

CRITICAL RACE THEORY AND POSTCOLONIAL DEVELOPMENT
THEORY: OBSERVATIONS ON METHODOLOGY

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IN recent years, increasing interest has arisen as to the potential applications for Critical Race Theory ("CRT") in international legal critique. This Essay raises the question in methodological form. I begin by identifying four "strands" of critical methodology that have been used in CRT: "external," "internal," "legitimate-ideological" and "illegitimate-ideological." The "external" strand criticizes doctrine by exposing its production or reinforcement of what might be termed, in admittedly generalizing shorthand, the "status quo,"¹ and contrasts this function of the doctrine with the portrait of social justice and equity implied to result from the doctrine. The "internal" strand criticizes doctrine by exposing its internal inconsistencies, which tend to prove doctrinal origin not in "autonomous" legal reasoning, but rather in one or another set of social-policy preferences. The third and fourth strands both seek to expose the ways in which the "ideology" or consciousness of legal decision-makers legitimates the status quo by mediating or disguising its internal and external flaws. The third strand, however, targets the operation of what I will term "legitimate" social ideology—most often "liberal legalism"; whereas the fourth strand

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1. The term seems to be used in these critiques most often as a shorthand for social structures that are systematically inegalitarian in that they produce and maintain various existing social, economic and political privileges in a way that can be descriptively and predictively linked to criteria such as race, gender and class.

demonstrates that the “status quo” is rationalized not only by legitimate social ideology, such as liberalism, but by “illegitimate” social ideologies, such as racism.² After a brief discussion of how each method has been used in CRT, I examine the relationship of each method to postwar criticism of the impact of international law and policy on developing countries. I am describing the latter group of critical works as “postcolonial development theory.”³

Given such a potentially broad endeavor, some disclaimers are clearly in order. First, the comparison relies on a limited sample of CRT works, and therefore draws examples from limited sources and excludes some kinds of methodology altogether.⁴ The same can be said for the works

2. “External” critique is discussed *infra* notes 8-32 and accompanying text; “internal critique” is discussed *infra* notes 33-57 and accompanying text; “legitimate-ideological” critique is discussed *infra* notes 58-75 and accompanying text; and “illegitimate-ideological” critique is discussed *infra* notes 76-102 and accompanying text.

3. The term “developing countries” can be defined in many ways, geographical and historical definitions included. The World Bank classifies countries by income, and places some European countries, such as Greece and the former Eastern bloc, in the middle-income category, at the same time true that some countries traditionally identified as “developing,” such as Hong Kong and Singapore, fall in the high income category. See, e.g., WORLD DEVELOPMENT REPORT 152-53 (1996). This Essay adopts the definition of “developing countries” used by the United Nations Food and Agriculture Organization, which comprises Africa, Asia (excluding Japan), Latin America and the Middle East (excluding Israel). See United Nations Food and Agriculture Organization, 1998 Production Year Book. Economic growth is of course an insufficient definition of development, and its deficiencies have been widely discussed and debated. See generally DIANA HUNT, ECONOMIC THEORIES OF DEVELOPMENT: AN ANALYSIS OF COMPETING PARADIGMS (1989) (discussing historical approach to development economics and various paradigms invoked in development economics field). Notwithstanding widespread recognition of its insufficiency, economic growth remains the lodestar of development policy for both governments and international institutions.

4. To claim to apply a CRT methodology begs the question as to how, and whether, such a methodology can be defined, given that CRT is known for its lack—and perhaps rejection—of a unifying method. See WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT 3-7 (Mari J. Matsuda et al. eds., 1993) (discussing CRT generally and six elements that have been identified as “defining”).

Notwithstanding its diversity, the critical theory field contains identifiable methodological approaches. One such approach is the exposure of “dominant” narratives in law, and the articulation of “counter-narratives” or “stories from the bottom.” Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-32 (1987) (analyzing CLS movement and advancing approach of “looking to the bottom” to assist critical scholars in understanding law and elements of justice); see also Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 308-12 (1993) (analyzing family law and reproductive rights from perspective informed by “neglected stories” arising out of slavery and its abolition); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 S. CAL. L. REV. 1581, 1584-93 (1993) (discussing “master narrative” of white supremacy in context of recent civil disorder in Los Angeles). Richard Delgado’s *Rodrigo Chronicles* constitute the most elaborate and sustained effort in this narrative vein. See, e.g., Richard Delgado, *Rodrigo’s Second*

examined here under the rubric of postcolonial development theory.⁵ Moreover, the comparison, because it begins by looking at CRT, superimposes this lens on postcolonial development theory. The impetus for this comparison was an inquiry into how CRT might be extended to international issues. Accordingly, the comparison begins by examining some CRT and is thereafter shaped by that departure point. Finally, the identified categories do not attempt to describe the "essence" of any of these theories, but serve strictly heuristic ends.⁶

Acknowledging the stylized nature of this comparison, the methodological parallels and incongruities it highlights are still instructive. Both of these critical theories focus on a sub-collectivity (racial minorities in the United States and developing countries in the international community), whose status within the constitutive legal system (U.S. law, international law) has shifted from formally separate and subordinate to formally equal. In their own ways, CRT and postcolonial development theory have sought to expose and theorize this transition as insufficient and/or incomplete and, therefore, unjust.

This commonality of purpose is reflected in other shared qualities. In particular, it is interesting to note that both CRT and postcolonial development theory have been cautious with respect to the claim of indeterminacy that has been so salient in twentieth century American legal critique. Many Critical Race theorists have expressed ambivalence about the inde-

Chronicle: The Economics and Politics of Race, 91 MICH. L. REV. 1183, 1193-98 (1993) (presenting Rodrigo's views on why law and economics do not account for continuation of racism and discussing recent conservative writing on American race problem); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387, 403-08 (1993) (dialoguing Rodrigo's view on what hinders national civil rights policy); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1139-47 (1993) (discussing how neutral principles of constitutional law disadvantage outsider groups). While this Essay does not focus on it, the narrative method has been a defining feature of CRT, and is discussed elsewhere in this group of commentaries.

CRT developed its methods in the context of a fairly specific time and place—the American legal academy of the 1970s and 1980s. For an explanation of this development, see KIMBERLÉ WILLIAMS CRENSHAW, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* at xvi-xxxii (1995) [hereinafter *KEY WRITINGS*]; RICHARD DELGADO, *CRITICAL RACE THEORY: THE CUTTING EDGE* at xiii-xvi (1995) [hereinafter *CUTTING EDGE*].

5. As suggested by the opening paragraph, the term postcolonial development theory is not one adopted by the writers discussed below themselves, but rather is applied to their works for descriptive ease because all their works share, whatever their differences, a focus on the impact of international law on developing countries. Consequently, the discussion incorporates works from theorists of political economy, such as Andre Gunder Frank and Samir Amin, as well as legal theorists, including the earlier works of Mohamed Bedjaoui and contemporary works. For a review of these works see *infra* notes 15-32, 49-57, 73-75 and 84-101 and accompanying text.

6. For a thorough account of critical methodology, see generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997).

terminacy argument.⁷ And while postcolonial development theorists argued that international law was internally inconsistent, they stopped short of charging the international legal system with inherent indeterminacy. This absence in one theory and ambivalence in the other suggest a pervasive tension within critical theories whose specific goal is to expose the insufficient integration of *historically subordinate* populations into the dominant legal system. To wit, such theories may be inherently conflicted in their objective of exposing a system as structurally flawed, while advocating its more perfect application—more effective rights for racial minorities, more effective sovereignty for developing countries.

Notwithstanding these similarities, the methodological differences between the theories suggest ways for each to incorporate technique from the other. CRT might benefit by strengthening its deployment of external critique: that is, by more precisely articulating and theorizing the material impact of current law on racial minorities. Postcolonial development theory, on the other hand, might benefit by incorporating post-structuralist and post-modernist methods, which, though deployed elsewhere in postcolonial theory, have only begun to be applied to postcolonial critiques of international law.

I. THE "EXTERNAL" STRAND

External critique seeks to show that law perpetuates inegalitarian social conditions despite its claimed allegiance to social equality.⁸ In American legal criticism, external criticism has been deployed in a variety of sources, beginning with the early twentieth century work of Louis Brandeis,⁹ Roscoe Pound¹⁰ and Robert Hale.¹¹ The contribution of CRT to this tradition of criticism has been to focus specifically on how law affected race relations. Thus, whereas conventional external criticism sought to demonstrate that law claimed to promote general social equality, but in fact perpetuated social inequality, CRT sought to show that liberal legal-

7. For further information, see *infra* notes 45-48 and accompanying text.

8. External critique need not serve left-leaning political ends. For example, law and economics theorists seek to identify the efficiency, or costliness (leaving open here how such questions might be defined), of legal rules. See, e.g., Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999).

9. See, e.g., Philippa Strum & Louis D. Brandeis, *The New Freedom and the State*, 69 MID-AMERICA 105 (1987).

10. See, e.g., Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909) (arguing that concept of equal rights of employer and employee to liberty of contract "is utterly hollow. All the ado made over the system of contract is surcharged with fallacy . . . Why, then, do courts persist in this fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality?" (internal citation omitted)).

11. See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) ("A careful scrutiny will . . . demonstrate that the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restriction of individuals . . . out of conformity with any formula of 'equal opportunity' or of 'preserving the equal rights of others.'").

ism claimed to promote *racial* equality but in fact perpetuated racial inequality.

The most common focus for this critique has been the so-called color-blind approach to constitutional interpretation, particularly to the equal protection clause.¹² Critical Race theorists have argued that the color-blindness principle adheres to classically liberal notions of formal neutrality and equality that entrench, rather than correct, racial subordination; hence Derrick Bell's argument for adopting a "Racial Realism" that "abandon[s]" the "ideal" of "racial equality" in the face of "the reality . . . that blacks still suffer disproportionately higher rates of poverty, joblessness and insufficient health care, than other ethnic populations in the United States."¹³ Neil Gotanda has sounded the charge that "color-blind constitutionalism . . . fosters white racial domination" by "maintain[ing] the social, economic and political advantages that whites hold over other Americans."¹⁴

In postcolonial development theory. The external postcolonial development critique of the international order asserts that it, though informed by seemingly egalitarian liberal ideals, perpetuated the "underdevelopment"—that is, the entrenched economic inequality relative to the North—of Southern countries, by failing to correct economic disadvantages bequeathed to the South by colonialism. Writers such as Andre Gun-

12. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

13. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992); *id.* at 364 (arguing for "viewing the law—and, by extension, the courts—as instruments for preserving the status quo and only periodically and unpredictably serving as a refuge of oppressed people").

It is worth noting that the proposition that a racial focus was unique in legal critique to CRT is disputed by some members of the CLS school, who point out that CLS writers addressed racial inequality as one part of a network of critiques. Examples of such critiques include Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); and Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884 (1987). For a fuller discussion, see Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. (1987), and *Responses to Minority Critiques of the Critical Legal Studies Movement*, 23 HARV. C.R.-C.L. L. REV. (1988).

14. Neil Gotanda, *A Critique of Our Constitution Is Color-Blind*, 44 STAN. L. REV. 1, 2 (1991) (setting forth treatment of race consciousness of United States Supreme Court).

der Frank,¹⁵ Raúl Prebisch¹⁶ and Samir Amin,¹⁷ working in the "structuralist," "dependency" or "neo-Marxist" vein, mobilized this critique.¹⁸

According to this external analysis, colonizing states in the North transformed Southern economies into satellites of the Northern economies.¹⁹ This colonialist organization of North-South relations displaced previous patterns of production in the South and enabled Northern actors to accumulate capital through the provision by Southern economies of raw materials²⁰ and markets.²¹ This provision led to a large-scale transfer of resources from the South to the North. The colonial international economy not only failed to develop the South, but actually "underdeveloped" the region by extracting indigenous resources and transforming it from a self-reliant (albeit subsistence) economy to one dependent on both

15. See generally ANDRÉ GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA* (2d ed. 1971) (mobilizing external postcolonial development critique) [hereinafter FRANK, *CAPITALISM*]; ANDRÉ GUNDER FRANK, *THE DEVELOPMENT OF UNDERDEVELOPMENT* (1966) [hereinafter FRANK, *UNDERDEVELOPMENT*].

16. See generally RAÚL PREBISCH, *CHANGE AND DEVELOPMENT: LATIN AMERICA'S GREAT TASK* (1970) (noting structural differences); RAÚL PREBISCH, *TOWARDS A NEW TRADE POLICY FOR DEVELOPMENT* (1964) [hereinafter *NEW TRADE POLICY*] (same).

17. See generally SAMIR AMIN, *LA NATION ARABE: NATIONALISME ET LUTTES DE CLASSES* (1976); *ACCUMULATION A L'ECHELLE MONDIALE* (1974) (critiquing international order).

18. Other writers include: G. ARRIGHI, *THE POLITICAL ECONOMY IN RHODESIA* (1970); P. BARAN, *THE POLITICAL ECONOMY OF GROWTH* (1957); Aidan Foster-Carter, *Neo-Marxist Approaches to Development and Underdevelopment*, in *SOCIOLOGY AND DEVELOPMENT* (Emmanuel De Kadt & Gavin Williams eds., 1974); George Lichtheim, *Oriental Despotism*, in GEORGE LICHTHEIM, *THE CONCEPT OF IDEOLOGY* (1967); AFRICAN SOCIALISM (William H. Friedland & Carl G. Rosberg eds., 1964); JULIUS NYERERE, *UJAMAA: ESSAYS ON SOCIALISM* (1968); JOSÉ VILLAMIL, *TRANSNATIONAL CAPITALISM AND NATIONAL DEVELOPMENT: STUDIES IN THE THEORY OF DEPENDENCE* (1978).

As in critical theory promulgated by Western writers on behalf of disadvantaged populations within Western society, the external postcolonial development critique had both radical and reformist proponents. Writers like Frank and Amin argued that Southern underdevelopment could be corrected only through "delinking," or exit by Southern countries from international economic relations with the North. See generally FRANK, *CAPITALISM*, *supra* note 15 (arguing that underdevelopment could be corrected through "delinking"). Prebisch, on the other hand, argued that North-South international economic relations could be reformed, not least through the reform of international economic law. See *NEW TRADE POLICY*, *supra* note 16, at 6 (discussing method for reform of North-South international economic relations). Although the proposed solutions differed, the analyses of the problem deployed a fairly similar external critical analysis.

19. That is, Southern economies were transformed from largely subsistence production and regional trade patterns to "dual economies," wherein a significant part of this activity became replaced by the production and extraction—directed by Northern colonial actors—of raw materials for export to the Northern center.

20. This includes profits deriving from the low-cost, relatively high-return export of commodities to the North.

21. This includes profits deriving from the import of goods to the South, now needed as a result of the displacement of indigenous production.

imports from, and exports to, Northern markets. Political independence, postcolonial critics pointed out, did little to alter this organization and, therefore, perpetuated economic relations characterized by the “neocolonial” dominance of Northern economic actors both within the economies of developing countries (“DCs”) and in the “international market.”²²

For postcolonial development theorists, the targets of critique were often the international legal systems regulating international economic relations. The General Agreement on Tariffs and Trade (“GATT”), for example, received several intensive applications of the structuralist or dependency critique.²³ Critics showed that the system’s organizing principle of “free trade” deprived DC governments from favoring domestic producers over foreign producers and from refusing to grant DC producers preferential treatment in foreign markets. It also hindered industrialization in developing countries by preventing DC producers from breaking into industrial sectors, consigning them to the production of raw materials and dependency on imports that had been established as a result of colonialism.²⁴

There are also parallels between the critique by Critical Race theorists of American judicial interpretation of the principle of equal protection and the criticisms that postcolonial theorists launched against the industrialized-country government interpretation of the international legal principle of sovereign equality. Postcolonial writers expressed agreement with their opponents that sovereign equality was the fundamental principle structuring international law; however, they objected to the view put forth by industrialized-country governments and some Western theorists that sovereign equality was to be understood as requiring no more than basic recognition of every country as formally sovereign. Critics like Raúl Prebisch argued that this formal concept assumed “an abstract notion of economic homogeneity which conceals the great structural differences between industrial centres and peripheral countries with all their important implications.”²⁵

Despite the profound differences in subject matter, Critical Race theorists and postcolonial development theorists employed a similar method: to show how a population once formally excluded from a putatively universal and liberal legal system and relegated to a formally separate and subordinate system—non-whites in U.S. law, and the Third World in inter-

22. This dominance is evidenced by disproportionately high import-dependence of developing countries, disproportionately low shares of world trade held by developing countries and disproportionately high ratios of foreign direct investment to gross national product in developing countries.

23. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

24. See, e.g., NEW TRADE POLICY, *supra* note 16, at 6 (discussing and criticizing GATT).

25. NEW TRADE POLICY, *supra* note 16, at 6.

national law—had been ill-served by a subsequent formal inclusion that ignored deep-rooted structural inequities. Notwithstanding this similarity, this Essay's comparative analysis suggests that there may be room for CRT to take a page from postcolonial development theorists by expanding on the external dimension of critique. The CRT tracts cited above as external criticism, for example, posit racial inequality without articulating the specific dynamics of it.

Such a suggestion demands some qualification. First, political scientists and economists, rather than lawyers, shaped the materialist explanations of postcolonial development theory. Second, many Critical Race tracts have employed empirical analysis to document assertions of material racial inequality.²⁶ Critical Race theorists have also employed social science for related ends, such as to explain the subjective basis²⁷ and subjective impact²⁸ of racism.

Third, non-empiricism is by no means exclusive to CRT, but rather characterizes American legal scholarship in general.²⁹ There are some good reasons for this: legal theorists enjoy a comparative advantage in textual, as opposed to empirical, analysis, so that empirical analysis can be argued to fall outside a legal theorist's bailiwick. Moreover, attempting to do empirical analysis without formal training may be foolhardy. Legal realists, for example, became famously frustrated with their efforts at empirical substantiation.³⁰ Finally, it may be justifiable to assume that racial inequality is patent and does not need substantiation. Notwithstanding all these justified reservations, there may be value in exposing the precise

26. See, e.g., Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998) (describing the material effect of alien land laws); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1983) (referring to empirical studies to substantiate proposition that significant disparities exist in conviction rates for black and white defendants); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) (discussing psychological data of cross-racial identification); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (describing historical basis for the "devaluation of black motherhood").

27. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (explaining subjective basis of racism and discussing doctrine of discriminatory purpose).

28. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.L.-C.R. L. REV. 133 (1982) (discussing psychological harms of racism).

29. See Cass R. Sunstein, *Well-being and the State*, 107 HARV. L. REV. 1303, 1305 (1994) ("The failure to identify the empirical dimensions of legal disputes is a continuing weakness in the legal culture.").

30. See AMERICAN LEGAL REALISM 232-36 (William W. Fisher III et al. eds., 1993) (describing commitment of early legal realists to empirical substantiation and frustration of efforts to obtain it). "Some scholars labored mightily at empirical research, only to find conclusions elusive, their hard-won data so incomplete as to be unpublishable, their work useless for suggesting reform." *Id.* at 236.

material dynamics of legal structures,³¹ if not through original empirical work, then by incorporating work from the social sciences.³²

II. THE "INTERNAL" STRAND

Internal critique emerged from American legal realism.³³ The critique charges that law is incoherent; despite prevailing representations of the law as rational and consistent by both legal decision-makers and legal academics, assessment of the law as applied in individual cases compels the conclusion that it is neither.³⁴ The charge of incoherence stems in significant part from doctrinal analysis. With respect to legal doctrine understood as a compendium of organizing principles, the incoherence critique has demonstrated that a single principle (for example, "rights,"

31. Elsewhere I have tried to move in this direction by quantifying the broad characteristics of the structural inequality that debilitates inner-city communities, the structural dynamics that perpetuate that inequality and the role law and policy play in creating that inequality. See generally Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451 (2000).

32. Notable such works include DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1994); SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY* (1999); SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (1993); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1997); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY* (1990).

33. The legal realist critique has integrally influenced contemporary legal decision-making and scholarship. See Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) ("We are all legal realists now."). As an example of the pervasive absorption of the lesson of indeterminacy, see Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 96 (1987):

Apart from the possible suggestion that the large principles at issue have a readily discernible, unique and non-debatable 'objective meaning'—a suggestion that nobody seriously maintains when pressed—there is little at this level of generality to divide [Robert] Bork and [Edward] Meese from more liberal lawyers, whether sitting judges or academics.

At the same time, the germ of the critique remained potent enough that critical legal theorists could deploy it in the late twentieth century to considerable effect. Thus, an earlier version of Singer's sound bite captured the "peculiarly ambivalent status in traditional scholarship: 'Realism is dead; we are all realists now.'" Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1669 n.4 (1982) (quoting W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 382 (1973)). For a discussion of legal realism as the basis for "incoherence" critique, see KENNEDY, *supra* note 6, at 82-96.

34. Hence the argument is that legal analysis be redirected from an attempt to discern organizing "precepts" or "principles" to what "the courts will do in fact." Oliver W. Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 992-94 (1897) (stating famed "bad-man" theory of law). Within U.S. legal scholarship, this project is generally identified as having gestated in the late nineteenth century and reached maturation with the ascent and self-identification of the legal realists in the 1920s and 1930s. See *id.*; see also Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-21, 838-42 (1935) (noting that reasonable minds could disagree on interpretations of law); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 442-43 (1930).

"freedom of contract" or the public/private distinction)³⁵ can be made to support contrary outcomes even in the same case (the "incoherent principle" critique), and that contrary principles can apply equally to a single case (the "incoherent facts" critique).³⁶ Internal methods of criticism have also averred that incoherence in the law results not only from doctrinal weaknesses, but also from institutional weaknesses (again, primarily of the judiciary) that allow variance across individual applications of the law (the "incoherent institution" critique).³⁷ These dynamics result in doctrine that represents itself as capable of being explained and predicted according to rational and consistent rules and categories, but that as applied cannot be so explained or predicted.³⁸

Of the three styles of incoherence critique, Critical Race theorists have perhaps most vigorously exercised the first, seeking to expose the

35. For a collection of legal realist writings, and theoretical antecedents thereto, on these subjects, see generally AMERICAN LEGAL REALISM, *supra* note 30.

36. Because precedents involve both legal principles and facts, this method of critique illustrates that the facts of any given case can be plausibly argued as either within or outside of precedent. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 73-76 (Oceana ed., 1960); see also Singer, *supra* note 33 at 470 (noting that "any case can be read in at least two ways"). Singer quotes Andrew Altman's statement that:

Depending on how a judge would read the holdings in the cases deemed to be precedents, she would extract different rules of law capable of generating conflicting outcomes in the cases before her. In the common-law system, it was left undetermined as to which rules, of a number of incompatible rules, were to govern a case.

Singer, *supra* note 33, at 470 n.10 (quoting Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208-09 (1986)).

37. The realist "credo is often caricatured as the proposition that how a judge decides a case on a given day depends primarily on what he or she had for breakfast." AMERICAN LEGAL REALISM, *supra* note 30, at xiv. The caricature attempts to ridicule the attention paid by legal realists to potential sociological and psychological influences on judicial behavior. See *id.*; see also JEROME FRANK, *LAW AND THE MODERN MIND* 145 (1930) (appealing for recognition of "need to see that biases and prejudices and conditions of attention affect the judge's reasoning as they do the reasoning of ordinary men"); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278-79 (1929) (admitting that, as judge, the "decision . . . itself, as opposed to the apology for that decision" results from process of "feeling or 'hunching' out"); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 522 (1986) (describing judge's reasoning process as "both free and bound—free to deploy work in any direction but limited to the pseudo-objectivity of the rule-as-applied, which he [or she] may or may not be able to overcome"); Max Radin, *The Theory of Judicial Decision: Or, How Judges Think*, 11 A.B.A. J. 357, 359 (1925) (arguing that since "several categories struggle in the [] minds [of judges] for the privilege of framing the situation before them, how can [judges] do otherwise than select the one that seems to lead them to a desirable result"). The primacy of this aspect of the "indeterminacy" argument is disputed. See Singer, *supra* note 33, at 470 (criticizing LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986), for taking exaggerated view of this aspect of legal realist critique).

38. See, e.g., Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1247-56 (1931). For a later discussion of this concept, see generally Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209 (1979).

application by courts of analytically indeterminate legal principles in a way that perpetuates racial hierarchy. Lani Guinier has, for example, objected to the interpretation of the "one-person, one-vote" principle in voting rights jurisprudence to support winner-take-all territorial districting.³⁹ Terry Smith has shown that the United States Supreme Court has inconsistently pursued the principle of two-party stability to the detriment of African-American franchise.⁴⁰

With respect to the Equal Protection Clause, Linda Greene has criticized the dominant "formal" conception of equal protection, as opposed to a conception that is more historically, contextually and, therefore, racially conscious.⁴¹ Similarly, Kimberlé Crenshaw has remarked:

Only in . . . a [racially equitable] society, where all other societal functions operate in a nondiscriminatory way, would equality of process constitute equality of opportunity.

This belief in color-blindness and equal process, however, would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present.⁴²

Critical Race theorists have also employed the incoherent facts critique, showing how different rules can apply to the same facts, and that the dominant choice of rules has had racially subordinating results. Regina Austin has shown that racially hostile remarks in the workplace, dismissed by courts as *damnum absque injuria*, meet the criteria for relief on grounds of intentional infliction of emotional distress.⁴³ Richard Ford has shown that courts have chosen between potentially applicable rules of property law in a way that perpetuates geographical racial segregation.⁴⁴

39. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1595-98 (1993).

40. See generally Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1 (1998). *Bush v. Gore*, 121 S. Ct. 525 (2000), demands recognition here as a rich and likely subject for future critics.

41. See Linda Greene, *Race in the Twenty-First Century: Equality Through Law?*, reprinted in KEY WRITINGS *supra* note 4, at 292 (criticizing United States Supreme Court jurisprudence for "us[ing] language that preserves the appearance of proper concern for achieving equality—yet . . . the reasoning seems indifferent to reality and to the impact of the decisions on the historical victims of racial discrimination").

42. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1345 (1988).

43. See Regina Austin, *Employer Abuse, Worker Resistance and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 58 (1988) (concluding that it is "extremely difficult to accept the assumption that employer abuse [including racial remarks] and the emotional pain it causes workers are too subjective, ephemeral, trivial, and mundane to warrant judicial relief").

44. See Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1860-78 (1994) (discussing various court decisions).

Although the recognition of incoherence operates as an effective critique, many Critical Race theorists have observed its limitations. In *The Alchemy of Race and Rights*, Patricia Williams recorded her deep ambivalence about dismissing the socially transformative potential of civil rights on grounds of indeterminacy.⁴⁵ In *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, Kimberlé Crenshaw confronts the question of what proponents for racial equity should do in cognizance of the indeterminacy of antidiscrimination law.⁴⁶ As Mari Matsuda has observed:

How could anyone believe both of the following statements? (1) I have a right to participate equally in society with any other person; (2) Rights are whatever people in power say they are. One of the primary lessons . . . [to] learn from the experience of the bottom is that one can believe in both of those statements simultaneously, and that it may well be necessary to do so.⁴⁷

The problem that Crenshaw, Matsuda and Williams confront stems from a felt recognition of the urgency of immediate improvement in the social conditions that generated and drives the Civil Rights Movement.⁴⁸ This problem is strikingly similar to the felt recognition by many postcolonial development theorists of the need for immediate improvement in the conditions of developing countries, which led to a parallel infusion of energy into immediate reform of international economic law—in particular, the New International Economic Order.

*In postcolonial development theory.*⁴⁹ With respect to the incoherent principle critique, postcolonial development writers sought to demon-

45. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (noting ambivalence about dismissing the socially transformative potential of civil rights on grounds of indeterminacy); PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* (1998) (same).

46. See Crenshaw, *supra* note 42, at 1331.

47. Matsuda, *supra* note 4, at 340.

48. Some Critical Race theorists have argued, however, that fundamental transformation of race relations is impossible. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (noting possible transformation).

49. This Essay looks specifically on writers whose focus was the impact of international economic law on postcolonial development. It is worth observing, however, that important critical work has been done on international law more generally, such as DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989). Both of these works incorporate an "internal" critique, striving to show how tropes in international legal discourse are indeterminate; as with much contemporary critique of American law, this is combined with a structuralist project of discovering the discursive structure, which, it is then argued, mediates this indeterminacy.

It is interesting to note the similarities and differences between this work and those discussed in this Essay. For example, while Kennedy's *International Legal Structures* rigorously employs the internal critique and demonstrates its placement in a discursive structure, it is different from the legitimate-ideological critique be-

strate how certain principles that industrialized-country governments had invoked as justification for the international economic status quo could also be invoked to justify reforms proposed by DC governments.

One such site of contestation was the principle of sovereign equality, which is a fundamental organizing principle of international law.⁵⁰ Much as Critical Race theorists objected to a narrow, formalist view of the right to equal protection and other civil rights, postcolonial development theorists criticized the prevailing narrow and formalist view of the principle of sovereign equality. According to the formalist view, the principle of sovereign equality is only thinly constitutive, with no necessary bearing on economic and political relationships between states.⁵¹ Mohamed Bedjaoui, a prominent postcolonial legal scholar, articulated one of the better-known versions of the critique of this rule:

Only the form of a legal concept is considered, while its content—the social reality it is supposed to express—is lost sight of. In this view of an international law detached from reality, concepts are not just abstractions but mere artifices and fictions. As a result, no attention at all is paid to the economic and political context, which differs from one State to another according to their degree of development and *which governs the application of a concept such as State sovereignty. Yet it is this context which is decisive in*

cause it does not explicitly relate that structure to a prevailing social ideology, nor does it explicitly incorporate an external critique. The absence of these elements may be explained by the absence of a Marxian influence; or may be explained by the more evident pre-modern discursive roots of international law or by the relative difficulty of portraying international law at least in its relationship to Northern states as a source of coercion or hegemony either on the governments of these states or on their populations. Of course, with the “internationalization” of all manner of law that has historically been “domestic” in Northern states, this may be changing, which accordingly begins to create a basis on which to deploy an external critique. See David Kennedy, *Receiving the International*, 10 CONN. J. INT’L L. 1, 1 (1994) [hereinafter Kennedy, *Receiving the International*]. Koskenniemi does incorporate a discussion of the relationship between the structuralism exposed and an overarching liberal politics, but also does not forcefully incorporate an external critique. See KOSKENNIEMI, *supra*, at 498-501. Koskenniemi argues that international law can become more socially useful, but this is different from arguing that it is currently socially coercive. See *id.*

50. See U.N. CHARTER art. 2, para. 1 (“The Organization [of the United Nations] is based on the principle of the sovereign equality of all its Members.”).

51. See J.L. BRIERLY, *THE LAW OF NATIONS* 130-33 (1963) (criticizing call for “equal voice” and “equal representation” by “small states” in international affairs as based on misleading and spurious interpretations of principle); Norbert Horn, *Normative Problems of a New International Economic Order*, 16 J. WORLD TRADE L. 338, 343 (1982) (deeming calls for reform of international economic order based on a substantive interpretation of sovereign equality “confusion of legal and economic concepts,” and questioning compatibility of such reform with “the principle of sovereign equality of all nations”).

*giving a concrete meaning to sovereignty—or in denying it any such meaning.*⁵²

Interpretive clashes arose over the question of what a government was entitled to do under international law by virtue of sovereignty—the nature of government authority and autonomy to execute its own decisions. Foreign investment law formed one such site of dispute over the meaning of sovereignty. For example, industrialized-country governments argued that sovereignty did not allow a government to void unilaterally contracts between itself and private persons (like multinational corporations with long-term contracts in its territory), even if the government was doing so in furtherance of some domestic policy (such as economic development or, more specifically, nationalization). The line of reasoning was that, by committing to the contract in the first place, a government by virtue of its sovereignty bound itself irrevocably. Postcolonial theorists demonstrated that sovereignty could just as easily be interpreted to support a rule that would allow governments to retain a permanent capacity to void its commercial contracts.⁵³

Postcolonial theorists also took issue with the principle of free trade that was said to underlie GATT. In particular, postcolonial theorists weighed in on the debate over whether industrialized-country governments should give non-reciprocal trade concessions to developing countries in recognition of their structurally weaker economic position and in order to facilitate their development. While commentators opposing non-reciprocal preferences argued that those principles controverted free trade, postcolonial critics demonstrated that free trade could support non-reciprocal preferences because trade would be less restricted in a world where DC imports were not restricted from entering Northern markets (even where Northern imports were restricted from DC markets).⁵⁴

With respect to the incoherent facts critique, it should be noted that this type of analysis is most specific to the adjudication process and least characteristic of other types of rulemaking, such as legislation. Because there remains relatively little in the way of adjudication by international bodies of international law, particularly international economic law,⁵⁵ and most of the rules were legislative in character (that is, established as the result of international agreement), this type of critique has not arisen with respect to the GATT or the International Monetary Fund (“IMF”). This

52. MOHAMMED BEDJAoui, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979) (emphasis added).

53. See, e.g., M. Sornarajah, *The Climate of International Arbitration*, 8 J. INT’L ARB. 48 (1991).

54. See Kennedy, *supra* note 37, at 521 (discussing GATT and free trade).

55. Of course, I am referring to law directly affecting governments, so I am excluding international arbitration between private parties, which is quite common.

type of critique, however, has been used in a series of arbitration cases surrounding nationalization in the 1970s.⁵⁶

With respect to the incoherent institution critique, both the GATT and the IMF have been criticized by postcolonial theorists for their inconsistency. While DCs faced continuing resistance to the establishment of non-reciprocal trade preferences in "exception" to the GATT rules, industrialized countries maintained long-term unilateral practices that directly contravened GATT policy, including agricultural textiles policy in the United States and European Union. The IMF, however, was criticized for not disciplining industrial countries who broke from the fixed exchange rate in contravention of IMF rules in the early 1970s.

It is striking to note that these internal critiques, though fiercely argued, generally did not go so far as to argue that the international legal order was inherently indeterminate. Rather, they were used as part of a full-scale movement to reform the international legal system. For example, although Bedjaoui criticized dominant views of law on grounds of an irrational attachment to the legal status quo, he nonetheless expressed faith in the determinacy of law, albeit determinate according to a functional rather than formal framework. The mistake of proponents of the status quo was in conceptualizing law as "centered on itself, whereas it is in fact a science embedded in reality and performing [an] eminently social function"⁵⁷

The critiques of Bedjaoui and others formed much of the legal basis for the movement towards a New International Economic Order spearheaded by DC governments and supported by much postcolonial development work in the 1960s and 1970s. In this way, the postcolonial development theorists, like Critical Race theorists, were generally unwilling to reject, and indeed often embraced, the transformative potential of law.

III. THE "LEGITIMATE IDEOLOGY" STRAND

This method goes beyond exposing the inequitable social impact and internal incoherence of doctrine to demonstrating how both result from, and are perpetuated by, ideology. In American legal theory, legal realists pioneered the argument of incoherence in legal rules. Critical Legal Studies ("CLS") scholarship sought to argue that the "politics" of these actors derived from socially pervasive "ideology" that tyrannized legal deci-

56. See generally, Sornorajah, *supra* note 53.

57. BEDJAOUI, *supra* note 52, at 100. Many critics, such as Foucault have commented on the apparent absence of the legal realist notion in legal theory outside North America. In addition, it is not clear that critical theorists in the United States outside the law do not share a similar view of the law's relative determinacy. See David Kennedy, *Comments on Jamie Boyle's Postmodern Subject in Legal Theory*, 62 U. COLO. L. REV. 597, 597 (1991) (noting "Jamie Boyle's repeated insistence on the subjective element in law" and noting Dale Jamieson's idea that obsession with reality is "infantile").

sion-makers through a "false" "legal consciousness"⁵⁸ that prevented them from perceiving the indeterminacy of the law they applied.⁵⁹ In some of its incarnations, CLS asserts that these ideological constraints also prevent the re-imagining of law⁶⁰ in a way that could better achieve social justice and individual fulfillment.⁶¹ CLS theorists worked with a *mélange* of continental social theories, some of which had been employed in their original milieu at cross-purposes.⁶²

Much of CLS eschewed the focus of the external critics of the late nineteenth and early twentieth century on quantifying the role of law in perpetuating social hierarchy—this was taken as a beginning assumption, rather than a conclusion.⁶³ Instead, CLS picked up a thread of inquiry

58. Kennedy, *supra* note 37, at 220.

59. See Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1581-82 (1984) (noting that indeterminacy is often disguised). This is over generalizing many different types of critiques and to some extent is conflating different types of critique. Also, the question of the role of determinism and the relationship between the different types of determinism is interesting. Although CLS certainly did not discount, and in fact endorsed, the Marxian notion of economic determinism, see Kennedy, *supra* note 38, at 220 (clarifying focus on internal structure of legal reasoning rather than its external relation to class conflict by venturing that "[t]his is not to say that the latter kind of motives do not exist—it is their very obviousness that distracts us from the deeper patterns I want to elucidate. What I am after is the logic of obfuscation, rather than the struggle of conflicting interests that gives it energy"), they seem to have two motives for focusing on a more internal critique. These two motives are (1) a scientific project of quantifying the actual analytical mechanisms through which these class-determined outcomes were derived, and (2) a belief forged through their partial alliance to other continental writers such as Freud, Sartre and the French structuralists that the "superstructure" was much more forcefully and internally self-perpetuating than a pure Marxian critique would suggest. See, e.g., Kennedy, *supra* note 38, at 221 ("thinking makes it so").

60. Indeed, even the "dis-imagining." See Peter Gabel, *Reification in Legal Reasoning*, in 3 RESEARCH IN LAW AND SOCIOLOGY 25, 46 (Rita J. Simon & Steven Spitzer eds., 1980) (calling for "delegitimation of law altogether, which is to say the delegitimation of the notion that social life is created and enforced by imaginary ideas"); see also David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 235-37 (1985-86) (noting possible effect of ideologies and false beliefs on people's perceptions and actions).

61. See Gabel, *supra* note 60, at 46 ("The only antidote to th[e] perpetual movement of unconscious conspiracy is the development of a concrete disalienating social movement that would make imaginary forms of social cohesion unnecessary.").

62. Influences on CLS included, for example, G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* (1967); JURGEN HABERMAS, *LEGITIMATION CRISIS* (1975); CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND* (1966); Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 26 (Robert C. Tucker ed., 1978); JEAN-PAUL SARTRE, *CRITIQUE OF DIALECTICAL REASON: THEORY OF PRACTICAL ENSEMBLES* (1976).

63. See Kennedy, *supra* note 38, at 220 (stating that the "very obviousness" of class struggle "distracts us from the deeper patterns I want to elucidate. What I am after is the logic of obfuscation, rather than the struggle of conflicting interests that gives it energy."). But see, e.g., Klare, *supra* note 13 (focusing on external critique). Other CLS scholars, however, did focus on external critique. See, e.g., Klare, *supra* note 13.

first spun by European social theorists writing during the interwar period, such as Marcuse, Korsch, Lukacs and Gramsci, who sought to unpack the ideological and analytical mechanisms through which the law mediated and rationalized outcomes.⁶⁴

The specific means through which this was done varied. Some writers, such as Duncan Kennedy, adapted early French structuralism in order to argue that legal reasoning operated along relatively fixed, and generally bipolar, analytical lines.⁶⁵ Others, such as Peter Gabel, drew more from Sartrean existentialism⁶⁶ and Freudian repression theory,⁶⁷ by focusing on the reification of specific legal concepts, as opposed to systems of legal reasoning. These critiques were therefore often doubly determinist in that they assumed law to be essentially determined by economic relations, but then also argued that legal outcomes were determined by phenomena at the level of the mind, whether by psychological structure or philosophical alienation.

What made CLS even more interesting was its desire to retain and expand the incoherence critique of the legal realists. The synthesis was to show that legal reasoning operated according to fixed structures; however, those structures always offered several alternatives to the decision-maker and were therefore analytically indeterminate and could not be analytically justified. From here, there were two possible critiques. One was to demonstrate how this structure of reasoning *itself* perpetuated larger conditions of social inequality.⁶⁸ Another was to show how legal decision-makers, notwithstanding the indeterminacy and the inability to justify analytically the pursuit of one or another possible line of reasoning within the

64. See Donald F. Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 259, 268-69 (1987) (noting influence of Korsch, Lukacs and Gramsci on CLS); Peter Margulies, *Doubting Doubtless, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought*, 51 U. MIAMI L. REV. 1155, 1159 (1997) (noting Marcuse's pivotal role in shaping CLS).

65. See Kennedy, *supra* note 60, at 268.

66. See, e.g., Gabel, *supra* note 60, at 31 (noting role that "our shared common sense of the world as it is" plays in legal reasoning).

67. Specifically, the attempts by the Frankfurt School at integrating Freudian theory into Marxian theory. See, e.g., HABERMAS, *supra* note 62; HERBERT MARCUSE, *NEGATIONS: ESSAYS IN CRITICAL THEORY* (1968); HERBERT MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (1954). These attempts have been particularly influential. See Gabel, *supra* note 60, at 42-46 (applying theories of Freud and Marx); Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 249-50 (1984) (noting importance of Horkheimer, Habermas and Marcuse to CLS movement and that they "used Hegelian, Marxist, Freudian, and Existentialist thought to expose the disguised oppressive elements and contradictions in 'capitalist' society").

68. Thus, in what is generally agreed to be a founding text of CLS, Duncan Kennedy opened with this quote from Korsch:

[T]he material relations of production of the capitalist epoch only are what they are in combination with the forms in which they are reflected in the pre-scientific and bourgeois-scientific consciousness of the period; and they could not subsist in reality without these forms of consciousness.
K. KORSCH, *MARXISM AND PHILOSOPHY* 88-89 (F. Halliday trans., 1970).

structure of legal reasoning, nonetheless did so, with the suggestion that doing so was therefore driven by a social ideology of liberal legalism.⁶⁹

Thus, the attempt by legal decision-makers to construct and administer a "rule of law" is fraught with conflict and inconsistency. The principle of freedom of contract can often be argued to excuse performance as much as to require it; the commitment to individual rights can pit rights against each other; the unfettered "private" social realm is shot through with government regulation. CLS sought not only to reinforce these observations first made by legal realists, but also to demonstrate how liberal legal ideology prevented the law's officers and subjects from glimpsing them. This argument was then interwoven with external criticism, which sought to show how the law, particularly law in liberal society, perpetuated conditions of social inequality. Taken together, the critique was that liberal legal ideology prevented the law's officers and subjects from perceiving its deep internal flaws, and the result was the perpetuation of social inequality through legitimating the status quo.⁷⁰

CRT incorporated this ideological critique by focusing it on the question of racial hierarchy. Critical Race theorists sought to show how liberal ideology served to "mystify" internal contradictions in the law and, therefore, also rationalized the perpetuation of racial hierarchy that resulted from the application of the law. Thus, in her critique of antidiscrimination law, Kimberlé Crenshaw adopts Antonio Gramsci's definition of hegemony as consisting both of "consent" of the "great masses of the population" and of "coercive power which 'legally' enforces discipline on those groups who do not 'consent.'"⁷¹ Using this model, Crenshaw argues

69. Social ideology need not always support the status quo; it may also come to undermine it. See Kennedy, *supra* note 37, at 528 (noting scenario when decision-makers attempt to create "legal arguments that go against [the] first impression of what the law is"). Under either scenario, decision-makers can take advantage of legal indeterminacy to formulate opinions that nonetheless seem logically determined by virtue of their replication of certain well-established analytical structures. See *id.* Erich Fromm's "humanist" version of Marx was popularized in the "New Left" movement on American university campuses in the 1960s which may also have influenced CLS. See DAVID McCLELLAN, *MARXISM AFTER MARX* 319 (1979) ("In as far as Marxism was influential in the early New Left it was in the form of the concept of alienation drawn from young Marx as interpreted by Erich Fromm.").

70. See, e.g., Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 REV. L. & SOC. CHANGE 369-70 n.1 (1982-83).

Hierarchical social relations are fashioned and reproduced principally through cultural conditioning rather than through the direct use of force. One element of this conditioning process is the creation of legal concepts and doctrines to establish the political legitimacy of the existing order. Judicial opinions play an important part in this process of legitimation

Id.

71. Crenshaw, *supra* note 42, at 1360.

that the *coercion* of black Americans is made possible by virtue of the *consent* of whites to "the dominant ideology."⁷²

*In postcolonial development theory.*⁷³ Much as American critical legal theorists took on the conception of the formalist conception of law, the scholar and jurist Mohamed Bedjaoui took to task a fetishism of "law for law's sake."⁷⁴ He argued that the dominant view of international law, which was resistant to its reform to accommodate the critiques of postcolonial development theorists and the attempted reforms by DC governments, rested on an ideological attachment to liberal legalism. Liberal ideology about the rule of law required a certain set of rules that were supposed to be natural, inevitable and, therefore, immutable, and failed to recognize that tools existed within the law to redirect it in a way more accommodating to the demands for reform. This view of law therefore became a kind of "paganism" of "false idolatry"—a concept seemingly quite similar to the notion of "reification" and ideological apologia established in CLS and developed in CRT.⁷⁵

IV. THE "ILLEGITIMATE IDEOLOGY" STRAND

The examination of law for its role in mediating and reinforcing the illegitimate and illiberal ideology of racism was the contribution of CRT to the pantheon of critical legal theories developed throughout the twentieth century.⁷⁶ This illegitimate-ideological method exposes not only the structurally unjust impact of the law, the indeterminacy of the rules that create that impact, and the obfuscation of the impact and the indeterminacy of the rules by a liberal ideology—it also argues that the obfuscation is aided in some important cases by illiberal bias.⁷⁷ Thus, CRT endorsed the CLS liberal-ideological critique with its combination of excavation of ideology, internal deconstruction and criticism of hierarchy, but extended it in a

72. *Id.* at 1358-59. Thus, Crenshaw writes, "White race consciousness . . . acts to further Black subordination by justifying all the forms of unofficial racial discrimination . . ." *Id.* at 1379-80 (asserting that racism also acts to rationalize continued racial inequality within a formally legal regime: "After all, equal opportunity is the rule, . . . if Blacks are on the bottom, it must reflect their relative inferiority.").

73. For a discussion of criticism of international law generally, see *supra* note 37 and accompanying text.

74. BEDJAOUI, *supra* note 52, at 98.

75. See *id.* at 100.

76. See *supra* note 13 for a discussion of CLS and racial critique.

77. See, e.g., Girardeau Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990) (arguing that constitutional interpretation by the United States Supreme Court incorporates bias against racial minorities, and observing that "Supreme Court justices are themselves majoritarian, in the sense that they have been socialized by the dominant culture. As a result, they have internalized the basic values and assumptions of that culture; including the beliefs and predispositions that can cause the majority to discount minority interests."), *reprinted in* CUTTING EDGE, *supra* note 4, at 23.

few ways designed to take into account specifically the problem of racial injustice.⁷⁸

Part of the illegitimate-ideological critique was the demonstration of how definitions of legal terms themselves inscribed otherness and coercion.⁷⁹ So, whereas the CLS author Peter Gabel criticized legal terms as reifications of liberal ideology,⁸⁰ many Critical Race theorists critiqued legal terms as reifications of illiberal ideology. In *Whiteness as Property*, Cheryl Harris argued that the privileges accorded by whiteness were defined and mediated by law, and that "ideologically, they became part of the settled expectations of whites."⁸¹ Neil Gotanda provided a detailed explanation of how legal decision-makers have constructed an ideology of race and race classification that legitimates racial subordination.⁸² Kimberlé Crenshaw argued that white supremacy is the ideology that produces consent by whites to the dominant regime and mediates and legitimates the subordination of blacks.⁸³

78. The CRT critique of CLS has been well absorbed by now. For a look at early critiques that fueled the establishment of the first CRT conference, see the 1987 issue of the HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW devoted to "Minority Critiques of the CLS Movement," in which several prominent writers in this vein contemplated "the promise and the frustration which CLS holds for minority scholarship and politics." Jose A. Bracamonte, *Foreword: Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297, 297 (1987). See generally Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987).

Besides the failure to deal with race, another important source of "minority critique" was the perception that CLS "trashing" of existing law delegitimated the use of existing law—most importantly civil rights—by advocates and activists to obtain racial justice. See *supra* notes 45-48. This also is parallel to the attempt to reform existing constructs in international law—such as sovereignty—in order to obtain economic justice, carried out under the banner of the NIEO. See *supra* notes 50-57.

79. See, e.g., Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1749-50 (1993) (noting that United States Supreme Court in *Plessy v. Ferguson* "did not specifically consider any particular rule of race definition, but it protected the property interest in whiteness for all whites by subsuming even those like Plessy . . . within categories that were predicated on white supremacy and race subordination"); Gerald Torres & Kathryn Milun, *Translating Yonnonndio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 633-35 (1990) (describing how legal definition of "Tribe" did violence and injustice to Mashpee).

80. See generally Gabel, *supra* note 59.

81. Harris, *supra* note 79, at 1749-50.

82. Neil Gotanda, *Our Constitution Is Color-Blind*, 44 STAN. L. REV. 1, 4 (1991).

83. For Crenshaw, the exposure of illiberal ideology follows from Gramsci. Crenshaw applies Gramsci to American race relations to suggest that whites consent to a racist legal regime while blacks are coerced by it. See Crenshaw, *supra* note 42, at 1359-60 (noting that Gramsci recognized coercion and consensus as "the two fundamental types of political control" and stating that "coercion of Blacks may provide a basis for others to consent to the dominant order").

This method seems to come at least partially from an absorption of critical theory emerging out of literary and critical studies. See, e.g., Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 STAN. L. REV. 449, 478 (1996) (book

In postcolonial development theory. Although the illegitimate-ideological critique has been thoroughly employed in aspects of postcolonial theory such as cultural and literary studies, it is only beginning to receive an application in international law. This leads to my third conclusion resulting from this comparative analysis: at the same time that Critical Race theorists have done more to expose the ideology behind law than to expose the material impact of law, postcolonial development theorists have focused on the material impact of law at the expense of addressing its ideological content. CRT, which originated explicitly to address the perpetuation of racial subordination in the United States after the end of formal segregation, expressly focuses on ways in which legitimate ideology (liberalism) interacts with illegitimate ideology (white supremacy) to rationalize and suppress the visible failure of the legal regime to assure racial minorities access to social equality. Applied to the postcolonial framework, this analysis helps to draw attention to the ways in which colonial discourse interacts with and supports prevailing legal ideology in the international order by attributing the persistent economic inequality of Southern countries to inferior characteristics of "otherness," and therefore rationalizes the continuing domination of the North by the South as a product of Northern superiority.⁸⁴ This section of the Essay seeks to describe the analysis as developed elsewhere in postcolonial theory and then to sketch a preliminary application to international law.

Much of postcolonial theory has concerned itself with showing how Western culture has produced and perpetuates an ideological conception

review) ("Seen in this way, Foucault's work suggests connections between legal scholarship and 'cultural studies' approaches."); Matsuda, *supra* note 4, at 325 & n.10 (discussing Gramsci's model and Cornel West's discussion of model).

In subsequent years, Asian-Crit and Lat-Crit writers have broadened the scope of CRT. See, e.g., Keith Aoki & Robert S. Chang, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1395 (1997); Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998); Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087 (1997); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J. L. & HUMAN. 89 (2000).

84. See, e.g., WORLD DEVELOPMENT REPORT 1989, at 6-15 (1989); Michael Driscoll, *The Developing-Country Debt Crisis: Comments on the Role of 'Northern' Macroeconomic Policy Coordination*, in THE INTERNATIONAL FINANCIAL REGIME 329 (Graham Bird ed., 1990). A related conclusion would be that liberal ideology suppressed the apparent inability of liberal legal regime to correct Southern underdevelopment by attributing it to the failures of Southern governments to comply fully with liberal international legal rules relating to foreign trade, investment and finance. Thus, severe debt crises experienced by many Latin American and Sub-Saharan African countries during the 1980s were partially attributed to statist and "discriminatory" economic policies and practices of the debtor governments, rather than to either continuing Northern economic dominance or liberal, international economic law. These arguably resulted in the concentration of DC export production in volatile and recession-prone commodities; chronically low savings and investment rates resulting from perpetual capital flight and the repatriation of profits by foreign-owned corporations; undisciplined and ill-supervised lending practices of international financial institutions; and so forth.

of the "South" as an amalgam of inferior characteristics, which serve to rationalize domination of the South and the South's continuing position of inequality. Emerging somewhat later⁸⁵ than the work summarized under the other methodological strands, a wave of post-structuralists, beginning with Edward Said,⁸⁶ generated an analysis of the ideological components of Northern hegemony by tracing the development of the discursive categories of the "colonizer" and the "colonized" or "other." If "colonialism" is defined as the combined will to geographical, cultural, racial and economic hegemony of the North over the South, a sketch of the categories that colonial discourse deploys to legitimate Northern hegemony might juxtapose the following:⁸⁷

85. But antecedents were in the same continental theorists that inspired CLS, and also in important Third World authors like Franz Fanon, Aime Cesaire and Leopold Senghor.

86. "It is perhaps no exaggeration to say that Edward Said's *Orientalism* . . . single-handedly inaugurate[d] a new area of academic inquiry: . . . colonial discourse theory . . ." COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER (Patrick Williams & Laura Chrisman eds., 1994).

87. See generally MALEK ALLOULA, THE COLONIAL HAREM (Myrna & Wlad Godzich trans., 1986); ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES (1991); RENATO CONSTANTINO, NEOCOLONIAL IDENTITY AND COUNTER-CONSCIOUSNESS: ESSAYS ON CULTURAL DECOLONIZATION (1978); EUROPE AND ITS OTHERS (Francis Barker et al. eds., 1985); ABDUL R. JANMOHAMED, MANICHEAN AESTHETICS: THE POLITICS OF LITERATURE IN COLONIAL AFRICA (1983); ALBERT MEMMI, THE COLONIZER AND THE COLONIZED (1965); SARA MILLS, DISCOURSES OF DIFFERENCE (1991); "RACE," CULTURE AND DIFFERENCE (James Donald & Ali Rattansi eds., 1992); EDWARD W. SAID, CULTURE AND IMPERIALISM (1993) [hereinafter SAID, CULTURE]; EDWARD W. SAID, ORIENTALISM (1978) [hereinafter SAID, ORIENTALISM]; EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY (James Clifford & George E. Marcus eds., 1986); Arjun Appadurai, *Disjuncture and Difference in the Global Culture Economy*, 2 PUBLIC CULTURE 1 (1990); Anthony Appiah, *Out of Africa: Topologies of Nativism*, 1 YALE J. CRITICISM 153 (1988); Homi Bhabha, *Representation and the Colonial Text: A Critical Exploration of Some Forms of Mimeticism*, in THE THEORY OF READING 93 (Frank Gloversmith ed., 1984); Homi Bhabha, *The Other Question—The Stereotype and Colonial Discourse*, 24 SCREEN 18 (1983); Laura Chrisman, *The Imperial Unconscious? Representations of Imperial Discourse*, 32 CRITICAL Q. 38 (1990); Johannes Fabian, *Presence and Representation: The Other and Anthropological Writing*, 16 CRITICAL INQUIRY 753 (1990); Abdul R. JanMohamed, *The Economy of Manichean Allegory: The Function of Racial Difference in Colonialist Literature*, 12 CRITICAL INQUIRY 59 (1985); Geeta Kapur, *The Centre-Periphery Model: Or, How Are We Placed? Contemporary Cultural Practice in India*, 16/17 THIRD TEXT 9 (1991); Edward W. Said, *Representing the Colonized: Anthropology's Interlocutors*, 15 CRITICAL INQUIRY 205 (1989) [hereinafter Said, *Anthropology's Interlocutors*]; Robert Stam & Louise Spence, *Colonialism, Racism and Representation*, 24 SCREEN 2 (1983).

	North	South
Geographical	here/center	there/periphery
Cultural	civilized modern scientific rational industrious/ambitious "rule of law"	barbaric traditional mystical irrational lazy/dishonest lawless
Racial	white	non-white
Economic	capitalist efficient growing	pre-capitalist inefficient stagnating

These categories have operated, for example, in social-scientific work relating to culture and development. Early on, for example, Max Weber developed a famous series of typologies allocating, among others, the characteristics of "formality" and "rationality" to Western culture and the characteristics of "informality" and "irrationality" to non-Western culture.⁸⁸ These inherent differences, Weber argued, explained the rise of capitalism in the West and its absence elsewhere. After decolonization, these discursive categories were embraced by Northern academics and professionals who designed the international order's stance specifically towards developing countries. As bureaucrats in, or consultants to, international organizations and Northern (and Southern) governments, these individuals straightforwardly viewed Third World "culture" as an obstacle to economic development. Bert Hoselitz, founder of the journal *Economic Development and Cultural Change*, raised the question whether economic development required "only a change in certain aspects of overt behavior [such as] the acquisition of new skills or the exercise of new forms of productive activity," or whether it also had to be "accompanied by or contingent upon more basic changes in . . . the structure of values and beliefs in a culture."⁸⁹ Works such as *The Achievement Motive* (1953) and *The Achievement Society* (1961) by David McClelland,⁹⁰ and *The Civic Culture, Political Culture and Political Development* by Talcott Parsons, reproduced and ex-

88. See MAX WEBER, *THE PROTESTANT ETHIC AND SPIRIT OF CAPITALISM* (Scribner & Sons eds., Talcott Parsons trans., 1958) (describing cultures); see also REINHARD BENDIX & GUENTHER ROTH, *SCHOLARSHIP AND PARTISANSHIP: ESSAYS ON MAX WEBER* (1971); ANTHONY GIDDENS, *CAPITALISM AND MODERN SOCIAL THEORY: AN ANALYSIS OF THE WRITINGS OF MARX, DURKHEIM AND MAX WEBER* (1971).

89. Irene Gendzier, *Culture and Development: Veiled Apologetic, or An Effort at Social Reconstruction of Economic and Political Change?*, 13 FLETHCHER F. WORLD AFF. 217, 221 (1989).

90. See generally DAVID MCCLELLAND, *THE ACHIEVEMENT MOTIVE* (1953) [hereinafter MCCLELLAND, *THE ACHIEVEMENT MOTIVE*] (extending Weber's theses); DAVID MCCLELLAND, *THE ACHIEVING SOCIETY* (1961) (same).

tended Weber's theses and significantly influenced both academic work and bureaucratic policy on development.⁹¹

The critique of these accounts is not, of course, the mere use of, or interest in, the analysis of culture as a causal factor in the development of economies or societies. Rather, the critique is two-fold. First, the discourse that developed around culture and development derived from Northern representations of Southern culture. The central position of the Northern speaker perpetuates hegemony both by implying the inability of the South to represent itself⁹² and by reconstituting the South into a clutch of inferior traits defined in opposition to the North. Second, culture, as deployed in this discourse, deflects attention from other factors that might provide at least an equally compelling explanation of underdevelopment, including inadequacies in the prevailing economic regime. According to the culture and development narrative, obstacles to development lay not in Northern economic dominance or in the international regime, but rather in the cultural incapacity of the South to partake fully in the benefits of liberal economy. The critique of the culture and development discourse, in other words, is not that it addresses culture, but, rather, that its treatment of culture operates to preserve both ideological and material sources of Northern hegemony.

Applied to international law, this critical framework demonstrates that the international "order" perpetuates Northern hegemony not only by virtue of its explicit rules and ideology, but also by virtue of a submerged "colonialist" ideology that rationalizes the contradictions between the implied outcomes of a liberalized international economy and the economic realities facing developing countries. Relatively early on, Mohamed Bedjaoui made some movement towards arguing that legal objections to the NIEO attempts to reform international economic law were grounded in an ideology of Northern domination. Bedjaoui wrote of the "philosophical and methodological absurdity" of the argument that proposals for reform were anti-law: "Such an attitude is merely a manifestation of legal imperialism, a logical component of imperialism pure and simple."⁹³

This thesis has recently been expanded in important ways. Antony Anghie has done groundbreaking work in demonstrating "the formative influence of colonialism on international law" and how "[i]ssues of racial superiority, cultural subordination, and economic exploitation played an extraordinarily prominent role in shaping the relationship between inter-

91. See generally McCLELLAND, *THE ACHIEVEMENT MOTIVE*, *supra* note 90 (extending Weber's theses).

92. Recall Karl Marx's admonition, "They cannot represent themselves; they must be represented." Said, *Anthropology's Interlocutors*, *supra* note 87, at 21 (quoting KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPART* 124 (International Public, 1964) (1852)).

93. BEDJAOUI, *supra* note 52, at 101.

national law and colonialism."⁹⁴ Anghie has shown, for example, how the concept of sovereignty "was not simply a European idea extended to peripheral areas [but] developed out of the colonial encounter," and mediated aspects of international law such as the trusteeship system.⁹⁵ Vasuki Nesiah has described how conceptions of territory in contemporary international law "structure our collective gaze in the retroactive reconstruction of territorial relationships at the moment of colonization, in ways that then frame the terrain of options made available in decolonization."⁹⁶ James Gathii has elaborated the racial and cultural biases operative in prevailing conceptions of aspects of the international economic order, such as the "good governance" policies of the international financial institutions.⁹⁷ Elizabeth Iglesias has articulated a "Lat Crit" framework for linking racial injustice across national boundaries.⁹⁸ Nathaniel Berman has elucidated the "genealogist's" critical view of international law as "shifting fortification for patriarchal power."⁹⁹ Gil Gott has argued for viewing Japanese-American internment as an instance through an international law lens.¹⁰⁰ Balakrishnan Rajagopal has described the "cultural geography" of the "Third World."¹⁰¹ These and other authors¹⁰² are now mining the rich field of international law for evidence of biased discursive structures.

94. Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 245 (2000); see Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 34 (1999) (demonstrating influence of colonialism on international law).

95. Antony Anghie, "The Heart of My Home": Colonialism, Environmental Damage and the Nauru Case, 34 HARV. INT'L L.J. 445, 448 (1993).

96. Vasuki Nesiah, *Territorial Sovereignty in ICJ Jurisprudence*, 92 AM. SOC'Y INT'L L. PROC. 376, 376 (1998).

97. See James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 1998-99 THIRD WORLD LEGAL STUD. 65.

98. See Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A Latcrit Perspective on the Imperatives of Linking the Reconstruction of 'Community' to the Transformation of Legal Structures That Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity*, 2 U. PA. J. LAB. & EMP.L. 773 (2000) (stating framework for linking racial injustice against Latina/os across national boundaries).

99. Nathaniel Berman, *The Grotius Lecture Series*, 14 AM. U. INT'L L. REV. 1515, 1523 (1999).

100. See Gil Gott, *A Tale of New Precedents: Japanese American Internment As Foreign Affairs Law*, 40 B.C. L. REV. 179, 229 (1998).

101. Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 1998-1999 THIRD WORLD LEGAL STUD. 1.

102. For further reading in the area of international law and biased discursive structures, see Aoki, *supra* note *; Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381 (2000); Catherine Powell, *Introduction: Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201 (1999); and Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000).

V. CONCLUSION

This Essay has discussed four methods of critique: external critique, which exposes the impact of law on material social conditions; internal critique, which exposes inconsistency and incoherence in legal reasoning and decision-making; legitimate-ideological critique, which exposes the role law plays in creating and maintaining liberal ideology; and illegitimate-ideological critique, which exposes the role law plays in creating and maintaining illiberal social ideologies such as racism and colonialism.

This Essay investigated the ways in which each of these four methods has been deployed by CRT and postcolonial development theory. A comparison of each theory's use of the four methods reveals striking parallels: in particular, both CRT and postcolonial development theory sought to expose the incoherence of the law at the same time that they expressed faith in its transformative potential. However, such a comparison also suggests ways in which each theory might benefit by incorporating lessons from the other: CRT might benefit by expanding its critique of law's material impact; postcolonial development theory might benefit through more attention to the ideological dimensions of law. In all of their methodological variety, these theories have contributed importantly to the investigation of law's relationship to justice—and injustice.