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# FAREWELL TO AN IDEA? IDEOLOGY IN LEGAL THEORY

*David Charny\**

CULTURAL SOFTWARE: A THEORY OF IDEOLOGY. By *J.M. Balkin*. New Haven: Yale University Press. 1998. Pp. xii, 335. \$35.

In 1956, Morocco inaugurated a constitutional democratic polity on the Western model. Elections were to be held, and political parties formed, with voters to be registered by party. The Berbers, however, did not join the parties as individual voters. Each Berber clan joined their chosen party as a unit. To consecrate (or, perhaps, to accomplish) the clan's choice, a bullock was sacrificed.<sup>1</sup>

These sacrificial rites offer a useful parable about the relationship between law and culture. The social order imposed by law depends crucially on the "culture" of the participants in the system — their habits, dispositions, views of the world and of themselves. A legal regime — for elections, say — will call forth very different modes of conduct in different cultures: here, the tribal and religious culture of Morocco contrasts to the more individualist and secular culture of Great Britain or the United States.

It is evident, then, that we need an understanding of the relationships between culture and the legal order. The formal stipulations of law have effects that are mediated through the cultural understandings in which they are embedded; indeed, even a basic understanding of those stipulations requires participants in the society to share a fundamental legal culture. Thus *J.M. Balkin*,<sup>2</sup> embarking on the task of constructing a theory of culture, enlists himself in a company that includes such venerable jurists and legal scholars as *Vico*, *Montesquieu*, *Tocqueville*, *Weber*, *Gramsci*, and *Luhmann*.

Yet this roster is also sufficient to remind us that the "theory" of culture preeminently reflects the culture — and particularly, the political concerns — of its time. *Vico*, for example, sought to vindicate the authority of the received Roman law — against the revolutionary claims of social contract theorists — by constructing a "rational civil theology of divine providence" through a theoretical

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1. On this episode, see *ERNEST GELLNER, CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS* 103-04 (1994).

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account of linked cultural and legal transformations.<sup>3</sup> Although elements of his thought exerted a powerful influence among romantic and modernist theorists, the project itself — a brilliant, albeit largely ignored intervention into the debates of the day — is one that modern readers are unlikely to find seductive, or even comprehensible. Similarly, Montesquieu's meditations on the links between law and culture appear driven, in part, by his sympathy for a cautiously meliorist approach to the difficulties of the legal regime of the French monarchy<sup>4</sup> — the approach that lost out to the more radical impulses embodied in the Jacobin revolutionary party. Of course, one could tell the same story about more contemporary figures; Weber's political polemics count among his most powerful writing,<sup>5</sup> and are indispensable to the interpretation of his more theoretical work.

The political impetus to Balkin's argument is evident. The aim is to reconstruct a conception of ideology as the basis for a critique of social, particularly legal, arrangements and conceptions. The fundamental notion is one of culture with the idea of cognitive tools — “software” — that individuals use to make sense of the world and of themselves. Software spreads from one individual to another: particularly, the units are of transmission “memes” — the “smallest units of cultural skills or information “that can replicate themselves with reliability and fecundity.”<sup>6</sup> “Ideology” is a particular type of memetic structure — one that helps to sustain unjust social arrangements. Having developed this general conception, the book analyzes a series of structures by which persons organize information into coherent but potentially ideological systems of thought — narrative analogy, nested opposition, and the privileging of selected attributes.

Balkin's book is a path-breaking effort to rethink legal critique using these biological and cybernetic models; the scope of its ambition and the subtlety of its execution are likely to make it a definitive work. For that reason, the book provides an important opportunity to assess the usefulness of these models for thinking about the law, and, indeed, about culture generally. My main tasks here are to situate Balkin's argument in modern legal thought, to display the structure of the argument, and to interpret its implica-

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3. See MARK LILLA, G.B. VICO: THE MAKING OF AN ANTI-MODERN 108-25 (1993).

4. Cf., MONTESQUIEU, THE SPIRIT OF THE LAWS, Books XI, XIX. Aspects of Montesquieu as a critic of absolutism are discussed by Judith Shklar, *Montesquieu and the New Republicanism*, in POLITICAL THOUGHT AND POLITICAL THINKERS 244 (Stanley Hoffman ed., 1998).

5. As collected, for example, in MAX WEBER, POLITICAL WRITINGS (Peter Lassman & Ronald Speirs eds., 1994).

6. P. 47. The definition comes from DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED 201 (1991).

tions for current debates in legal theory and jurisprudence. Part I of this review locates Balkin's notion of "ideology" in the debates surrounding the term in legal sociology. Parts II and III take up the two notions central to Balkin's reconstruction of the concept of ideology: the memetic structure of culture and the transcendental foundations of the conception of justice. On the basis of this analysis, Part IV argues that Balkin's revisionary conception of ideology provides the groundwork for an understanding of the rhetorical structure of legal discourse.

## I. IDEOLOGIES

Balkin's use of the term "ideology" injects the work into a set of long-standing debates. In the development of ideas about culture, theories of ideology have served at least three purposes. The concept of "ideology" was first used in the late eighteenth and early nineteenth centuries to describe the ideas — most specifically the normative judgments — that supported a distinctive political program. The emphasis was on the partiality and schematic nature of the ideas; pejoratively, the label "ideology" suggested that political ideas were biased, rested on false factual claims or incoherent theories, or were distorted by their purveyors in order to further a political agenda. More extensively, "ideology" came to refer not only to consciously constructed or adopted programmatic notions, but also to systems of thought, judgment, or inclination — "world views" — that tended to support a particular social order. Definitive for this usage was *The German Ideology*.<sup>7</sup> The brilliance and polemical force of its argument came in the merger of the narrow, political, pejorative notion of "ideology" with the more extensive culturalist understanding of the term. All aspects of culture could be "ideological," with the connotation of partiality, bias, and distortion in the service of political ends. The Marxist usage maintained the polemic, accusatory thrust of the label "ideology," while developing a richer understanding of the ways in which ideas could have undetected social causes or unintended social effects. Ideas could evade the conscious, reflective self-understandings of their putative creators or advocates.

In the end, however, the specific polemic force of the conception of "ideology" would dissipate precisely because of the range and ambition of the underlying Marxist theory. The theory soon lost itself in endless debates over the various relationships between the "base" (physical and economic forces) and the "superstructure" (ideas, or more generally, culture). In this guise, the notion of ideology — or "false consciousness" — played a particular role, not so

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7. KARL MARX & FREDERICK ENGELS, *THE GERMAN IDEOLOGY* (C.J. Arthur ed., 1970).

much in Marxist polemics, but in the theory of history and consequent understanding of political action. The predominance of "ideology" would explain such puzzles as why the unregenerate working classes of the prosperous western democracies continued to support the bourgeois status quo, rather than rising up to move history onto its next, socialist stage: ideology had occluded the proper "class consciousness," which would have permitted the working classes to play their historically assigned role.<sup>8</sup>

These arcane and intricate debates lose their meanings when the Marxist theory of historical progression is discarded. "Ideology" then comes simply to refer to a worldview, without any implicit claim about that view's wrongful partiality toward particular social arrangements, or about its role in distorting the progress of history and perverting the relations among the classes. Ultimately, the term "ideology" simply functions to emphasize the distinctive *unity* of such coherent, practice-supporting systems of ideas, valuations, and assumptions, but ceases to carry any significant critical implications.<sup>9</sup> The theory of "ideology" collapses into the general theory of ideas or cultural constructions. This emptying-out of the specific materialist and political content of the notion of ideology finds its counterpart in the movement of ideas among analysts who continued to work with a notion closer to the classical Marxist one. These theorists announced the "end of ideology" in a distinctively political sense. In the contemporary American polity, the theorists observed, the conditions for ideological conflict did not obtain; sharp class division, with a distinct working-class consciousness, had disappeared or had never arisen. A pluralist political regime managed to achieve rough accommodation among conflicting social interests.<sup>10</sup>

Thus, one could choose between the demise of "ideology" in a conceptual and in a practical sense. On the one hand, the predominant modes of post-Realist legal scholarship pursued the practical project of constructing a constitutional and legal order that corresponded to, and as necessary supported, the pluralist, "post-ideological" political vision.<sup>11</sup> Of course, this accommodationist vision

8. Exemplary works on this tradition of thought include ERIC OLIN WRIGHT, *CLASS, CRISIS AND THE STATE* (1978), and G.A. COHEN, *KARL MARX'S THEORY OF HISTORY* (1978).

9. See, e.g., LOUIS DUMONT, *FROM MANDEVILLE TO MARX: THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY* (1977); LOUIS DUMONT, *GERMAN IDEOLOGY: FROM FRANCE TO GERMANY AND BACK* (1994); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973). Crucial figures in the transition are Mannheim and Weber.

10. The seminal text is DANIEL BELL, *THE END OF IDEOLOGY* (1960), ironically published just at the dawn of one of the most intensely ideological periods in American political history.

11. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge & Philip P. Frickey eds., 1994).

was perfectly capable of rationalizing sweeping gestures in the grand manner: "representation-reinforcing" judicial review might seek to topple educational apartheid, redesign state legislatures, or submit law enforcement to drastic new disciplines.<sup>12</sup> But these radical interventions were to be understood in a pluralist and inclusive spirit.

On the other hand, the advocates of a critical or *Marxisant* variety of contemporary legal thought, which arose in explicit revolt against the "end-of-ideology" pluralism, found themselves wrestling with the conceptual quandaries that had baffled their forbearers. Legal analysis replicated the familiar difficulties about the relations between base and superstructure: how, consistently with an anti-idealist conception of social causation, could mere ideas play a role in the determination of actual social — here, legal — relations? Conversely, by what mechanisms did social relations determine the content of the superstructural ideas in law, as Marxist "materialism" seemed to require? These questions pose particular problems for legal theorists because of the difficulty of locating law in the classical base-superstructure dichotomy. On the one hand, the legal system determines the rights and duties that are foundational for bourgeois economic relations — particularly, by defining what it means to be an owner of property (or, more generally, a bearer of rights), the constitutive legal status for the bourgeois. On the other hand, law would appear to be preeminently a system of ideas, appropriately analyzed as part of the "superstructure" rather than the economic base. At the level of causation, the question was whether the law's content could be understood as immediately determined by economic forces; or whether law enjoyed a degree of "relative autonomy" in the development of its fundamental conceptions. In the latter case, the analyst's task in turn would be to display the structure of the "bourgeois legal consciousness," while relating this structure, ultimately, back to economic forces. One could then speak of these independent ideas as forming a legal "ideology," not only in the sense of a coherent cultural or intellectual system, but also of a system that served to support a particular (here, bourgeois) social order.<sup>13</sup>

This complicated intellectual stalemate provides the setting for Balkin's rethinking of the conception of ideology. Balkin remains interested in the problems that generated previous theories of ideology — the possible unity of our systems of ideas or cultural con-

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12. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

13. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205 (1979); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 *RES. L. & SOC.* 3 (1980).

ceptions, their roots in social and economic contexts, and their susceptibility to systematic critique. The book jettisons much of the Marxist historical apparatus for a new theory that seems reconstructed by a type of pragmatic reduction. Yet, once the Marxist historical theory is discarded, ideology is, as we have seen, a seemingly superfluous concept — it refers simply to any general unified or coherent system of culture. Within our understanding of cultural constructions, it can only play a distinctive critical role if it maintains some normative or evaluative content. Balkin's acceptance of this intellectual situation defines the double focus of the book. A distinctive conception of ideology must rest on a normative theory; which Balkin finds, not in a particularly Marxist notion of justice in class relations, but in a more general conception of the inherent claims about truth or justice fundamental to any coherent conception of social order (ch. 7). If a distinctive swath of a society's culture is to be analyzed as "ideological," it is in the sense that this swath has *unjust* effects — perpetuates unjust social relations. On the other hand, this swath of culture will operate by the same cognitive logic as any other part of the culture: its normative valence does not affect the mechanisms of its operations. These operations are to be analyzed through a general model that would apply to all cultural formations.

## II. COGNITIVE TOOLS/MEMES

The model's core notion is the "tool" of understanding — broadly defined to include all of the knowledge, understanding, skills, and cognitive faculties that allow us to negotiate our way through the world and understand our place in it. Particularly, language is the "quintessential cultural tool" (p. 24). Crucially, "tools" — despite the common connotation of the term — need be neither instrumental nor technical; they can serve expressive and social functions. Most fundamentally, they enable us to understand ourselves and to develop and articulate our ends. In a deep sense, they are constitutive of the self.

Tools are elements of our cultural software. Structurally, cultural software consists of "memes" — the basic "unit[ ] of cultural transmission" (p. 43). Memes "encompass all forms of cultural know-how that can be passed to others through . . . imitation and communication" (p. 43). These patterns of transmission are best understood by analogy to processes of ecology and evolutionary biology, particularly to the propagation of viruses. Memes "survive" if they are embedded in and used by individuals; they disappear or become extinct when people have stopped using them. Memes obey the laws of biological populations: they propagate themselves by occupying persons' brains, and then guiding persons' activities,

in a way that induces persons to preserve them and transmit them for others.

The basic idea, then, is to treat ideas, information, skill, and practices as the units of replication. "Culture" is simply the outcome of these interactions. Once one identifies the meme as the unit of analysis for culture and defines it as (or analogizes it to) a biological entity, a wealth of biological conceptions comes into play. A meme may be parasitic on its host (the person), forcing the host to spread the meme even while the meme harms the host itself; thus maladaptive ideas may gain wide currency. Large cultural constructs, like religious faiths, can be understood simply as a congeries of mutually supportive memes. Memes can compete for particular ecological "niches"; as a consequence of such competition, a thriving meme may cause the extinction of its rivals.

The book's account offers a useful synthesis of the large literature on "memes," and it enriches that literature with a wealth of specifically legal examples. But it remains unclear whether the "meme" or "software" provides a cogent basis for a theory of culture. As Balkin remarks in the Introduction, mechanistic and particularly biological models are a persistent feature of Western thinking about social conduct and social relationships: Descartes seeks to understand persons as working like clocks; ancient and medieval thinkers thought of the polis in physiological terms, and, later, in terms of a Newtonian machine. A striking feature of these cognitive metaphors is their built-in obsolescence. They are, of course, very much keyed to the science or technology that provides the requisite models; as the conceptions of science change, so the models change as well. Clocks were very much the *avant garde* device of the seventeenth century. They were wonders, objects for collection by connoisseurs; clocks that displayed their inward mechanisms were particularly fashionable. Now the idea that one could gain much purchase on the problems we need to resolve about persons by comparing them to clocks would seem a little odd, to say the least.

Nonetheless, such models are not mere ephemera. They have a deep cognitive structure, serving at least two disparate but often mutually supporting ends. The models may work by providing a picture of how persons work in terms of animals or machines; modern cognitive scientists may consider the mind to be a computational machine. Alternatively, the models may seek to understand some collective or aggregative social entity in organic terms. For example, the image of the "body politic" must be understood in the context of the teleological physics and biology that governed the European account of bodies from classical antiquity (as well as the content of the association with particular bodies — the body of the



king as an archetype for sovereignty). In this context, the stipulation that the polis is a body imported a teleological understanding of the proper unified functioning of the community, based on principles of mutual responsibility within a system of hierarchy and taken as an instantiation of an ideal form. This is precisely what the Aristotelian teleological biology provided. The “modern” move to a mechanistic analogy would reflect the loss of faith in this premodern image of social order. In the Aristotelian body, explanation would proceed by the doctrine of tendency to conform to rational purpose. In the Newtonian cosmos, the coordinative mechanism was a notion of force; in talking about political struggles, we still find it natural to speak of a “balance of forces,” an essentially Newtonian image.<sup>14</sup>

How does Balkin’s fusion of computational and biological analogies work to explain cultural formations? The concept of the meme emerged in attempts to address issues largely oblique from those that animate Balkin’s project. The meme was developed by biologists, cognitive psychologists, and philosophers who sought to describe the processes of thought with conceptions that were entirely physiological and material — or, at least, observable by the procedures of empirical science — and so would not depend on supposedly occult metaphysical conceptions such as an individual “consciousness.”<sup>15</sup> More specifically, some theorists hoped that memes would explain how thinking, like other biological processes, could be interpreted in terms of the evolution of organisms.<sup>16</sup> Ideally, in this view, one would dispense altogether with consciousness as a *causal* conception. Just as genes determine the structure of the organism, so memes would determine the structure of thought and of cultural activity. Correspondingly, philosophers convinced of the inevitable role of “consciousness” in our mental life would dismiss this conception of memes out of hand.<sup>17</sup>

As far as one can tell, Balkin’s conception of ideology does not depend upon this reductive, mechanistic project of modern cognitive psychology: he explicitly leaves room for the operation of conscious thought and judgment in the development of cultural forms. Instead, the book uses the “meme” to set itself against notions of “collective,” rather than individual, “consciousness”; the project is to use a memetic model of thinking to account for culture and ide-

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14. A historical exploration of the epistemic properties of such metaphors can be found in HANS BLUMENBERG, *PARADIGMS FOR A METAPHOROLOGY* chs. 2, 6 (1997).

15. Richard Dawkins coined the term. See RICHARD DAWKINS, *THE SELFISH GENE* 192 (1989).

16. E.g., DENNETT, *supra* note 6; DANIEL C. DENNETT, *DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* (1995); HENRY PLOTKIN, *DARWIN MACHINES AND THE NATURE OF KNOWLEDGE* (1994).

17. See, e.g., JOHN R. SEARLE, *THE MYSTERY OF CONSCIOUSNESS* 105 (1997).

ology consistently with “methodological individualism.” Previous accounts of culture, it is contended, had postulated suprapersonal metaphysical entities that have no determinate existence. In contrast, the memetic account of culture can be entirely formulated in terms of the characteristics of the individual person and his cognitive apparatus.

The notion that there is a covert metaphysics to the thought of such resolutely antimetaphysical thinkers as Levi-Strauss, Foucault, or Habermas will intrigue some readers; the tendency of the argument seems to recall, for example, Derrida’s celebrated “deconstruction” of Levi-Strauss.<sup>18</sup> However, the project of the book is not primarily exegetical, and the suggestion is left undeveloped. As it stands, it seems a somewhat idiosyncratic interpretation particularly of the structuralist point of view: it both underestimates the force of the structuralist position and creates curious tensions with the latter part of the book, which largely relies on structuralist methods.

Indeed, the memeticist inevitably falls back on a structuralist account.<sup>19</sup> The difficulty for the student of memes is to provide some explanation of how they “mean” — or, to speak more naturalistically and pragmatically, how they have cognitive effects. The connection to structuralist accounts of language is readily developed. In these accounts, the capacity of an isolated sensory or behavioral unit — a sound, image, or gesture — to denote depends on its position in the structure of a language, which is defined in terms of its *difference* from other units. No unit denotes in isolation, and a nonsense syllable is meaningless precisely because it differs from any of the *signifying* sensory units that make up the structure as a whole. It is the structure as a whole that is the language. Now, of course, this structure is not an occult metaphysical entity in the sense in which Balkin objects to these; though its precise embodiment — whether in the hard wiring of brains, in the network of social interactions, or elsewhere — is controversial. The point is that some such structure is required to give the notion of “meme” itself any content: How else determine whether something *counts* as a “meme”? Inevitably, then, the account of how memes work largely

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18. See JACQUES DERRIDA, *Structure, Sign and Play in the Human Sciences*, in *DISSEMINATION* (1982).

19. It should be noted here that structuralist analysis potentially plays two distinct roles in Balkin’s construction. First, one might offer a structuralist account of what counts as a “meme” — the unit of cultural transmission. This, as I understand it, is what Balkin would wish to resist. Second, one might use structuralist conceptions to explain how individuals process memes to form larger units of thought, such as legal argument. See *infra* Part IV. It is not entirely clear, at least to me, why the first use of structuralism, but not the second, is to be stigmatized as involving appeal to illicit transpersonal entities. In any case, it seems to me that at both steps of the construction, structuralism is not only a permissible, but a necessary, feature of “memetics” method.

recaps structuralist and semiotic work: Levi-Strauss's oppositions; the dichotomy of metaphor and metonymy; Duncan Kennedy's nested oppositions. While the book's development seems to offer up these structures as merely contingent psychological features of how memes are integrated by human minds, it is hard to see how the notion of meme could have any content at all outside of such a structuralist account.

Not only does the conception of "meme" fail to avoid the difficulties faced by structuralisms generally; it brings with it a set of problems peculiar to its own strategy. The transfer of biological theories to the "meme" is a little tricky, to say the least. For one thing, the unit of survival is difficult to define in a way that rigorously corresponds to the biological categories, and even more so because identifying a meme is a matter of cultural interpretation. In biology, one can distinguish rigorously between the genotype — the gene — and the phenotype — the realization of the genotype in a particular individual organism. It is indeterminate, however, whether to treat the meme as genotype, phenotype, or organism (a collection of, and substrate for, phenotypes). Here, the biological analogy breaks down. In addition, the biological "gene" is identifiable physically by a standard set of biochemical methods, and guides organic development (the "expression" of the gene) through a set of biochemical sequences that are remarkably well understood. There is no such corresponding physical specification of the meme. Rather, its identification depends on the very processes of cultural interpretation for which it is offered as an account.

Consider, as a very simple example, a musical phrase discussed in Daniel Dennett's work, and taken up by Balkin.<sup>20</sup> The phrase consisting of the descending notes F-sharp, E, and D, opines Dennett, is not a meme because it does not elicit any sense of recognition on the part of an auditor. But, Balkin retorts, that's the opening of "Three Blind Mice," not to mention the slow movement of Tchaikovsky's *Pathétique* symphony. One might add that, to a musician trained in the modern theory of atonal music, the notes form the pitch-class set 3-6 (12), consisting (in retrograde order) of the pitch-classes 0, 2, and 4.<sup>21</sup> As this example suggests, it seems doubtful that one gains much purchase on the structure of culture by identifying a particular fragment as a "unit of cultural transmission." The fragment itself is not what is transmitted. The merely behavioral notion of transmissibility is inadequate to the task because it does not tell us how to decide what counts as proper transmission of a meme, as opposed to invention of a new one. Rather,

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20. P. 47. The example is from DENNETT, *DARWIN'S DANGEROUS IDEA*, *supra* note 16, at 344.

21. See ALLEN FORTE, *THE STRUCTURE OF ATONAL MUSIC* 179 (1973).

what makes the fragment accessible cognitively is its embedding in a larger structure of perception or analysis — the sort of structure with which Gadamer, for example, was concerned in the theories of “tradition” that Balkin wishes to reject.<sup>22</sup>

This problem of embeddedness appears as well when one analyzes the “natural selection” of memes — their survival properties. The famed “spandrels” provide a good example. Spandrels are the supports for roofing found in Romanesque churches. As the Gothic design of ribbings developed, spandrels became superfluous from a strictly engineering point of view; the spandrels were preserved in design for their decorative function. Observing the spandrels of San Marco in Venice, biologists Stephen Jay Gould and Richard Lewontin were struck by the analogy between this architectural survival and the survival in biological organisms of structures that had ceased to serve any strictly functional purpose. Gould and Lewontin dubbed these biological remnants “spandrels,” in analogy, or perhaps even in homage, to the architectural spandrel.<sup>23</sup> In a final maneuver, analysts import the concept back into the realm of culture, observing that spandrel-like features — features that have survived despite their loss of function — are commonplace in cultural objects.

This intellectual fable itself suggests some cautions about evolutionary models of culture. Most apparently, the notion of “function” in the cultural realm has none of the clarity of definition that it has in evolutionary biology. As the goal of evolutionary biology is to explain the selective survival of organisms, the notion of function has a simple pragmatic definition: a feature of an organism is functional if it aids survival. What might count as function, however, is precisely what is in contention in the analysis of culture. The notion that the merely decorative elements of a building serve no function seems a curious regression to the banishment of ornament in the now lamented International Style of the postwar years. Indeed, one is tempted to dismiss it as a spandrel itself — a belated outbreak of a modernist delusion.

At stake here is not merely a particular question of aesthetic taste, but the conceptual question — fundamental for biological models of culture — of how “function” or “survival” are to be defined in the cultural realm. No one who has stood with the prescribed attitude of reverential awe at the cathedral of San Marco would dismiss the spandrels as mere excrescences. Nor could one say properly that the cathedral-type of which San Marco is an ex-

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22. HANS-GEORG GADAMER, *TRUTH AND METHOD* pt. I ch. 1, pt. II ch. 2 (1975).

23. See Stephen Jay Gould & Richard C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm*, in *CONCEPTUAL ISSUES IN EVOLUTIONARY BIOLOGY* (Elliott Sober ed., 1984).

emplar had “survived” if it had been stripped of what seems to count from an engineering point of view as its functionless elements. Clearly, the spandrels — or, more accurately, the design sensibility that would introduce them — form part of the complex of religious and aesthetic judgments that enable one to build, or participate in, San Marco.<sup>24</sup> In short, the biologism of the “meme” suffers a severe limitation: what counts as a “meme” is itself a question of cultural interpretation. In sum, to decide what counts as a unit of cultural transmission (a “meme”), we need a prior account of the process of cultural transmission; but once we have such an account — say, a theory of the aesthetic coherence of architectural ornament, in the case of the spandrel — of what use is the notion of a “meme”?

The “memetic” conception of culture is a curious echo of the modernist aesthetic of the fragmentary, which finds its most prominent exemplars in works such as Eliot’s “Waste Land,” Pound’s *Cantos*, Stein’s prose poems, or Joyce’s *Finnegan’s Wake*. In these works, quotations ripped from context and set down with an appearance of arbitrariness or discontinuity provide the basic material for new works of art. This method contrasts sharply with more traditional methods of allusion or incorporation in which the poet rings his own subtle changes on a familiar image or trope: say, the weary ploughman returning home from a hard day in the fields. Rather, in the literature of the fragment, the *form* of detachment or discontinuity underscores the sense of a radical break from the past meanings — an inevitable loss of sense or aura. “These fragments I have shored against my ruin”<sup>25</sup> — the pathos here is that the grasping of the fragment is really an emblem or symptom of the impending cultural disintegration. Memetic analysis seems to look at this fragmentariness in an up-to-date, techno-optimistic, celebratory light. The change of mood may be refreshing, but the intellectual maneuver begs a key methodological question: are these fragments memes that have been successfully transmitted? Or does their context make them new memes that look like old ones but as such are mere impostors or replicants? One can tell only by an act of interpretation which treats the work as a whole, in light of stipulative canons of interpretation or aesthetic judgment.

The same problems appear as we turn to legal culture where, indeed, mechanistic tendencies have a powerful claim even aside from the meme. The meme of “equal protection” familiarly, drastically changes its meaning as the accepted grounds for legitimate differentiation among citizens changes over time. So what is the status

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24. Of course, this is the point of Ruskin’s massive polemic on Venetian architecture. See JOHN RUSKIN, *THE STONES OF VENICE* (1851-53).

25. T.S. Eliot, *The Waste Land*, in *THE WASTE LAND, AND OTHER POEMS* 1. 431 (1962).

of the meme? One soon finds oneself engaged in the parsing of an elaborate, albeit familiar, set of legal distinctions — an intellectual process in which the notion of “meme” makes no parsimonious appearance. Familiarly, one may distinguish between the concept of equality and the various conceptions of equality (which is the meme?) and find that conceptions change, say, with changing social consensus on certain questions of the scope of public morality. Again, the conceptual apparatus can be labeled memetic, if one will; but the label has ceased to provide any guidance about how it works. We are back to evocations of “political and social context” (p. 88). The puzzle of how this interaction works — which bedeviled, as we have seen, generations of ideology theorists — remains unsolved.

### III. JUSTICE

*Cultural Software*'s conception of ideology requires, as we have noted, a theory of justice. Ideological thinking is no different in cognitive structure from any other type of thinking; what makes it distinctive is its effect — to cause or give support to unjust social arrangements. This seems to place the memeticist in an exceedingly awkward position: do not claims about justice rest upon transcendental foundations that any social constructionism — memetic or otherwise — would have to reject?

Here Balkin deploys a variant of an argument that has been developed by contemporary philosophical moral “realists.”<sup>26</sup> The basic point is that anyone who holds convictions about justice must claim that these convictions are valid for others, not simply for himself.

[W]hen our actions affect other people and come into conflict with other people's values and goals[, t]hen we have to defend what we are doing. . . . At that point . . . [w]e must regard truth and justice as something [sic] that has claims on others besides ourselves. We must abandon the convenient dodge that what we believe is true and right is true only for us and right only for us and for no one else. [pp. 145-46]

Unlike the philosophical realist, however, Balkin faces the difficulty of integrating this strategy of argument into a system that leaves room for a view of “ideology.” Balkin apparently appreciates that the argument from performative self-contradiction does not entirely support the analytic structure that he wishes to develop: after all, within the perspective of Balkin's pragmatist social constructionism, it seems to remain open to the reader to deny the validity of any standard of “justice,” either for herself or for anyone else.

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26. For a beautiful rendition of this point of view, see THOMAS NAGEL, *THE LAST WORD* (1997).

So Balkin goes further to offer an affirmative account of “[t]ranscendent[al] ideals of truth and justice” (p. 146). These ideals are “presupposed in our understanding of encounters between people as encounters between subjects of justice — that is, as the sort of entities that can be treated justly or unjustly. Questions about what is true and what is just *necessarily* arise whenever people affect each other’s lives” (p. 146; emphasis added). Balkin develops the point with the example of a massacre:

We cannot understand the meaning of this massacre as a human action except by reference to an ideal of justice that applies to both the victors and the vanquished. . . . [W]e cannot understand what their murderers did — as the brutal actions of responsible individuals rather than as the random or determined actions of objects — without reference to a common and transcendent ideal of justice. . . . What distinguishes [human] action is precisely the fact that it *can be* just and unjust, and furthermore, that its meaning cannot be adequately understood except against this fact. [p. 147]

The argument here seems to make several different, although closely related, claims about justice. One suggestion seems to be that a conception of justice is essential for understanding human action. The passage just quoted may remind some readers of Leo Strauss’s attack on the notion of a value-free social science: we cannot understand some human actions without characterizing them, say, as “cruel,” an essentially evaluative conception.<sup>27</sup> The general point is compelling, and definitive as a critique of a certain kind of purportedly value-neutral social theory. It is quite a leap, however, to start from the requirement of value judgment to understand human action, and to end up with the particular type of value judgment needed for ideological critique as Balkin imagines it. After all, one may readily deny that the notion of “justice” really allows one to understand the massacre; it may occlude understanding. We may wish to understand massacres, rather, in terms of an innate drive toward death,<sup>28</sup> or an imperative to compete for limited resources,<sup>29</sup> or a racist claim of the superiority of certain human types.<sup>30</sup> Each of these modes of understanding may invoke evaluative conceptions, but none requires any particular notion of what social arrangements might count as unjust. It may be, rather, that the only “valid claim” to be made about justice is, say, the Thrasymachean one — that claims of justice are really just claims about power, or, in contemporary parlance, “victor’s history.” This,

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27. See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 52 (1953).

28. See, e.g., SIGMUND FREUD, *TOTEM AND TABOO* (James Strachey trans., W.W. Norton & Co. 1952) (1913).

29. See, e.g., MARSHALL SAHLINS, *STONE AGE ECONOMICS* (5th ed. 1981).

30. See, e.g., HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 158-266 (1951) (describing ideological bases for twentieth century genocide).

of course, is a sort of claim about of justice, but it is not one that can ground Balkin's conception of ideology, which needs the ability of the ideological analyst to test assertions against a more specific standard. Indeed, one common conception of ideological analysis is that it should aim to show that claims about justice or other supposedly transcendental values are really claims of the powerful, designed to protect their interests or justify their depredations. This particular form of ideological unmasking does not require any affirmative conception of justice at all; it may simply embrace a form of nihilism, which sees the unmasking of justice-claims as a weapon in a struggle for power, and one which justifies itself in terms of the benefits it wins for its own good.

Alternatively, Balkin's argument sometimes seems to rest its conception of transcendental justice on an idea of *mutuality*. Once one has entered into a discussion of questions of justice, one must insist on a criterion of justice to which the interlocutor would also agree, on "common values of truth and justice that we [all] are somehow obligated to recognize" (p. 148). Transcendental concepts must be postulated "whenever there is a clash or encounter between the positive norms of different cultures, different groups, or different persons . . . [O]ur encounter with an Other causes the transcendent norm magically to spring to life" (p. 150). This simply moves too quickly; it ignores the possibility that one can simply "agree to disagree," as the expression goes, or even give up on the project of mutual understanding altogether. Indeed, this is the essence of the *modus vivendi* — a normative order of a sort, but not one that generates claims about justice that would support the practice of ideological critique as Balkin conceives it.<sup>31</sup> Balkin's account seems to conflate the notion that "one can make valid claims about justice" with the more specific, but more controversial notion that there are "common values of . . . justice that we are somehow obligated to recognize" (p. 149).

Perhaps it is a sense of this weakness that forces the book's discussion toward its third proposal about the sources of transcendence, that are now found, not in performative contradiction or in the needs of social interpretation, but rather in conditions of mutual intelligibility. Every culture, we are told — including, presumably, the culture of nihilists — works with some "transcendent ideal of a *normative order*" (p. 166).

[B]ecause all of our moral discourse presupposes the idea of subjects and agents in a normative order, we can be intelligible to each other

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31. Although Rawls of course does not pursue questions of ideology, his description of the "*modus vivendi*" — from which I have borrowed the term — identifies well this underlying amoral structure. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997). Of course, Rawls objects to it but, unlike Balkin, does not claim that to embrace it involves a performative contradiction.



even if we do not always agree. Indeed, if we could not understand the speech and actions of others as presupposing a normative order with subjects and agents of some kind, it is likely that we would not even understand them as being rational agents. [p. 167]

The argument is apparently a rendition of Davidson's critique of a certain notion of incommensurability or mutual incomprehensibility.<sup>32</sup> Davidson had shown that we could not without contradiction speak of agents' working with a language or a conceptual scheme that was radically incomprehensible to us. If we could not make even the first step in interpreting a communication, it would be impossible for us to say that we were dealing with a language or a conceptual scheme at all. However, even allowing that the argument can be extended to claims about *normative* schemes, the argument still does not exclude, as Davidson's exposition makes clear, the case of *undecidability*: indeterminacy about whether or not we are in the presence of a rival, but uninterpretable, cognitive or normative scheme. Is uninterpretability or mutual incomprehensibility a sign that there is no coherent scheme at all, or simply a signal that our own interpretive or communicative powers are failing?

Balkin evidently understands that there is a considerable tension between these transcendental arguments and the positivist and, apparently, social constructionist rhetoric of the work as a whole. His final attempt at resolving this tension is a curious and revealing conversation between the author and a hypothetical objecting pragmatist. Acknowledging that the notion of a "transcendent value" is a mere Western construction, he proposes that the concept "is the best way, given who we are and where we are now, to make sense of these features of human existence — our experience of justice as a[n] inexhaustible demand, and our sense of the inadequacy of all attempts at capturing this value and making it determinate" (p. 168). Balkin explains:

Given who we are and where we have come from, the language of transcendence is the best way to explain our ability to discuss questions of truth and justice with other cultures and other persons. It is the best way to understand the phenomenological demands of truth and justice. It is the best way to describe the relation between human values and the felt imperfections of this world. Moreover, transcendent concepts are implicated by many other beliefs about ourselves and our world that we would find it hard to jettison. In other words, the pragmatist argument for transcendent values is that one should accept these concepts and this way of talking *because they work*. [pp. 168-69]

At the same time, "I argue that this way of talking is the most adequate way of describing the human predicament" (p. 169).

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32. See DONALD DAVIDSON, *On the Very Idea of a Conceptual Scheme*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 183-98 (1984).

It is not clear, however, what it means for these concepts to “work” or to be “adequate.” For the critic of ideologies, it can hardly be sufficient to say that they work because we like the outcome, or because we would find it arduous to get rid of them. Presumably, the very point of ideological analysis is to question conceptions that are built into our current modes of thought and action. Alternatively, the claim that these conceptions are “adequate” in the scholastic sense — *adequaetio verba ad rem* — abandons pragmatism altogether. Nor can the point be that these concepts are useful “for us.” After all, we have just been informed that the restriction “for us” involves a performative contradiction, because, when others challenge our use of concepts, we will present arguments that appeal to our interlocutors as well. In the end, the “pragmatic” account of our sense of justice does more to create doubt than to dispel it. Indeed, that may be one of its principal virtues.

#### IV. RHETORIC

In relation to previous work on ideology, Balkin’s argument has followed the strategy of strengthening one’s position by tactical retreat and a consolidation of force. The sweeping ambition to explain the causes of ideas has been abandoned; with it the attempt to construct a general theory of delusion. The result, as we have seen, is an account of culture that is forceful on its own terms but that operates at one level of removal from the cultural phenomena that it purports to describe. Once one takes up the task of describing or criticizing a particular cultural formation, the scaffolding of memes and transcendental judgments falls away. What remains, however, is a type of postmodern rhetoric: a system for understanding the linguistic structures that persuade or generate conviction. This approach to a rhetoric presents the book’s most interesting features.

This structure of argument directly parallels Aristotle’s rhetoric. On one interpretation of the Aristotelian conception, rhetorical processes are a crucial structural feature of the good life in the *polis*, understood as the life of persons for whom living together in a community is a defining feature of the self. Such persons will not resolve the differences that naturally arise from the project of living together simply through the exercise of pure reason or intellect. That is the province of the philosopher alone, that is, of one who has in a sense withdrawn from the community. For those in the community, conduct on political matters is inevitably influenced by passion and by the interests that arise from personal circumstance. Rhetoric is the study of how to persuade persons so situated in the

contexts of communal decision.<sup>33</sup> Without processes properly understood as rhetorical, the community could not collectively deliberate — and so, could not be a community endowed with law and a political order. As a subsidiary matter, rhetoric then includes an understanding of how linguistic structures — particularly, the tropes — can be deployed to guide inferences of persons in these deliberative settings.

The core of the Aristotelian conception has continued to exert a powerful seductive force, at least in the study of law. Legal thinkers in their work constantly come up against the impetus to the rhetorical project — that the deliberative practice of the community inevitably differs from the procedures of philosophical reason (now to be conceived as the moderns understand it). Of course, this premise is controversial. For economically oriented scholars, or for those who see in our constitutional jurisprudence the latter-day embodiment of a Kantian dispensation, the work of the lawyer is simply that of scientific or philosophical reasoning. For those unconvinced by these projects, however, there remains the task of properly characterizing the distinctive modes of “reason” or deliberation that characterize aspects of communal life, including the life of the law.

The Aristotelian model of rhetoric, however, is situated within the more comprehensive Aristotelian view of persons: in the conception of the *polis* as a mode of living together; in the biological psychology of the passions and of perception; and in the conception of the distinctive place of the reason of the philosopher. The modern — or perhaps, more pertinently here, the “postmodern” — rhetorician, by contrast, generally will adopt little of this apparatus. He is left with the Aristotelian catalogue of tropes — some pervasive, like metaphors, and others obscure and forgotten, like the anacoluthon. At the limit, the tropes appear as entirely formal linguistic structures that can be manipulated at will without reference to the implicit anthropology by which the Aristotelian rhetoric integrates them into a master social theory.

The modern rhetorician, then, faces two tasks of reconstruction: he must lay the grounding for rhetoric in a conception of the person and of communal life that fits modern understandings in a way that the Aristotelian view (at least on most current readings) cannot; and he must show how these account for the persuasive force of the set of linguistic structures (the tropes) that constitute the rhetoric itself. For exegesis, it is helpful to contrast Balkin’s approach to these problems with that of his more explicitly Aristotelian col-

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33. On the connections between emotion and reason in the process of persuasion, see Martha Craven Nussbaum, *Aristotle on Emotions and Rational Persuasion*, in *ESSAYS ON ARISTOTLE’S RHETORIC* 303-23 (Amelie Oksenberg Rorty ed., 1996).

league, Anthony Kronman, in *The Lost Lawyer*.<sup>34</sup> In terms of the task of reconstruction that I have defined here, Kronman jettisons the Aristotelian psychology for one founded in part on a Freudian theory of drives and repression, in part on an existentialist depiction of the indeterminacy of the deep value choices. The specifically Freudian notion of the integrity of the self — one in which the self reflectively comes to terms with past losses and traumas — commends a type of deliberation about the unity and coherence of one's life. This type of deliberation then provides a model for the corresponding deliberation among members of a community. The intra- and interpersonal settings have in common the recuperation of differences and losses that arise from the need to make choices among irreconcilable competing goods.

Balkin's account of the "meme" provides the basis for a radically different, and distinctively more agonistic, conception of the self. The "memetic" and instrumentalized structure of the self suggests that the unity and coherence that Kronman postulates are elusive. Of course, one might posit a "master meme" that organized all of the subordinate memes, extinguishing those that interfered with some unified conception of the person. Balkin, however, conspicuously omits this possibility; and the emphasis on the independent action of memes as self-propagators seems to suggest that the role of the self-censor in memetic adoption is never as forceful as would be required to produce that coherence of the self which provides, in Kronman's view, the *telos* of deliberation.

Correspondingly, then, Balkin's memetic view implies a more chaotic, fragmentary, and conflictive account of the communal processes that civic-republican Aristotelians perhaps too ideally describe as "deliberative." In the world of social communication, deliberation becomes a sort of war of all against all, a return to the state of nature, except that the warriors are not so much individuals as the memes that define individuals and that use them as vectors of propagation. The public space is not a collection of rational selves, but a swarm of viral particles of information. What rescues this from utter bleakness is the (individually limited though collectively determinative) power of each self to influence memetic propagation, and the celebratory sense in which this diversity spawns ideals and aspirations that might elude a more tightly controlled communal discourse. This is a compelling and refreshingly subversive image of our communal space.

The second step in the rhetorical project (as I have tried to describe it here) is the move from the reconstructed notion of deliberation — grounded in a "psychology" — to an understanding of the

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34. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 62-101 (1993).

persuasive (socially causative) power of formal linguistic structures. Here Balkin, influenced by various structuralist and poststructuralist theorists, broadly adopts and recharacterizes the terms of the Aristotelian tradition: distinguishing the synchronic from the diachronic; organizing the synchronic around the fundamental dichotomy between metaphor and metonymy; and analyzing the diachronic through a theory of narrative. The difficulty which any such rhetoric must face, however, is the seemingly formal character of tropological analysis. Consider, to take one example, the metonymic analysis of our images of the “working mother” (pp. 255-58). Balkin treats this as a case of metonymy as “prototype,” in which the housewife mother becomes the metonym, the linguistic and cognitive representative of our ideal of mothering generally. The “ideological effect” is to privilege a particular conception of the role of the mother or, more generally, of the ways women should lead their lives: “implicitly [to] demarcate normal, natural, and privileged associations about mothers and fathers, nurturance and outside work” (p. 257).

A problem here is that the formal identification of the tropological structure does not account for its persuasive force.<sup>35</sup> Though the rhetorical analysis here nicely explains how our notions of “working mother” may reflect the workings of a metonymy, it does not explain why we actually think of women through *this particular* metonymy, rather than any other that one might construct. Why is not the governing metonymy the notion of a “superwoman” who does everything well, or the “public woman” who creates a distinctive role out of a position that comes to her in part through her spousal relations? The determinacy of any particular ideological effect seems to evade the formal results of a rhetorical analysis.

What the book avoids in its conception of ideology, then, is any particular sense of material causation — a link between ideas and economic or social situation, of the sort that gave earlier conceptions of ideology their power. Ideas are neither symptoms of physical trauma, nor covert expressions of class interest, nor distorted expressions of biological drives, nor clever ruses of the brain to achieve individual and species preservation. I suppose that each of these might be formulated in terms of the memetic theory, and indeed that Balkin would celebrate this openness to diverse social phenomena — a form of methodological bricolage — as one of the theory’s most essential features. Yet, more appealing than this for-

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35. This problem has been analyzed as the aporia between rhetoric as trope and rhetoric as persuasion. See PAUL DE MAN, ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZCHE, RILKE, AND PROUST 3-19, 103-31 (1982). Conversely, the persuasive force always transcends the mere rhetorical form and seems to rest on something outside of it (though, whenever that is identified, it turns out to be merely another formal rhetorical structure — hence the notion of an “aporia” in rhetorical analysis generally).

mal indeterminacy is the book's formulation of the senses in which individual knowledge and self-understanding extend beyond the bounds of entirely conscious reflection and choice. "Cultural software dwells within us and is part of us . . . We become agents and embodiments of history . . . cultural information . . . is made part of our flesh" (p. 287). This "enfleshment is best symbolized by the fingers of the jazz pianist":

These fingers possess a second nature. They know where to go. But their responses are not foreordained. They are not automatic. The fingers of the pianist respond to the moment, they improvise, they create works of great beauty that never existed and never were thought of before . . . [pp. 287-88]

This image of the self that creates prior to, or independently of, conscious reflection, provides a powerful new basis for a pragmatic conception of legal order.