

# Introduction: History, Ideology, and the Crisis of Legal Critique

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This symposium occupies the intersection of recent developments in the vicissitudes of critique. One is the ongoing discussion across the humanistic disciplines about whether critique—the standard mode of humanistic argument for decades—has had its day, or is in need of critique itself. And, more particularly, the symposium asks: how has this discussion been received in the domain of critical legal theory, if it has been received at all? A prominent thread in the pages that follow is a renewed question about the viability of Marxism—perhaps the ur-version of critique.

Ironically, Marxism has had a complex or even distant relation to the dominant modes of critique in recent decades, both inside and outside the legal academy. With another wave of interest in the 1960s, the Marxist theories that were emphasized as time passed tended to represent Marxism’s culturalist forms (pre-eminently the work of the Frankfurt School). But all varieties of Marxism suffered in relation to post-Marxist social thought, including various forms of poststructuralism. Yet especially since the economic crisis of 2008, many believe Marxism needs to come back—and in its economistic and even materialist forms—for legal critique to be “truly” possible.

The contemporary manifestation of the “critique of critique” dates at least as far back as Bruno Latour’s question in 2004: “Why has critique run out of steam?”<sup>1</sup> Since then, a number of voices among literary critics—Rita Felski’s most notably—have gone further, flirting with the resuscitation of an appreciative mode of engagement with even deeply compromised works from the past. This approach is grounded on the notion that treating canonical works as irredeemable loses touch with the original purposes of literary study, all while forsaking constructive impulses and normative grounding.<sup>2</sup> For some, that concern courts an even worse risk of restoring a

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1. Bruno Latour, *Why Has Critique Run Out of Steam?: From Matters of Fact to Matters of Concern*, 30 *CRITICAL INQUIRY* 225 (1984).

2. RITA FELSKI, *THE LIMITS OF CRITIQUE* (2015).

status quo ante of belletristic complacency. But there is no doubt that—especially in an age of declining interest in critical theory—such arguments have had a powerful effect. The positions pro and con are, of course, only partly applicable to legal scholarship. It had never been in the business of a kind of pre-critical model of scholarship grooming its readers to appreciate law in the same way aesthetic discourses did. But legal scholarship certainly had its canon of cases, and its doctrinal and historical work could imaginably return to fashion if it were decided that legal critique has had its day.

A second development in the “critique of critique” discourse seemingly goes in the opposite direction from the feeling of the exhaustion of critique: legal historiography, which has been practiced increasingly in the last generation, is less and less theorized, and less and less critical, though many of its roots lie in traditions of critique. Strangely, the *practice* of legal history has departed from the critical framework that such figures as Duncan Kennedy, Roberto Unger, and Robert Gordon set up—or if the practice hasn’t departed from it, the framework may not have been as “critical” as we first believed. For the architects of critical historicism, there was no point to history if it did not offer an emancipatory purchase on our present. As we have argued elsewhere, however, in the context of critical legal theory, critical historicism suffered the fate of political and professional domestication.<sup>3</sup>

The essays that follow engage with these developments in critical legal theory and legal historiography from various angles. The first three, from John Henry Schlegel, Charles Barzun, and Paulo Barrozo, take history as their point of departure. In his essay, Schlegel asks what might have been the future for legal history “if the music hadn’t stopped.” The music, in short, was an early marriage of critical legal studies and postmodernism—a time in which a great intellectual “kerfuffle” created an exciting new space for the practice of critical history. But the music did stop, intellectual experimentalism ceased, and a methodological malaise settled in, slogging today’s legal history down in a cramped and tired professionalism. The key, Schlegel believes, is to find a way to turn it back on.

In their contributions, Paulo Barrozo and Charles Barzun tackle the problem of legal historiography from a more philosophical vantage point. Barrozo suggests that such scholarship has lost touch with what ought to be the central question about law: How, in high-complexity societies like ours, does it achieve the feat of social order? Barrozo’s ambitious argument is that legal history must connect with our most ambitious intellectual purposes on pain of failing to be critical or reflective. If Schlegel’s suggestion is that legal history has departed from what it was becoming in

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3. Justin Desautels-Stein & Samuel Moyn, *On the Domestication of Critical Legal History*, 60 *HIST. & THEORY* \_ (forthcoming 2021).

the 1970s, Barrozo's is that those transformations were insufficient from the start. For Barzun, the question is less about Barrozo's demand for legal history to adopt a theory of law than it is about its need to examine the common terrain of legal theory and theories of history. Through an examination of an exchange between Quentin Skinner and Charles Taylor, Barzun tracks the modes of reasoning indigenous to their respective disciplinary homes in history and philosophy. He finds some striking resemblances. The upshot is that Barzun ends up flying parallel to Barrozo, as they allude in different ways to the unhelpful disciplinary distinction that separates law and history in the first place.

Elizabeth Anker's essay strikes a useful middle ground in the symposium, transitioning from the contributions that foreground history and historiography and to those more concerned with the critique of legal ideology. Anker takes a diagnostic approach to the reign of "critique" in recent decades, while acknowledging that many of its impulses are coeval with modernity more generally. She assesses the way assumptions from different quarters coalesced after World War II into something like a holy trinity of "ambiguity-indeterminacy-contradiction," and then shows how these concerns washed over legal scholarship through figures like Duncan Kennedy, Robert Gordon, and Chris Tomlins. Helpfully, she makes some arresting suggestions about how legal critique is bound in ways it might want to resist to the formalism it officially abjures.

If critical legal studies had, at best, a vexed relationship to Marxism, with its interest in legal ideology leaving it allergic in many moods to any reductive materialism, then one option—especially attractive to the post-2008 generation—is to rehabilitate Marxism. In critical legal theory today, debates rage about the extent to which Marxism was ever abandoned, and, if so, rightly or wrongly. But our final three interventions insist that it has a great deal left to criticize, and to teach, about the makings of the contemporary legal order.

Rob Hunter powerfully argues that critical legal studies, with its premature conclusion that Marxism was not up to the challenge of theorizing modern law, missed an enormous opportunity. For Hunter, that opportunity therefore beckons today. It may involve not rejection of the work of the past generation but its incorporation into a new body of work that theorizes the legal constitution of state and capital, as well as how law abets, institutionalizes, and legitimates the workings of both. In her hard-hitting essay, Ntina Tzouvala argues that the critique of Eurocentrism which has become orthodox in the burgeoning historiography of international law has also missed an opportunity, which is to frame stories about the globalization of capital using international law.

In the symposium's final essay, Justin Desautels-Stein and Akbar Rasulov argue that the entire tradition of critical legal theory is in crisis.

With so many absorbed into an operative common sense about how to be “critical,” the authors suggest that media saturation has led to a “paralysis of judgment, or the curious reverse, judgment without any reflection at all. All-out criticism via an absence of thought. Either we cannot decide, or we have already decided.”<sup>4</sup> In part, Desautels-Stein and Rasulov blame a popularized postmodernism—the problem isn’t that Schlegel’s music stopped; it is, rather that the music is still playing, and blaring to boot. The answer cannot be about simply turning it back on—it has to be about changing the tune.

One path for doing so is going back to the out-of-fashion Marxist critique of ideology, and more specifically, exploring the ways in which Marx has and has not been deployed in the critique of *legal* ideology. Desautels-Stein and Rasulov survey four twentieth-century schools—sociological jurisprudence, empirical legal studies, cultural legal studies, and critical legal studies—arguing that most attempts to theorize legal ideology have fallen into one of these four styles. Only understanding the terrain of criticism, they insist, can orient future inquiry so that it gets beyond the series of cul-de-sacs reached so far. As for motivation, they hope for a re-engagement with legal ideology to help radicalize and reinvent critical legal theory from the ground up. “It is in the effort to reawaken our ability to envision social transformation” that Desautels-Stein and Rasulov ask: “How can critical theory enable a more emancipatory and revolutionary approach to the contemporary crises that beset us?”<sup>5</sup>

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4. Justin Desautels-Stein & Akbar Rasulov, *Deep Cuts: Four Critiques of Legal Ideology*, 31 *YALE J. L. & HUMAN.* 503, 505 (2021).

5. *Id.* at 513.