poverty line are not.

I concede, of course, that the justificatory universalizing move that ideology makes in mediating ideas and interests is frequently the *object* of ideology's critical gaze. Indeed in the epistemological version of the critical account, the move from particular to general is precisely what ideology seeks to unmask, to expose the 'true' array of political interests, both winners and losers, that 'in fact' benefit from the pattern of reasoning offered in a particular case. But I do not wish, as I have said, to rely upon the epistemological version to rescue ideology's critical

edge and thus its relevance to adjudication. Rather, I would suggest that in the context of the power version of the ideology critique, explicating the move between particular and general is *all that matters*. The power version, remember, envisions ideology as 'ways in which meaning (including techniques of legitimation, universalisation, reification, naturalisation) serves to establish and sustain relations of domination'. One way in which meaning sustains relations of domination, or as Marks sometimes puts it, asymmetrical power relations, is the move between particular and general made in adjudicative reasoning, and thus to chart exactly how this happens is to effect ideological critique. In this way, the question of whether a 'true' or 'truer' version of how things are or should be does not actually arise. Rather, the sting of the critique is simply this: 'things could be otherwise'.

The phrase 'things could be otherwise' is at the core of what I consider to be the third and final positive contribution of the concept of ideology to the study of adjudication. This is that ideology as a concept makes it possible to explain how patterns of judicial reasoning construct as natural, legitimate and correct, decisions that are contingent and arguably arbitrary. Ideology explains how particular interests are clothed in reasons and principles that universalize their justificatory force, and are then integrated into a pattern of reasoning that, in falling silent about the now suppressed particular interests, naturalizes the result. In denaturalizing that path, an ideology critique opens up the possibility for suggesting new and alternative ways to bridge ideas and interests. It unveils the pluralism and the range and depth of choice actually open to judges. It reveals that law, like politics, is the art of the possible, and expands the range of possibilities that are capable of being shaped by adjudication.

Now Lucy is not, I hasten to clarify, blind to the implications of such pervasive contingency, and though his specific account of ideology's contribution to this differs from mine, I would agree with his conclusion that the heretics' core challenge to orthodoxy is to blur the divide between law and politics. This much we share. But Lucy then, as I have indicated before, seeks to 'save' the coherentist spirit of orthodox approaches to adjudication by suggesting that a plausible account of moral realism or rationalism is necessary to ground their account of law as a practice that is relatively determinate, justifiable in principle and distinct from politics. Lucy's own brief 'first-order' contribution towards the place of values in adjudication springs from an intellectual temperament that values resolution, consistency, closure, and quasi-transcendence. I want to end this essay by extending further my conviction that value pluralism, and the associated contingency of adjudication as a social practice, can be the core *strength* of a theory of adjudication (or indeed of law)—and not, as it tends to appear in Lucy's book in relation to both orthodoxy and heresy, the weak link or a source of internal contradiction.

For far from needing to turn to moral realism or objective truth claims to avoid contingency, at least one strand of heretical jurisprudence takes the irredeemable contingency of law *as the ground of law*. If this sounds contradictory,

there is indeed an element of contradiction, or at least of paradox, in a purely logical sense. But to accept that element of contradiction or paradox is crucial to a full understanding of this approach, which is embodied in the work of one of Lucy's band of heretics, Drucilla Cornell.

C. *Groundless Grounds and Impossible Utopias*

What, then, is this alternative approach, elements of which recede into the invisible background when subsumed in the terms of Lucy's argument? Put simply, it is an approach where the absence of a ground for law functions as a ground, and the two elements combine either in some symbolic function which Cornell labels an impossible utopia (but Derrida might label an aporia, or Peter Fitzpatrick a myth). Let me show what I mean by careful reference to Cornell, building on some of Lucy's presentation of her position.

For present purposes, all that is relevant is Lucy's engagement with a particular aspect of Cornell's deconstructionist approach to the place of values within adjudication. He summarizes Cornell's view of what is involved in 'enacting an ethical relation': to wit, respecting the singularity and difference of the Other (p. 320). He then shows how Cornell relates this to legal doctrine and judicial decisions in a way which suggests that for Cornell, law and adjudication violate the ethical substance of deconstruction because the establishment of shared meaning and generalized standards eliminates difference and particularity (p. 321). At the same time, however, these shared values, ultimately representing 'the Good' in some universal sense serve to make possible (by standing as an impossible-to-achieve ideal that suggests a limit, boundary or ground) the kinds of particularized specific legal decisions that *do* respect the other. There is, however, always a tension or contradiction, because the full realization of the Good is a 'commitment to the impossible' (quoting from Cornell on p. 321). Thus, as Lucy observes, 'the way in which Cornell makes resort to law and adjudication palatable [within a deconstructionist perspective] is to *accept some degree of conflict while ensuring an even greater degree of dependence* between the . . . Good on the one hand, and the law . . . on the other' (p. 322).

All well and good, and I think Lucy does a very fair job of presenting Cornell's position as neutrally as possible. But it is his evaluation of it from which I would differ. The italicized portion of the above quotation is for Lucy a central problem in that it presents a contradiction. The simultaneous presence of conflict between two concepts and their interdependence is in Lucy's terms a 'compatibility problem' (p. 322),¹⁵ which is 'strong enough to generate a contradiction' and thus puts a heavy burden of proof upon Cornell to resolve this tension (p. 325).

The problem with this approach, understandable though it is, is that it arguably misses the vital point that paradoxical contradictions can have a constitutive

¹⁵ He also articulates a 'vagueness problem', which I would be happy to concede, and a 'redundancy problem' which I would suggest falls away once it is (if it is) accepted that the 'compatibility snag' is not in fact a problem, but a deep challenge.

effect, and can thus act as the ground of law. Relatedly, the challenge presented by the kind of argument that Cornell makes does not depend upon resolving tension—indeed, quite the contrary, it insists upon holding the contradictory elements of law or adjudication in an eternal suspension of ongoing tension. It is quite accurate for Lucy to state of Cornell's argument that it ultimately supports a contention that the generality of . . . rules and their . . . synchronising thrust . . . guarantees conflict with the ethical relation, understood as respect for difference and particularity' (p. 326). But it is to miss a crucial aspect of the argument's force to target it for an absence of 'consistency'. Any such absence is deliberate, knowing. Lucy's triumphal point against her is that she has 'shown that the condition that makes law necessary . . . also makes the realisation of the ethical relation impossible' (p. 325). But Cornell, I suggest, would agree with and concede this impossibility, without viewing it as undercutting her position.

Other strands of jurisprudence drawing on a similar philosophical heritage insist upon a similar point. Peter Fitzpatrick, for instance, in his *Mythology of Modern Law* (1992), makes clear the significance of this simultaneous conflict and interdependence. The book is devoted to showing that law and its seeming opposites (whether that be politics, community, administration or society) are in a relation that is 'a relation between mutually supporting mythic entities and not simply . . . one of opposition' (p. 6). The mythic dimension of law, in Fitzpatrick, serves a function analogous to the impossible utopia of the universal Good in Cornell—it is a site where seeming opposites appear to converge and yet simultaneously define each other in a way that perpetually defers convergence (or 'resolution'). Lucy's paradigmatically different approach is actually nicely illustrated here, given the themes of this review essay. Lucy refers to myth only in relation to the epistemological version of the ideology critique; in other words, to indicate obfuscation as opposed to 'truth'. As a result he sees ideology as being in tension with the deconstructionist project to an extent that points to the brooding threat of . . . a contradiction' (p. 243). But myth and ideology *can* co-exist in a sympathetic relation to each other in ways quite compatible with the deconstructionist project. This is so if ideology is conceived of as mediating ideas and interests in a way which is simultaneously expressive of collective general values and yet instrumental to the achievement of particular segmented interests, as I have argued above. The 'myth' of the collectivity operative within ideology is both true and false at the same time from such a perspective.¹⁶

The thrust of this section, then, has been to rescue shards of the heated battle between heretics and orthodox from the *entente cordiale* which Lucy's book adroitly manoeuvres between them. As Fitzpatrick says:¹⁷

¹⁶ From a slightly different angle, Fitzpatrick also considers myth and ideology to be related in ways that do not depend on epistemological commitments to objective truth, but on a profoundly different vision of the necessary and necessarily mute ground of law: P. Fitzpatrick, *The Mythology of Modern Law* at 31–2, 37–8 (London: Routledge, 1992). He also emphasizes that the antinomies of law are a 'matter of myth' rather than a 'matter of inconsistency or delusion' (at 9). The simultaneous denial and necessity of myth in modern law constitutes law's only truth, ever present but ever elusive.

¹⁷ Fitzpatrick, n 16 above, at 2–3.

Jurisprudence is littered with isolated and opposed notions about law but the field retains a unity of engagement with law. To the extent that the keepers of one notion engage with another, it is to reduce that other notion to the terms of their own. [There is a notion that] further thought and the accumulation of knowledge will eventually establish the rightness of one position over or rather than another. The immensity of effort so far unsuccessfully devoted to this consummation suggests that persistent irresolution is a more likely outcome.

I would suggest, with the greatest of respect, that Lucy has effected a translation of at least one heretical version of adjudication into his 'own' terms. In keeping with what came across to this reader as a temperamental affinity with the orthodox approach, he has insisted that heretics seek the *kind* of argumentative resolution that he values. In so portraying them, he has, at least in respect of one strand of heresy, purported to douse a fire that still burns.

D. *From Philosophy to Sociology*

But I would not wish to close on a note that could imply throwing one's hands in the air with a reference to incompatible paradigms and implicit images of the tower of Babel. For the constitutive paradox that is such a core element of the deconstructionist strand of heretical jurisprudence *can* be approached in a way that re-opens dialogue between 'orthodoxy' and 'heresy'. This would be to approach such paradoxes sociologically rather than philosophically. I can do no more than gesture towards this path in the current context, and I will do so with temerity by standing briefly on the shoulders of Luhmann's elliptical and deeply insightful excursus into the 'creative use of paradox in law'.¹⁸ In this short but rich article, Luhmann identifies the 'third question' for law (after 'who is right' and 'who is wrong') as this: 'how can we rightly or wrongly differentiate the right and the wrong?'. The question need not be phrased in terms redolent of ethics; it could just as well be 'how can we legally or illegally differentiate the legal and the illegal?' Either formulation of the third question, Luhmann suggests, leads inevitably to a paradox, and thus an alternative approach is 'to unask the question'. In what would such an unasking consist?

There are paradoxes everywhere, whenever we look for foundations. The founding problem of law, then, is not to find and identify the ultimate ground or reason which justifies its existence. The problem is how to suppress or to attenuate the paradox which an observer with logical inclinations or with a sufficient degree of dissatisfaction could see and articulate at any time.

Lucy is just such an observer, of a particularly acute kind, and his response, in his gesture towards moral rationalism or realism, is to continue the search for the ultimate ground. An alternative approach would concede the irredeemable persistence of paradox at the foundation, and would instead explore how legal

¹⁸ Niklas Luhmann, 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' (1988) 15 *Journal of Law and Society* 153–165.

institutions and practices sociologically mediate (and cover over) paradoxes by introducing key ‘distinctions’ and replacing the paradox with ‘a narrative telling [of] the genesis of distinctions’. Luhmann’s own survey of such practices sweeps over the *longue durée*, advertent to distinctions such as those between divine law and natural law, law and equity, natural law and positive law, legislative power and judicial power. And this brings us full circle back to ideology, since ideologies over time make key distinctions appear natural and much of the heretical project has been to uncover the mute ground of such distinctions. Thus the core challenge of heretical jurisprudence is not confined to deconstructionist philosophical thought—it also extends to a particular kind of critical history, the study of different ways over time of the various forms of ‘deparadoxifying the paradox’, forms which ‘depend on [varying] conditions of social acceptability . . . [which] change with the transformations of the social system of the society . . . depend on social structures and are therefore historical conditions’. In short, a genealogical approach to adjudication may well bring into dialogue orthodox and heretical understandings of this complex practice, without searching implicitly in the process for a stable foundation for law. Nor need such a genealogy necessarily range over such an ambitious time period as does Luhmann’s quasi-fable. Valuable and fascinating work can be done in much more constrained compass: indeed, two recent monographs have explored the creation of legal norms with a nuanced critical approach centring on ideology within the compass of recent decades—Davina Cooper’s *Governing out of Order*, exploring political authority and its limits in the context of local government in England, and Susan Marks’ *The Riddle of All Constitutions*,¹⁹ exploring the norm of democratic governance in the context of international law in the 1990s.

4. Conclusion

It might be said that Lucy’s book enacts his own paradox. For one of the distinctions discussed by Luhmann as critical to suppressing the paradox of law’s foundation (that between legislative and judicial power) is really none other than the law/politics distinction which Lucy himself argues the orthodox theorists have not succeeded in validating. The paradox would be this: Lucy’s (heretical) support of the untenability of sustaining the distinction between law and politics is combined with his (orthodox) gesture towards replacing that paradox with the firm ground of moral realism or rationalism. And I do not wish to suggest that Lucy is unaware of the potential of genealogy. Rather I wish to highlight the way in which the principal trajectory of his argument works against such acknowledgements. His encyclopaedic knowledge of a very broad range of literature makes him hard to fault, and it is for the reviewer a dispiriting fact that in every few pages of Lucy’s book, one could undoubtedly unearth a morsel

¹⁹ Davina Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (Rivers Oram Press, 1998); Susan Marks, *The Riddle of All Constitutions: International Law, democracy and the critique of ideology* (Oxford: Oxford University Press, 2000).

of text that would contradict my assertions. On genealogy itself, his adroit footnote on the possibilities of genealogy²⁰ saves himself from paradox just at the moment that he appears to ‘contradict’ himself. Just as each individual judicial decision can be ‘saved’, through the adept use of doctrinal or philosophical distinctions, from the paradoxical absence of foundation upon which the system as a whole ultimately rests,²¹ so every page of Lucy can save his book as a whole from my own arguments.

It is, however, the spirit and temperament of the book as a whole that I have tried to present, as it has appeared to me. For it is, as Lucy himself recognizes (p. 293, p. 354), at least partly a matter of faith or temperament that will determine one’s theoretical predilections in jurisprudence, as in any theoretical enterprise. And in the end, bridging the divide between orthodoxy and heresy may need more than rational logical debate; it may need an apprehension of the fundamental mystery at the bottom of law: its grounding in paradox. Lucy is incredulous at the thought that ‘the Benthamite task of secularization and demystification of the law [might] still be incomplete’ (p. 354). But I think it is incomplete, and necessarily so. There are limits to a ‘science’ of law: whether the underside of this dream of a science of law be sacred mystery or naked power, it is an underside that constitutes the very possibility of the dream, and it will not disappear. Whether our temperament is to have faith in it or no, it will, I venture to suggest, rear its head regardless. We should take heed.

²⁰ On p. 222 for example, in a footnote, he lauds the genealogy of Nikolas Rose just as in the accompanying text he excoriates Pierre Schlag for ‘sub-standard’ genealogy—a classic example not only of his mordant style but also of the sheer range of his presentation of different schools of thought.

²¹ For an intriguing recent essay that aims to solve the paradox of the grounds of the legal system as a whole by the use of a distinction (between the perspective of legal science and that of the practice of law), see John Gardner, ‘Law as a Leap of Faith’ in Oliver, Douglas-Scott and Tadros (eds), *Faith in Law: Essays in Legal Theory* (Hart, 2000) at 19–32.