

A SEMIOTICS OF CRITIQUE

*Duncan Kennedy**

I am grateful to the friends and colleagues who participated in the seminar that Michael Fischl and Pierre Schlag organized last February at the University of Miami Law School about *A Critique of Adjudication: Fin de Siècle*¹ (“*Critique*”), and who have now turned their pieces into articles for this volume of the *Cardozo Law Review*. I was moved and am still moved by their willingness to put their time and energy into the task of mastering, criticizing, and improving on what seems to me a very imperfect contribution to critical theory. I responded at the seminar to the early versions of the papers, and thought that I would write up those responses for this symposium. On second thought, after the final versions began to come in, this seemed like a bad idea, not least because the critiques have been tightened and elaborated so that I don’t think I would be able to do anything like justice to them at a page or two per. Indeed, they are full of unanswerable criticisms. So I prefer to bask in the attention rather than struggle to have been right.

So what to do instead? What I’ve come up with is a piece about what one might call the “theory *langue*” of critical legal studies (“cls”). It is a listing, with explanations, of the moves or tropes or building blocks out of which, it seems to me, speaking in the neutral and detached voice of the linguist, many crits, including me in *Critique*, have composed our various and conflicting theories of lawdom.

Part I defines and then analyzes four genealogies within critical thought broadly conceived. I have given them names that correspond to my argument about how to interpret them, rather than according to more familiar usages, and the proper names in parentheses are supplemented below. These are organicism

* Carter Professor of General Jurisprudence, Harvard Law School. Thanks to Lama Abu-Odeh, Nathaniel Berman, Janet Halley, David Kennedy, Mopsy Kennedy, and Karl Klare. Special thanks to the student and faculty participants in the University of Michigan Law School’s Fall 2000 Legal Theory Workshop. Errors are mine alone, an important point given how much ground this Article purports to cover.

¹ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997) [hereinafter *CRITIQUE*].

(Hegel, Ruskin, Parsons), antinomianism (Kierkegaard, Nietzsche, Sartre), structuralism (Marx, Freud, Foucault), and semiotics (Saussure, Lévi-Strauss, Derrida). Each has a rationalist and an irrationalist variant. The versions presented in Part I are not “readings” of the authors referred to, but rather (fairly) concise statements of ideas, at least loosely associated with the author in question, that my peculiar substrand of *cls* (left-modernist/postmodernist) has used in its critical enterprise.

These genealogies have complex relationships of mutual critique. Part II presents three arrangements of the genealogies seen as attacks on one another, suggesting that when these are taken into account there is a certain organic unity to the set. Deploying the genealogies against one another is as much a part of critical theoretical practice as the combination of bits from the genealogies into discrete theories.

Part III suggests (no more than that) a relationship between the theory-moves described and liberalism broadly defined. It may be useful in reading Parts I and II to have an idea of how this (very short) part works. My claim is that the genealogies of critical theory sometimes operate to undermine (although they do not in any sense refute) a particular way of understanding American political life. Indeed, I would say that they were instrumental in undermining my own faith in this mode of understanding.

This is the mode of the mainstream American tradition in political theory, including liberals and conservatives, who organize their normative and descriptive thinking about social justice through the categories of majority rule, individual human, social, and economic rights, the rule of law, constitutionalism, due process, the public/private distinction, the aspiration to be a principled actor, the notion of tolerance, and above all the categories of individuality, autonomy, liberty, choice, and consent. The people I imagine myself to be addressing believe that a societal commitment to these ideas will, first, distinguish a particular type of society by contrast to others, and, second, within such a society, provide a legitimate basis for making the continuous series of decisions through which that society defines and redefines itself in the face of change and controversy.

Of course, within liberalism there are vigorous practices of internal critique (for example, the working out of the consequences of voting paradoxes, prisoner’s dilemmas, multiple and/or unstable equilibria, and so forth). I like and use this kind of analysis in my work, but this piece is about the more distanced and hostile type of analysis called “critical theory.” Within critical theory, I am, like everyone else, self-taught.

I. FOUR GENEALOGIES OF CRITICAL THEORY²A. *Organicism*

The theory-move that I will call organicist shows that something (a society, a group, an individual, the ego in relation to the other components of the psyche, a concept) that looks like a “whole” is better understood as a “part,” whose relevant characteristics are at least partially determined by a “larger whole,” no matter how plain it may seem to ordinary common sense that the thing in question is “free standing,” meaning independent of the whole.

Organicism does not necessarily annihilate the part in the name of the whole. For example, it is an organicist move to represent individuals and groups as mutually constituting each other. Group membership conditions what a person “is” or “is like,” and the character of the group cannot be reduced to the choices or to the preexisting nature of the individuals who make it up. At the same time, actions of individuals constantly impact collective characteristics, reproducing them or inflecting or subverting them. In this context, the organicist move is to show that the “larger whole,” the group, at least partially determines *what its individual members think of* as natural or chosen.

There are many ways to theorize this kind of thing. A big difference among organicisms is over how to treat both the internal structure and the dynamism of groups. Organicisms are rationalist to the extent that they construct the whole on the basis of data, or employ an evolutionary model based on natural selection, or theorize it as a “system” that has “laws.” Organicisms are irrationalist when the portrayal of the whole is “spontaneist” or “vitalist”—the whole is autonomous and alive in a sense that makes it impossible to reduce its internal order and its course through time to laws of whatever kind science is proposing at the moment.

1. Rationalist Organicism

The following is a list of rationalist organicisms, each of which involves a different way of theorizing the relation of the part to the

² The informed reader will have to keep reminding herself that these categories refer to the ideas I set out in the summaries and to the thinkers included in the four lists, so that structuralism here means Marx, Freud, and Foucault, and also late-twentieth-century radical feminism (Firestone, Dworkin, Rich, MacKinnon) rather than structuralism in linguistics or literary theory, *see infra* Part I.C, and that poststructuralism (de Man, Derrida) is part of semiotics (along with writers like Jakobson and Lévi-Strauss often denominated structuralists). *See infra* Part I.D. What is often called decisionism (including Nietzsche, Weber, Schmitt, and Sartre) falls within antinomianism. *See infra* Part I.B. Heidegger is not in here because I haven’t read him.

whole. Rational knowledge of the whole is “objective” in whatever sense knowledge of nature in general is or can be objective. The point is not that rationalist organicism is positivist, but that it refuses an ontological distinction between knowledge of society and science more generally.

The question is not which organicism is right. The goal is to describe models that critical legal theorists implicitly adopt to analyze particular instances of part/whole relations. In every case, the outcome of applying one of these models is that what looked like choice, or “just the way things are,” or the random, is intelligible in a new way once we understand that (contrary to whatever the part may think about it) the part is a function of, at least partially determined by, a larger whole.

a. *Culture as Naturalized Normative Order: Anthropology*

The anthropologists present cultures in a series, allowing us to compare them as normative systems, each with a kinship system, a religion, an economy, and so forth. Two key points about this exercise are, first, that we see right away that what seem to be very large differences between cultures are not chosen, and, second, that we see equally quickly that the participants regard many things as “natural” that our comparative study shows to be “socially constructed.”

The culture is an “organic whole” because an amazingly large amount of what everyone who “is” an “X” (Samoan, Frenchperson, etc.) does and thinks is just what all the other Xs in that part of the culture do and think, and all this fits together to produce an overwhelmingly powerful experience of naturalness and choice in every area of life for everyone involved. Yet step back to the godlike posture of the anthropologist and this appears with equally overwhelming force to be illusion. The consequences for our understanding of our own culture are . . . somehow important even when not obvious.³

³ Though they are “discredited in some circles,” I still worship Bronislaw Malinowski, Margaret Mead, Ruth Benedict, E.E. Evans-Pritchard, S.F. Nadel, and Gregory Bateson. James Clifford’s famous postmodern critique, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (1988), seems to me misguided at the level of “theory,” though full of interesting narratives about particular distortions in particular anthropological moments. See GREGORY BATESON, *STEPS TO AN ECOLOGY OF MIND* (1972); RUTH BENEDICT, *PATTERNS OF CULTURE* (2d ed. 1959); E.E. EVANS-PRITCHARD, *THE NUER: A DESCRIPTION OF THE MODES OF LIVELIHOOD AND POLITICAL INSTITUTIONS OF A NILOTIC PEOPLE* (1940); BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (Littlefield, Adams & Co. 1959) (1926); MARGARET MEAD, *COMING OF AGE IN SAMOA: A PSYCHOLOGICAL STUDY OF PRIMITIVE YOUTH FOR WESTERN CIVILISATION* (1928); S.F. NADEL, *A BLACK BYZANTIUM: THE KINGDOM OF NUPE IN NIGERIA* (1942).

b. *The Mechanically Organic*

The basic idea here is that we posit that all the parts of the system are what they are in consequence of their participation in the system, and that the system is nothing more or less than the organization of its parts—there is no ontological priority between part and whole. Key concepts are evolution, selection, structure, function, environment, equilibrium, and reproduction.

i. Natural Selection

This is the *ur*-organicism of modernity. The point is not whether you “believe in” evolution, but rather the way models based on selection can explain traits of species and of individual species members that look as though they are either chosen or “just the way things are” or random.

Individual members of a species die; if the species is to live, the individuals must engage in reproduction. The environment determines the reproductive success of species. Species and their individual members change over time through random mutation and random environmental change. These in turn change the way the environment and the organism interact, causing the organism to flourish or disappear.

For the species, what looks like just its nature is a changing product of the system as a whole. For the individual, what seems like his or her nature or his or her choice turns out to be “programmed” in the sense that it was selected because individuals who had the trait survived or contributed to the survival of the species of which they were a part. For example, we “are” altruistic, even at the price of our lives, because altruism serves the species, although we experience our altruism either as chosen or as “just the way we are.”⁴

ii. General Equilibrium Systems

The economic version. Every price in a general equilibrium system is a function of every other price, as well as of the (direct or indirect) use value to consumers and cost of the commodity involved. The point is not that prices are solely a function of one another. It is that changing any price sends ripples through the system and may or may not affect every other price. Here the price initially looks like a “whole” in the sense of an indicator of the “value” of the thing priced, but on second thought we realize

⁴ See CHARLES DARWIN, *THE ORIGIN OF SPECIES* (Oxford Univ. Press 1996) (1859); EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975).

that it is a “part” in the sense of being a function of the market as a whole, *as well as* of the use value and cost of the commodity.⁵

Saussure’s theory of the “value” of a sign, with a sign defined as a word and its associated concept(s). The word is associated with the concept in the same way that the price is associated with the commodity. At first, it looks as though the word is anchored in, or just allows us to identify, a preexisting concept. But then it turns out that one language has many words for different kinds of snow while another has only a single word covering all the types differentiated in the first language. In order to figure out the “coverage” of the word “snow” in English, we have to know whether there is a distinct word for “sleet.” Adding a word for sleet changes the “value” of the word “snow” (by reducing its coverage). This means that the meaning of each word in the system depends on the meanings of all the other words in the system, rather than just denoting one of a preset collection of concepts.⁶

A common bad mistake is to think that this is a statement about the relationship between language and “reality,” so that Saussure is misinterpreted to be saying that “words get their meanings from their relationship with other words *rather than* from the things they refer to.” Rather, just as prices depend *both* on other prices and on the use value and cost of commodities, so the meaning of words depends, in Saussure’s theory, *both* on other words and on the way reality presents itself for conceptual organization. Neither Walras’s economics nor Saussure’s semiotics fully clarifies the relationship between the middle term (commodity, concept) and the “base” or underlying reality. The point is, rather, to avoid a mistake: we must assume neither that words correspond to concepts that correspond to reality, nor that words depend solely on one another and that reality is chaos. A general equilibrium system forces us to navigate between these poles, with the parts being functions of two distinct wholes (reality and language; use value and market value).

word = price

language = price system

word is to concept as price is to commodity

sign is to reality as commodity price is to use-value and cost of production

⁵ See LÉON WALRAS, ELEMENTS OF PURE ECONOMICS, OR THE THEORY OF SOCIAL WEALTH (William Jaffé trans., A.M. Kelly 1977) (1874).

⁶ FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally et al. eds., Wade Baskin trans., Peter Owen Ltd. 1959) (1907-11).

the price of a commodity is a (partial) function of the prices of other commodities

the meaning of a word is a (partial) function of the meanings of other words

These analogies are by no means perfect. They serve to underline the key point that general equilibrium systems make everything depend on everything else but do not reduce prices to other prices or words to other words.

Phenomenological general equilibrium. Everything we grasp (apprehend) as a whole is what it is only by virtue of its place in a larger context. That is, every perceived whole is “really” just a part at least partially determined by the context. The context, in turn, is determined by what we are paying attention to. Most of the things in the world are “over the horizon,” i.e., not present to our minds, when we focus on something in particular. If we change our focus, we change the context and the position of the horizon. It may appear to me that I have grasped you in your particularity, and that I can do that prereflectively—without giving it a second’s thought—but that grasping is relative to the horizon in question, meaning that I have in the back of my mind the surrounding universe within the horizon, and that presupposed universe is necessary for you to be what you seem so unequivocally and independently to be.

For example, I can identify you as “a man” only because you exist as part of a larger system that I am not thinking about when I so identify you. I focus on you in particular, but apprehending you as a man can only happen because the you I focus on is part of a “world” that I presuppose at every moment of apprehension. So, there has to be a category of man, and I have to have in mind that there are many others like you, but for there to be man there has to be woman, and for there to be man and woman there have to be animals, and so forth.

Husserl’s phenomenology directly addresses the issue left obscure in both Walras and Saussure as to how we are to understand the relationship between the price/sign and “reality.” Husserl suggests we “bracket” (parenthesize) this question, that is, that we leave it in abeyance while we reflect on the relations “on the surface,” so to speak, of the world as it appears to us as naive observers.⁷

⁷ See EDMUND HUSSERL, *THE ESSENTIAL HUSSERL: BASIC WRITINGS IN TRANSCENDENTAL PHENOMENOLOGY* (Donn Welton ed., 1999).

iii. Input/Output Systems

Structural functionalism. Here, the idea is that we can understand what look like wholes as parts of a system that is internally differentiated with each part having a function to perform in order that the system as a whole can reproduce itself. There is a flow of inputs that get processed by the various functions, so everything remains the same. Suppose that in the same way as a person has to have a liver in order to survive, a society must have a mode of dispute resolution. There must be an element in its structure that performs this “function.” The function both explains the existence of the structural element or part, *whatever the part itself may think it is doing*, and provides a criterion for assessing the part—how good it is at performing its function.⁸

Cognitive systems. A cognitive system “processes information,” meaning that it does more than mechanically respond. Processing information means transforming raw data by turning it into inputs organized within a set of categories that reside in the processor. The facts of the case as recounted by the parties are scanned and winnowed to select those that the legal system has identified as determining the application in one way or another of a rule of the legal system. Who cares whether the horse was white or black? Horse color is irrelevant to the crime of horse theft.

But processing goes beyond scanning and winnowing: if the only categories of sexual relations in the legal system are forced and consensual sex, each with a well-defined, distinct consequence (conviction or acquittal), then the processor must decide whether a given narrative involves one or the other, even if this distinction is foreign to or just ignored by the narrator. This type of cognitive system is structurally closed but cognitively open, because it has a fixed set of interpretive categories and only two responses, but can process any narrative.

⁸ See TALCOTT PARSONS, *THE SOCIAL SYSTEM* 19-22, 483-86, 533-35 (1951). Such a system may be *self-equilibrating* or *cybernetic*. The cybernetic system reacts to changes in its environment in order to maintain itself in equilibrium, rather than in order to reproduce itself. It does this through feedback loops. The idea is that of the thermostat—the system has a way to return to the equilibrium heat level when the temperature falls, and then to stop heating when the temperature reaches the equilibrium level. But the system is invariant. Operating does not change the system, only the temperature. In a competitive market, deviation from the competitive price produces action that returns the system to where it was (no one buys if you price too high; supply is exhausted if you price too low). For a useful discussion, see KENNETH E. BOULDING, *BEYOND ECONOMICS: ESSAYS ON SOCIETY, RELIGION, AND ETHICS* (1968).

Systems that learn. A more complex model is Piaget's, in which the system is not merely cognitively open—it can “assimilate” a “new” narrative by adjusting its categories, and also “accommodate” by modifying its outputs or responses to a given input or stimulus.⁹ Such a system can be described as “learning” or “evolving” or “developing,” because it changes responsively rather than simply processing according to its protocol whatever data are fed in. But unless some good explanation is given of just why the system changes in one way or another in response to variations in the inputs, we will accuse its auteur of irrationalism or vitalism, even if he claims to be a scientist.

Autopoietic systems. A cognitive system is more or less autonomous or “autopoietic” to the extent that it is programmed to produce, regulate, and adapt its own elements, rather than relying on the environment to do these things for it. In law, for example, legal academic writing provides, within the legal system, a constant supply of normative direction for those who do the first order work of interpreting and applying rules to facts.¹⁰

2. Irrationalist Organicism

a. *Romantic Devolutionary Organicism*

In this genealogy, the social whole is romanticized, but it is also seen as in decay, since yesterday or since the neolithic.¹¹ A major theme is that the process of decay is related to rationalization, the very process that is celebrated in narratives of Western progress. It is the rise of science and the decline of religion, or the rise of the market and the decline of the village community, that drives the devolutionary process. The key part/whole move is to attribute traits of individuals to the condition of the society as an organism, rather than to the will or to the intrinsic character of the actor. This goes first for virtues and vices, and, second, for what seem intensely personal emotions of alienation or anomie or angst. Romantic devolutionism can be either right wing or left wing or both. It can have a strong religious

⁹ See JEAN PIAGET, *PLAY, DREAMS AND IMITATION IN CHILDHOOD* (C. Gattegno & F.M. Hodgson trans., 1951).

¹⁰ See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993) (1989).

¹¹ My favorite piece in this genre is Ruskin's *The Nature of Gothic* in *The Stones of Venice*, in which he praises Gothic and condemns Renaissance style on the ground that Gothic is organic and holistic while Renaissance mechanical and atomic. See JOHN RUSKIN, *THE STONES OF VENICE* 118-39 (Jan Morris ed., Little, Brown & Co. 1981) (1853); see also JOHN RUSKIN, *UNTO THIS LAST* (Routledge/Thoemmes Press 1994) (1862).

component or not. After World War I, it was associated with fascism. Today it is associated with communitarianism.¹²

I am critical of romantic devolutionism because I like modernity, modernist culture, and cities, have no longing for earlier forms of community, am an atheist, like pop culture in many of its manifestations, and don't think for a minute that the human condition in the Western bourgeois democracies is getting worse and worse with the passage of time.¹³ I like the romantic devolutionist emphasis on culture as consciously created through collective projects. And I think it is often invaluable to re-conceive what people experience as individual, personal traits and emotions as products of social forces that are transindividual and impersonal. It's just that devolutionists are "Golden Ageists" and are likely to be scolds.

b. *Dialectical Transformation*

What looks to you like a whole is "really" just a temporary synthesis of previously discordant parts, about to develop an internal "contradiction." The contradictory elements, thesis and antithesis, will at first appear as wholes in their own right. But then there will be "transcendence" or "going beyond" the opposition to a new synthesis, in a process that is simultaneously analytic and temporal, and is, obviously, a lot "bigger than the both of us." The process turns out to be a path—toward the self-transparent harmony of the whole and its parts—and Spirit turns out to be both the driving force and the underlying logic of the process/path.

What makes the dialectic irrationalist in my sense is that Hegel provides no account at all of why one emergent contradiction, rather than another, or why one synthesis, rather than another, were the particular vehicles by which Spirit developed in the world. The genius of the method is that he does indeed show over and over again that the synthesis incorporated elements of the prior opposition into a new whole, which then divided along a new axis, but to show is not to explain (though he seems to think he is explaining). Hegel's dialectic is also irrationalist because it is "vitalist," by which I mean that Spirit in itself and in all its manifestations has the characteristic of "life" or

¹² See CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1978).

¹³ See DUNCAN KENNEDY, *SEXY DRESSING ETC.* 126-214 (1993).

“appetite”—in order to live it must eat, so to speak (right up to the end where this is no longer necessary).¹⁴

3. The Legal Uses of Organicism

There is a long history of deploying organicist models in studying law. For example, against legal positivism: positive law looks like a free-standing entity, produced by a free-standing sovereign will. But organicist analysis shows that positive law is rather a part, with both its content and its application at least partially determined by the larger cultural context.¹⁵ Another mode is to show that legal institutions that seem to operate autonomously are functional elements in larger systems, and are better understood, say, as “resolving disputes” so the larger system can reproduce itself than as “pursuing justice.”¹⁶ A third idea is that legal institutions are themselves complex systems, and that the actors who play roles in them are determined by the system context, even when they think they are acting autonomously.¹⁷

All the organicisms are available as items of the conceptual vocabulary we critics deploy according to our theory circumstances. All are also open to two modes of use, a bad use and a good use. In the bad use, the theorist believes in his theory more than he should. He thinks that his version of the logic of the whole has explanatory power so great that it makes it possible to dispense with other ways of accounting for the part. Writers in the antinomian, paranoid structuralist, and semiotic genealogies spend as much time trashing the pretensions of organicisms to explain everything as they do in the more politicized critique of particular regimes of domination and of liberalism broadly conceived. The good use of organicism is critical: it aims not to provide a theory of the whole that will dispense with all other accounts of the part, but to use the revelation of the part’s complex connection to the whole

¹⁴ See G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* (J.B. Baillie trans., MacMillan Co. 1971) (1807) [hereinafter HEGEL, *PHENOMENOLOGY OF MIND*]. Hegel’s work is brilliantly read by Herbert Marcuse, see HERBERT MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (2d ed. 1960), and Catherine Colliot-Thélène, see CATHERINE COLLIOT-THÉLÈNE, *LE DÉSENCHANTEMENT DE L’ÉTAT: DE HEGEL À MAX WEBER* (1992).

¹⁵ See GEORG W.F. HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT* (T.M. Knox trans., Oxford Univ. Press 1942) (1821); FREDERICK CHARLES VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (Abraham Hayward trans., Arno Press 1975) (1831); see also EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Arno Press 1975) (1936).

¹⁶ Brian Tamanaha usefully summarizes and critiques this kind of thinking. See Brian Z. Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 OXFORD J. LEGAL STUD. 501 (1995); see also MALINOWSKI, *supra* note 3; PARSONS, *supra* note 8.

¹⁷ See TEUBNER, *supra* note 10.

to destabilize the complacent and/or apologetic focus on the naturalness or autonomy of the part.

B. *Antinomianism*

Antinomianism is the idea that “you can never rely on the law.” It means that as moral and political actors we make choices that cannot be justified according to the available principles that are supposed to govern that particular kind of choice, because it is “in the nature” of the principles that they either contradict each other or “run out” just when we need (and want) them most to tell us what to do. We have then to resort to inspiration or intuition. This is the irrationalist strand in antinomianism, and it applies when we attempt a phenomenology of decision making.

But antinomianism also has a rationalist strand: it also means that if we want to understand what other people have done, as social actors, we must beware the mistake of imagining that their action could have been “just” the “application” of the principles or other maxims that were supposed to have governed their conduct. Even when they themselves are most fully convinced that what they did was to act according to their principles, it will turn out over and over again that the choice was underdetermined (not altogether undetermined) by the available principles, and that conscious or unconscious strategic behavior, rather than strictly interpretive behavior, must be added to the mix if we are to understand the outcome. (The following discussion is the longest of the four because the “forceful joining of opposites” I attempt here is new (at least to me) while the others are more familiar.¹⁸)

1. Irrationalist Antinomianism: Charisma

- a. *There Is No Necessary Correspondence Between the Ethical and the Best Possible Interpretation of the Ethical Principles that Bind the Decision Maker, So that Ethical Behavior Has to Rely on Faith and Inspiration*

Whenever you argue that we can behave ethically by following or applying a valid ethical maxim, the antinomian responds that “the letter killeth, but the spirit giveth life.”¹⁹

Many antinomian writings are not just Protestant but deeply dissenting Protestant, obsessed with the notion that Protestantism is different “in its essence” from Judaism and Catholicism because

¹⁸ For some influences, see *EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE* (Walter Kaufmann ed., 1956), and *ÉDOUARD MOROT-SIR, LA RAISON ET LA GRÂCE SELON PASCAL* (1996).

¹⁹ 2 *Corinthians* 3:6.

of its attitudes toward textual authority (divine law), spiritual authority (e.g., the Pope), and temporal authority (including Protestant church governance). But I don't think there is in fact anything particularly Protestant about antinomianism. It seems to crop up in all the traditions, with Pascal's *Pensees*²⁰ and *The Brothers Karamazov*²¹ being important examples for me. That many Protestant authors have had ignorant or scarily prejudiced ideas about the "essence" of Judaism or Catholicism is a turn off, and didn't bode well for those groups in many situations, but doesn't undermine at all, for me, the insights I am going to try to describe.

The point I take from *Fear and Trembling*²² is that, in our ethical life, it is a core experience that we have an intuition of what is ethically binding (God's command that a father sacrifice his beloved son) that violates both a clear moral law and our own desire. In this situation, which is paradigmatic rather than bizarre, we have to decide, in fear and trembling, one way or the other, with *no* "warrant" at all that it will all be okay in the end. If we are lucky, it turns out at the last moment that our willingness to defy both the law and our desire somehow gets us out of it (God relents, reaching down to stay Abraham's hand, as in Caravaggio's picture, as his sword descends, because it was "just a test"). If you goof, you go to hell.

This is (is readable as) a critique of the idea of "principle," as it is understood in mainstream intelligentsia (as opposed to popular) culture. Because the letter killeth, you need faith or inspiration, and then you may need divine intervention if trying to do the right thing is not to end you in the soup. The point is not to try your absolute best to decide what principles govern and then apply them. That is legalism. The point is to submit to the dialectic of principle and inspiration in search of a justice that transcends them both. So, it would be completely missing the point to hope to be "guided" by inspiration as an alternative to being guided by principle. You may have to give yourself to one or the other, but it will be without the benefit of a "metaprinciple" that isn't instantly nihilated by a metaintuition.

This attitude is irrationalist in two different ways. First, because it denies that we can incorporate "the spirit" (say, intent, or policy) into the process of interpreting "the letter," and thereby

²⁰ BLAISE PASCAL, *THE PENSÉES* (J.M. Cohen trans., Penguin Books 1961) (1660).

²¹ FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* (Constance Garnett trans., Random House 1950) (1880).

²² SØREN KIERKEGAARD, *FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH* (Walter Lowrie trans., Princeton Univ. Press 1954) (1843).

overcome the opposition. And, second, because it populates the universe with conceivable resources to deal with the ensuing dilemma—for example, God, or just American-Congressperson-on-a-talk-show “spirituality.” So one can be antinomian—and even believe that one may be called on to sacrifice one’s beloved son—without freaking out altogether, because one imagines that faith in something or other and inspiration from somewhere or other will at least possibly help one out.

I have no belief in any of these things. God’s command to Abraham is for me “just a projection” and may actually represent my (evil) desire (see below under Paranoid Structuralism). But I totally buy the analysis of ethical life as hopelessly conflicted and angst-ridden. It’s just that it’s not so simple as law against grace.

The antinomian irrationalist tradition, because of its spirit/letter dichotomy, has both strong authoritarian and strong antiauthoritarian tendencies. When the available normative resources leave the person in charge (the authority) in an antinomian pickle, he may find himself in the position of Dostoyevsky’s Grand Inquisitor, having to choose between apparently contradictory moral imperatives.²³ He may have to enslave the ruled for their own good, and so forth. If the enterprise turns out not to be ethical after all, or if the authority chooses the wrong “exception,” then authoritarianism gets you sent straight to hell; but you have no way to avoid that risk.

When I am an antinomian subject to state law (Ellul),²⁴ rather than an authority, it is always possible that the authorities will unequivocally command unethical action—action against God’s will. Since it is my own salvation that is at stake in deciding what God really wants me to do, I have to be ready to defy the authorities when obedience will damn me, and I have to be ready to submit to them when obeying the immoral command is the moral thing to do.

Again, I am not myself even slightly likely to feel that the ethical is God’s command or that damnation is the punishment for doing what the authorities say I should when it is against my conscience. And the people I am admiring here may be killing doctors who perform abortions. In that case I am very much in favor (as a Grand Inquisitor) of locking them up, and I often think that the best way to understand them is through the DSM-IV.²⁵

²³ See DOSTOYEVSKY, *supra* note 21.

²⁴ See JACQUES ELLUL, *ANARCHY AND CHRISTIANITY* (Geoffrey W. Bromiley trans., William B. Eerdmans Publ’g Co. 1991) (1988).

²⁵ AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994).

But these judgments do not rest on principle. They are different only in substance, not in method, or in “warrant,” from those that drive crazies. And like the crazies I do not believe that it is permissible to obey the authorities, no matter how clearly I have consented to their rule, and no matter how impeccable (according to legal criteria) their interpretation of the law, when they command what in my judgment based on all the circumstances it is wrong for me to do.

b. *From Antinomianism to Decisionism: Nietzsche and Weber*

The transitional figure between antinomianism and the secular topic of decisionism seems to be Nietzsche. Nietzsche is an irrationalist antinomian in the typology I have been developing, because he wants to sacralize the “will to power.” In other words, Nietzsche wants to return charismatic authority from a projected supernatural realm into the individual world-creating subject. If this doesn’t work for you, but you have lost faith in God and confront one of the typical antinomian moral dilemmas or paradoxes or conflicts or gaps, then you are in the decisionist situation: you have to decide without either rational or supernatural warrant.²⁶

Nietzsche’s contribution was to set the problem up in this way, and I must admit that I don’t understand the impulse to reject the problematic because his solution seems either crazy or evil. Lots of people with crazy and evil ideas also have interesting and valuable things to say about the world, it seems to me. Moreover, even if it turned out to be true (it seems to me fanciful) that “Nietzsche’s ideas led to Hitler,” I would still be interested in getting everything I possibly could out of them for my own purposes.

The crucial thinker about antinomianism from the outside and (maybe) the first thinker about decisionism from the inside was Max Weber. Weber’s “disenchantment” occurs when “rationalization,” a multivariant self-sustaining process over long historical time sequences, deprives actors of the capacity to fill (through projection) ethical lacunae and resolve ethical contradictions by inspiration. At the same time that it disenchant, rationalization disempowers the individual social actor, supplanted by “impersonal” technocratic and bureaucratic practices.

²⁶ See FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* (R.J. Hollingdale trans., Penguin Books 1973) (1886); FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Douglas Smith trans., Oxford Univ. Press 1996) (1887) [hereinafter NIETZSCHE, *GENEALOGY OF MORALS*]; FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* (Thomas Common trans., Macmillan 1916) (1883-85).

What I take from Weber is not his long-run historical determinism, or philosophy of history—according to which disenchantment and disempowerment are irreversible and also represent the tragic triumph of reason over inspiration/illusion—but his “universal sociology,” which identifies enchantment, rationalization, disenchantment, and disempowerment as concrete historical processes that we can study. Weber’s analysis identifies a particular kind of situation for an actor caught up in the end stages of such an historical process—the situation that is theorized as “decisionism” by later thinkers. Weber’s own answer is the professional rather than religious “vocation.”²⁷

2. Rationalist Antinomianism: Decisionism

Post-Nietzschean decisionism means that you believe that people “just decide,” i.e., that we cannot give a rational or an inspirational account of some choice that is convincing to ourselves or others. To say that you are a decisionist is to say that you believe that within some domain of choices, the choices are “unaccountable” in terms of some set of criteria for choice. People who are “against” decisionism typically interpret it as an impossibility theorem about rational or inspirational justification of choices, that is, as the belief that it is necessarily impossible to give an account of choice within some domain as rational or inspired. (They sometimes even think that Plato long ago refuted decisionism in the form of sophism—have another look if you think this.²⁸) But this interpretation is inaccurate and quite uninformative about the “real issues.” The people preoccupied with the notion that you “just decide” are engaged on different sides with the claims made for particular systems for the justification of personal and political choices, and for the explanation of patterns of outcomes.

a. *Decisionism and Underdetermination of Choices*

What is interesting and valuable to me in the thought of those commonly denominated decisionists—including Nietzsche,²⁹

²⁷ MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H.H. Gerth & C. Wright Mills eds., 1946); MAX WEBER, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra*, at 129; MAX WEBER, *The Social Psychology of the World Religions*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra*, at 267; see also COLLIOT-THÉLÈNE, *supra* note 14; HARVEY GOLDMAN, POLITICS, DEATH, AND THE DEVIL: SELF AND POWER IN MAX WEBER AND THOMAS MANN (1992).

²⁸ See PLATO, GORGIAS (Donald J. Zeyl trans., Hackett Publ’g Co. 1987); PLATO, REPUBLIC 1-32 (G.M.A. Grube trans., Hackett Publ’g Co. 1992).

²⁹ See *supra* note 26 and accompanying text.

Weber,³⁰ Schmitt,³¹ Sartre,³² and Camus³³—is first of all the critique of particular discourses of justification, including Christian ethics, liberal ethics à la Kant or Mill, liberal constitutionalism, and Marxism. In each case, the first part of the argument is that the discourse of justification underdetermines important choices. This part relies on an “internal critique” of some claim of interpretive closure within the justificatory discourse. The making of internal critiques of this kind is part of the Weberian rationalization process, and so can be done, and often is, by good-faith participants in the project of justification through the discourse in question. The internal critique may be more or less global—that is, it may allege that the discourse must always and necessarily fail of closure, or that it must necessarily sometimes fail, or just that it failed in a particular case of interest to us. What makes the thinker a decisionist is not that he has a global or ontological critique of justificatory closure, but that, after coming upon a situation of choice where governing norms contradict one another or “run out,” he refuses the enterprise of either repairing the discourse or replacing it with a new discourse that will be more determinate.

If the decisionist is a responsible actor, and time has run out at the same time “the law” has, then she accepts that she will just have to “do it” on the basis of intuition rather than with a “warrant.” The decisionist as analyst, on the other hand, wants to talk about how we can understand decisions that are underdetermined by the discourse that is supposed to guide them. This inquiry into the intelligibility of the indeterminate can have either a normative or a descriptive focus—either on making ethical sense of underdetermined action, or figuring out how the existence of denied lacunae in normative systems modifies their operation as normative facts (internalized by actors) in the world.

³⁰ See *supra* note 27 and accompanying text.

³¹ See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Rutgers Univ. Press 1976) (1932) [hereinafter SCHMITT, *CONCEPT*]; CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., MIT Press 1985) (1923) [hereinafter SCHMITT, *CRISIS*]. As far as I can tell, Schmitt’s most elaborate statement about the legal order in general, as opposed to the constitutional order, and his most complete statement of decisionism as a category for understanding law, is in *Über die Drei Arten des Rechtswissenschaftlichen Denkens*, which I have read in Spanish translation. See CARL SCHMITT, *SOBRE TRES MODOS DE PENSAR LA CIENCIA JURÍDICA* (Montserrat Herrero trans., Tecnos 1996) (1934) [hereinafter SCHMITT, *TRES MODOS*].

³² See JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (Hazel E. Barnes trans., Philosophical Library 1956) (1943) [hereinafter SARTRE, *BEING AND NOTHINGNESS*]; JEAN-PAUL SARTRE, *THE PROBLEM OF METHOD* (Hazel E. Barnes trans., Methuen & Co. 1963) (1960).

³³ See ALBERT CAMUS, *THE REBEL* (Anthony Bower trans., Vintage Books 1956) (1951).

b. *The Friend/Enemy Diad = The Dialogic/Strategic Diad*

For many years, when I happened to be peddling antinomian ideas in Europe, ideas that I thought derived from existentialism (the absurd, the notion of action as metarational commitment), and that I thought I was applying for the first time to judicial decisions, some purportedly friendly European law prof would take me aside and tell me that I sounded just like Carl Schmitt, and then that Schmitt was a decisionist and also a Nazi, and that I might want to rethink my position in light of the resemblance. I regret that I didn't read *The Concept of the Political*³⁴ until last year, since I think it is an extraordinarily valuable book, one that helps clarify many debates within critical theory.

The Schmittian claims that fit neatly into the antinomian genealogy are two. First, it is always possible that the evolution of group conflict, within any conceivable liberal constitutional regime, will end up in a situation where power holders (maybe just "the people") are ethically required to violate the constitution (to make an "exception"). This occurs when the political process is polarized in such a way that the actor believes that the survival of his group's "way of life" turns on his willingness to disobey the clear rules of the system. Liberal constitutional principles will leave the actor in a situation like that of the Kierkegaardian patriarch, unsure whether or not to sacrifice his son.

Second, once this situation has come into being, there is no set of ethically plausible liberal principles whose observance rules out the possibility that a power holder will be ethically obliged to escalate rule breaking into civil war or revolutionary war against the opponent.

I find both of these claims highly plausible.³⁵ Imagine a group that makes choices under a norm of deliberation that is understood as dialogue, in which each participant attempts to win the others over to a position by appealing to mutually acceptable or universalizable principles. When time runs out without agreement, the relationship of the actors is no longer dialogic but strategic. This means that they now aim to make their position prevail according to whatever rules govern conflict. The result will be against the wishes of the losing parties. If we want to understand the outcome, we have to understand it as imposed by some on others in the sense of not agreed to.

An outcome is the product of strategy rather than dialogue even if it occurs by application of an unambiguous rule of decision

³⁴ SCHMITT, CONCEPT, *supra* note 31.

³⁵ See CRITIQUE, *supra* note 1, at 43-44, 187-212.

for cases where there is no agreement, for example, a rule of majority rule. In this case, of course, the outcome is not imposed by force, but according to agreement about what to do in the absence of agreement. The outcome is also determined by the clash of strategic actors if it is a bargain—in bargaining, the goal is to get as much as you can, “getting to yes” by expanding or shrinking the pie according to what maximizes your take, within whatever ground rules govern bargaining. Another strategic mode is violence, meaning the use of force beyond or outside whatever is built into the preexisting decision rules. Killing all those who favored the other position, or throwing them out of the country in violation of the legal norms previously governing this kind of action, are examples of settling the disagreement about what to choose by violence.

Suppose that, under the existing decision rule determining the outcome in the absence of agreement, we will lose, and our way of life will be threatened or extinguished. Now we begin an infinite regress. We open a dialogue about changing the decision rules (say, by constitutional amendment). When that fails, we open a dialogue about changing the second-order decision rules about changing the first-order decision rules (say, by changing the procedure for amending the constitution). Time runs out without agreement to change at either level. Do we have to obey the governing decision rules in spite of the high stakes? Should we resort to violence against those who win according to nonviolent decision rules given the stakes, or use violence to change to a new nonviolent decision rule that will permit us to win the stakes?

Looked at in terms of the system as a whole, from the outside, we may be tempted to say that the outcome was the result not of agreement generated in a system of fair argument, but a result of the “balance of forces.” But, for rationalist decisionists, this way of looking at it is profoundly misleading because it leaves out the decisions of the actors about which rules of the game to honor and which to break. Rationalist post-Nietzschean decisionists are preoccupied with finding and analyzing the situations in which decisions about rule breaking plausibly determined the outcome of strategic interaction. They are also preoccupied with the various ways in which actors deny that their choice to follow or violate the rule was unjustifiable because undecidable within the available discourses covering this kind of choice.

c. *Decisionism and Murder*

It is common to say that if you insist that it is always possible that dialogue will give way to strategy, and that the strategic has no

internally generated necessary stopping point short of all-out war, you are endorsing, or at least inviting, political murder. Schmitt himself sometimes seemed to think that all enemy/enemy schemata were in some sense logically destined for a war to the death.³⁶ (Very much in the mode of Hegel's dialectic of the master and the slave³⁷—an obvious origin that today's liberal critics of Schmitt don't say much about.) And Schmitt argued that to prevent that you needed either "homogeneity"³⁸ (no Jews) or leadership (the Führer principle).³⁹ None of these views are implicit in decisionism.

Schmitt also argues, and I think here he is decisionistically correct, that because there is no built-in logical stopping point, it may be justifiable to do things that are utterly criminal in terms of the rules of everyday social life in order to prevent some larger massive loss of stakes. This, of course, was the view of both Hobbes⁴⁰ and Locke,⁴¹ as well as Machiavelli,⁴² and indeed the whole tradition of *raison d'état* and of those who tried to assassinate Hitler. But it does not follow at all that every enemy/enemy confrontation ethically justifies any particular strategic (other-as-object) behavior, or that as an empirical matter all such oppositions lead to murder.

Indeed, we decisionists, who believe that justificatory systems are pervasively underdeterminative of issues with large stakes, seem to have a tendency to believe that it is almost always the case that the best thing to do is for the parties to compromise. But we don't believe that you can exclude a priori the possibility of situations in which things are much more dire. From our point of view, the problem with Schmitt (other than that he was a Fascist) was that he was too much of an organicist, believing either in national homogeneity or in the psyche of the leader as a way out, rather than that he was too much of a decisionist.

Let me illustrate what I am saying. I worked for two years for the CIA, in the operation that funded and controlled the foreign activities of an organization called the National Student Association. I justified what I was doing on the quite uncannily

³⁶ See SCHMITT, CONCEPT, *supra* note 31.

³⁷ See HEGEL, PHENOMENOLOGY OF MIND, *supra* note 14, § 433.

³⁸ See SCHMITT, CRISIS, *supra* note 31, at 5.

³⁹ See SCHMITT, TRES MODOS, *supra* note 31.

⁴⁰ See THOMAS HOBBS, LEVIATHAN (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

⁴¹ See JOHN LOCKE, *Second Treatise*, in TWO TREATISES OF GOVERNMENT 285 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

⁴² See NICCOLÒ MACHIAVELLI, THE PRINCE (A. Robert Caponigri trans., H. Regnery Co. 1963) (1513).

Schmittian ground that there was a conflict of “ways of life” and our deceptive activities were within the range of acceptable costs of containing the Soviets. I was a “cold war liberal,” a person who favored left-wing but anticommunist reforms all around the world. My nonliberalism began in 1966 (just before the operation’s cover was blown) when I began to feel that the Soviet threat was not serious enough to justify what we were doing, and that the left-wing reforms would never materialize. I quit, and after that I thought I could be preoccupied with what the overwhelmingly liberal American ruling class was doing in Vietnam, and failing to do in response to the black ghetto riots, without worrying for as much as a second that the real threat was from communism.

I was surprised when the Church investigation revealed CIA assassination plots,⁴³ because I had naively believed such conduct extremely unlikely as well as unjustified and foolish under the circumstances, rather than because I thought it was categorically wrong regardless of the circumstances. As I now see it, I made the wrong decision when I signed up (misassessing the strategic situation and too strongly influenced by the offer of a draft deferment), wrong under the circumstances rather than categorically.

3. Antinomianism in Law

The current discussion of Schmitt and of decisionism in general, from my point of view as an American legal academic rather than a political theorist, is very odd. It is only rarely acknowledged (e.g., a footnote reference in passing to Dworkin in Rob Howse’s article on Schmitt and Strauss⁴⁴) that modern American legal theory is obsessed with this very problem. Writers like Scheuerman⁴⁵ and McCormick⁴⁶ seem never to have heard of the “countermajoritarian difficulty.”⁴⁷

The starting point (not the end) of the American constitutional theory debate is that the extant legal materials seem persistently to underdetermine outcomes in situations with very

⁴³ See, e.g., Nicholas M. Horrock, *Church Says C.I.A. Actually Tried to Slay Castro*, N.Y. TIMES, Oct. 6, 1975, at A1.

⁴⁴ See Robert Howse, *From Legitimacy to Dictatorship—and Back Again: Leo Strauss’s Critique of the Anti-Liberalism of Carl Schmitt*, in *LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM* 56, 87 n.20 (David Dyzenhaus ed., 1998).

⁴⁵ See WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* (1994).

⁴⁶ See John P. McCormick, *Schmittian Positions on Law and Politics?: CLS and Derrida*, 21 *CARDOZO L. REV.* 1693 (2000).

⁴⁷ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press 2d ed. 1986) (1962).

high stakes (e.g., *Brown v. Board of Education*⁴⁸). To say that the legal outcome is underdetermined by the relevant legal discourse is to say that, looked at as an actor within that discourse, the judge “just decides.” This seems to put the judges in the position of dictators in the Schmittian system, but of dictators with a malleable justificatory discourse designed to disguise their power rather than to advertise it.

The constitutional debate has interacted for a hundred years with the private law theory debate, whose starting (not ending) point is that the extant legal materials seem persistently to underdetermine outcomes in cases with small stakes but obvious ideological significance. The contribution of sociological jurists and legal realists to both debates turned out to be critical rather than constructive. They developed a repertoire of destructive moves directed at legal reasoning, a repertoire that makes it hard to produce the effect of legal necessity (the rule of law, in its commonplace definition) and easy to show choice—and bias.

In the postrealist legal universe, because the rule itself is so often malleable, so often subject to strategic inflection in the interpretive process, the judges dispose large stakes without worrying about defying their oaths. Another way to put this point is to ask whether the criminalization of the American Communist Party amounted to a Schmittian “exception,” meaning a violation of the Constitution possibly in a good cause, or a valid legislative act within the boundaries established by the First Amendment.⁴⁹ From a postrealist decisionist perspective, there is no “right answer” to this question.

This means that the Schmittian problem of “the exception” is the least of our difficulties.⁵⁰ The temptation of the “exception” is unlikely to be the issue because the judge doesn’t need such extreme measures, and the problem of malleability is pervasive rather than limited to situations of constitutional crisis involving “ways of life.” The judges will dispose, at least some of the time, according to criteria other than those built into the materials and the legal tradition.⁵¹

⁴⁸ 349 U.S. 294 (1954).

⁴⁹ See *Dennis v. United States*, 339 U.S. 162 (1950).

⁵⁰ See CRITIQUE, *supra* note 1, at ch. 5.

⁵¹ The intricate specificity of the sociological jurists’ and realists’ internal critiques has a more straightforward (though, to my mind, less convincing) parallel in European legal theory. According to Kelsen, every “application” of a norm is a new norm because indeterminacy is inevitable (he’s not very clear as to why). HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY § 36, at 80-81 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934).

Unless we go with Dworkin's "right answer" theory,⁵² designed to get us out of this very bind. But rather than going down that path . . . on to a third genealogy, one we may want to draw on in trying to make sense of what the judges do with whatever quantum of power we accord them.

C. *Paranoid Structuralism*

Paranoid structuralism teaches us that it is part of our modern social and individual psychological condition that we are playthings of forces whose existence and true relationships the "normal" discourse of our world denies, thereby helping to reproduce the denied condition. The forces have a "logic" we can master, to some extent, but only if we overcome the denial. Reproduction theory⁵³ is just as important here as in organicism, but it has taken a perverse turn. The paranoid structuralist asks how unwanted things get reproduced, rather than how the organism sustains itself through time. The answer is paranoid because it emphasizes that "out there" forces or people or structures operate behind our backs, insinuating themselves into our very being to make us feel that we are freely choosing what is bad for us. The result is that we can't trust ourselves or anyone else, unless and until we have . . . undergone enlightenment.

1. Marx/Freud Parallelism

I am struck by the strong parallels between Marxist theories⁵⁴ of the significant parts of a capitalist society and their interaction, and Freudian theories⁵⁵ of the parts of a modern psyche, and their interaction. I will present these parallels in a quick schema,

According to Hart, the law will inevitably sometimes "run out," when we move from "core" to "penumbra," and the judge's decision will be "legislative." No rule can determine the scope of its own application and only forms of life guarantee the existence of a core. H.L.A. HART, *THE CONCEPT OF LAW* 124-41 (2d ed. 1994). Their theories do not preclude, indeed they seem to make it inevitable that, judicial lawmaking will sometimes dispose large stakes.

⁵² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 60, 118 (1977).

⁵³ See *supra* Part I.A.1.b.

⁵⁴ See KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (Frederick Engels & Ernest Untermann eds., Samuel Moore & Edward Aveling trans., The Modern Library 1906) (1867) [hereinafter *CAPITAL*]; KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO OF KARL MARX AND FRIEDRICH ENGELS* (D. Ryazanoff ed., Eden Paul & Cedar Paul trans., Russell & Russell 1963) (1848); KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* (Daniel de Leon trans., Charles H. Kerr & Co. 3d ed. 1919) (1852); KARL MARX, *On the Jewish Question* (1844), in KARL MARX: *EARLY WRITINGS 1* (T.B. Bottomore ed. & trans., C.A. Watts & Co. 1963) [hereinafter *MARX, On the Jewish Question*].

⁵⁵ See SIGMUND FREUD, *A GENERAL INTRODUCTION TO PSYCHOANALYSIS* (G. Stanley Hall trans., Boni & Liveright 1920) (1917).

leaving for another time the many qualifications.

First, the id is to the ego as the proletariat is to the bourgeoisie. The ego and the bourgeoisie “repress” the id and the proletariat—of course, in quite different senses of repression. At the same time, the bourgeoisie and the ego are utterly dependent on the proletariat and the id. The ego runs on unconscious drives, and the bourgeoisie lives by exploiting the labor of the masses.

Second, the ego deals with irrepressible conflict through defense mechanisms (rationalization, denial, projection, etc.), while the bourgeoisie deals with this kind of conflict through ideology (both liberal political theory and political economy). “Irrepressible” isn’t quite the same thing in each case, but all the same. In each case the “actor” does not understand his own action—neither his “true” motives, nor his true place as a cog in the machinery that he appears to command.

Third, the last factor in the equation of the psyche is the superego, which enforces through implacable guilt the harsh “law of the father” (against parricide and incest)—the set of prohibitions that structure the relation of the self to others. In capitalist society, formal bourgeois law, like the superego, gets set aside from and above the *va et vient* of interest conflict. It enforces through the police and, when necessary, through the gunfire of the National Guard against unarmed strikers at the factory gate, the harsh prohibitions against theft and breach of contract that define the “relations of production” at the base of the capitalist economy. This parallel is particularly aesthetically pleasing but also perhaps weaker than the other ones.

So here we are:

proletariat = id

bourgeoisie = ego

formal bourgeois law = commands of the superego

bourgeoisie + ego *repress*

bourgeoisie’s *exploitation* of the proletariat =
the ego’s *dependence on id energy*

bourgeois *ideology* (liberal political theory and political economy) =
ego’s *defense mechanisms*

formal bourgeois law protects *property and contract* through *armed violence* =

the superego's harsh commands forbid *parricide and incest* through *implacable guilt*

I know, I know, we've always already understood this, and, besides, it is completely inaccurate both as a reading of Marx and Freud and as a description of our world . . .

The exercise in parallelism just performed is quite different from the classic exercise of hooking Marxist and Freudian theory together to show how one supplements, contributes to, or is the product of the other. In such exercises, it is the interface or the hookup between the theories that drives us to make them "compatible," so to speak, rather than just the love of parallelism for its own sake, which is what is at work above. The early Wilhelm Reich (*Sex-pol*⁵⁶), the Frankfurt School (particularly Marcuse⁵⁷), and Althusser, in his essay on Lacan,⁵⁸ all try to do hookups based on seeing the parallels, and they rock my world and all, but they are going far beyond (and also falling far short of) what I am trying to identify as the core paranoid structuralist contribution to later correct thought.

That consists in showing that a discourse of description or prescription about the self or the social world can be nothing more (or less) than an elaborate self-deception intended to hide and legitimate a highly structured condition of domination by disreputable or disfavored or evil forces. In social theory, it doesn't have to be capitalism in particular that is legitimated, and in psychoanalysis neurosis is a normal rather than a pathological condition. Gramsci⁵⁹ and Althusser⁶⁰ on ideology and Anna Freud⁶¹ and David Shapiro⁶² on defense mechanisms and neurotic styles contribute a way to understand anything at all, rather than

⁵⁶ WILHELM REICH, *SEX-POL: ESSAYS, 1929-1934* (Lee Baxandall ed., Anna Bostock et al. trans., Random House 1966) (1929-34).

⁵⁷ See HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* (1955); HERBERT MARCUSE, *AN ESSAY ON LIBERATION* (1969); HERBERT MARCUSE, *ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1964); MARCUSE, *supra* note 14.

⁵⁸ See LOUIS ALTHUSSER, *Freud and Lacan* (1964), in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 189 (Ben Brewster trans., Monthly Review Press 1971).

⁵⁹ See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., Lawrence & Wishart 1971).

⁶⁰ See LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses* (1970), in *LENIN AND PHILOSOPHY AND OTHER ESSAYS*, *supra* note 58, at 127.

⁶¹ See ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENCE* (Cecil Baines trans., Hogarth Press rev. ed. 1968) (1936).

⁶² See DAVID SHAPIRO, *NEUROTIC STYLES* (1965).

two parts that can be joined to cover twice as much as any one could cover separately.

2. Rationalist vs. Irrationalist Paranoid Structuralism

One way of seeing it has Marx and Freud as hyper-rationalist theorists because of their scientism—their belief that they were unearthing the hidden laws of operation of their respective objects of investigation. But, on another level, Marx is a rationalist because for him neither conflict nor the opacity of the self to the self is the inescapable condition of mankind. His proletariat, after capitalism strips off all the particular characteristics it acquired under the previous regimes and drives all its members back into a primitive but also universal state of mere subsistence, will then become the instrument of the postrevolutionary conflictless state of communism and attain a form of consciousness that transcends the antinomies of bourgeois thought. (This is the Lukács⁶³ take.)

By contrast, in Freud the most we can hope for is to be able to love and work within our conflicts and neuroses. The id is a much more formidable thing than the proletariat, first just because it is unconscious. The proletariat is knowable to the bourgeoisie and to itself as it attains class consciousness. Second, all energy comes from the id; it is the primal source of life and death wishes. Third, the id is the domain of contradiction, where opposites coexist and the laws of time and space are in abeyance. While the labor power of the proletariat is the source of all value, labor power is a very civilized thing, disciplined and instrumental rather than wild and contradictory.

In the Freudian genealogy, I find more in the wild ones—Reichians, Jungians, Gestalt therapists, Laingians—than in those who have tried hard to get a rationalist grip (e.g., Hartmann⁶⁴). But then we can reread Marx as just a little irrationalist too, because, after all, exploitation physicalizes and de-moralizes the proletariat, reducing it to pure power with nothing to lose, which is the energy for class struggle up to the moment of triumphantly violent physical revolutionary combat against the bourgeois state. And we can trace a “wild Marxist” genealogy through people like Sorel,⁶⁵ forward to Sartre.⁶⁶

⁶³ See GEORG LUKÁCS, *Reification and the Consciousness of the Proletariat*, in *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 83 (Rodney Livingstone trans., MIT Press 1971) (1968).

⁶⁴ See HEINZ HARTMANN, *EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTATION* (1958).

⁶⁵ See GEORGE SOREL, *REFLECTIONS ON VIOLENCE* 136-70 (T.E. Hulme & J. Roth trans., Free Press 1950) (1906).

⁶⁶ See JEAN-PAUL SARTRE, *CRITIQUE OF DIALECTICAL REASON, THEORY OF*

3. The Paranoid Structuralist Paradigm Is Common in Social Theory

To make the analysis structuralist in my sense here, all you have to do is show that a representation or a normative claim is “motivated” in the sense that we can do an internal critique that shows its falsity and then go on to explain, first, why a false claim would be accepted, and, second, how accepting it helps reproduce the situation in which people want to make it. What appeals to me is not just the substance of these theories, but also the template they provide. The template gets applied again and again, and I want to use it too.

So, some examples: Perhaps the granddaddy of them all (but maybe there are many predecessors I don’t know about and maybe there’s an explanation of why he isn’t worshiped except by me) is Feuerbach’s *The Essence of Christianity*,⁶⁷ with its internal critique of Christian dogmatics combined with the theory of God as projection of man’s experience of his own goodness and power onto a distant divinity, producing a neat explanation of man’s evil and impotent existence here below. Another: Nietzsche’s theory of Christianity as slave morality claims that “resentment” of the weak against the strong explains a set of repressive institutional structures and a set of repressive ideas aimed to subdue and domesticate the naturally dominant.⁶⁸ A little-known good one is R.D. Laing’s analysis, in *Sanity, Madness and the Family*,⁶⁹ of the way parents can gaslight children by putting them in double binds, thereby producing what looks like purely individual craziness that stabilizes a tragic collective enterprise.⁷⁰ Another little-known good one, perhaps because it is *so so so* paranoid, is Guy Debord’s *Society of the Spectacle*,⁷¹ which argues . . . ah, go read it yourself.

From Frederick Engels⁷² through Shulamith Firestone⁷³ to the early Catharine MacKinnon,⁷⁴ radical feminists have modeled

PRACTICAL ENSEMBLES (Jonathan Rée ed., Alan Sheridan-Smith trans., NLB 1976) (1960).

⁶⁷ LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* (George Eliot trans., Harper & Bros. 1957) (1841).

⁶⁸ See NIETZSCHE, *GENEALOGY OF MORALS*, *supra* note 26.

⁶⁹ R.D. LAING & A. ESTERSON, *SANITY, MADNESS AND THE FAMILY* (1964).

⁷⁰ See *id.* Forget his *The Divided Self*—much less successful, to my mind. See R.D. LAING, *THE DIVIDED SELF: A STUDY OF SANITY AND MADNESS* (1960).

⁷¹ GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* (Donald Nicholson-Smith trans., Zone Books 1994) (1967). The problem with Debord, to my mind, is that he thinks he can hook his brilliant spectacle theory to very tired French 1950s structural Marxism.

⁷² See FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (Int’l Publishers 1972) (1884).

⁷³ See SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970).

⁷⁴ See Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983)

theories of patriarchy on Marx's theory of capitalism, in one way or another analogizing the reproductive process to the economic "base." Paralleling Western Marxist ideology theory, the cultural feminist theory of "compulsory heterosexuality" claims that women experience themselves as straight in part because they know (but deny that they know) that they will be punished if they manifest forbidden gay impulses.⁷⁵ Then there is the radical feminist notion of the eroticization of domination, according to which women and men learn to get sexual pleasure from male-over-female domination, experience the pleasure as "natural," and are thereby induced to reproduce the regime of patriarchy.⁷⁶

Foucault's theories of subjectification⁷⁷ and sexualization⁷⁸ are, to my mind, the most amazing examples of extending the Marx/Freud paradigm. We think of ourselves as autonomous individual actors in the world, or subjects, because we have been trained to think of ourselves that way, and subjects are gay or straight because they have been trained to "have" a "sexual orientation." Instead of repression, we have discipline, which produces rather than gets rid of subjectivity and sex; and instead of ideology/denial we have the social scientific discourses of normalization. This combination takes Foucault's paranoia well beyond that of his masters, since the very presupposition of autonomy—a subject—and of the private self—sexuality—are reconceived as productions of a malign social whole.

4. The Uses of Paranoid Structuralism

The point is not that, one after another, these paranoid structuralist analyses manage to reduce a piece and then another piece and then another of our social and individual psychological existence to intelligibility. The point is to learn to do a new paranoid structuralist analysis on our own of something that's important to us. There is a big tension here between the ambitions of these thinkers and what they seem to me to offer in fact. They constantly imagine that they are either rationalistically or

⁷⁵ See ADRIENNE RICH, *COMPULSORY HETEROSEXUALITY AND LESBIAN EXISTENCE* (1980); see also MARY JOE FRUG, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992).

⁷⁶ See ANDREA DWORKIN, *INTERCOURSE* (1987); ANDREA DWORKIN, *RIGHT-WING WOMEN: THE POLITICS OF DOMESTICATED FEMALES* (1978); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); see also KENNEDY, *supra* note 13.

⁷⁷ See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Pantheon Books 1977) (1975).

⁷⁸ See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., Vintage Books 1990) (1976).

irrationalistically telling us how things really work by mastering the hidden logic that rules our world. To my mind, the hidden logics always fall to critique (see antinomianism and semiotics).

What survives is that we always have to structure things in order to understand them at all, and we desperately need models of intelligibility that we can adapt to this project as we go along. When we are suspicious that things are not what they seem, in ourselves and around us, and suspicious that this not-what-they-seemness of things is malign, then we need these guys to help us figure out how that could be. They do it by showing how paranoia can be harnessed in the interest of figuring out who the “real enemies” (all us paranoids have them) may be in this situation, letting the merely apparent enemies off the hook, thereby paradoxically freeing us from the very paranoia that set us on our quest. (Unless of course it doesn’t work and we end up more mired in fantasy than we were to begin with.)

D. *Semiotics*

1. Rationalist Semiotics: Saussure and Kohler

a. *The Language Model: Saussure’s Three Distinctions*

The starting point for the semiotics genealogy is Saussure’s set of distinctions for the structural study of language. These are (i) *langue/parole*: the “*langue*” or language is the set of the resources available at any particular moment to compose utterances (*parole*, or “speech”); (ii) synchronic/diachronic: studying the relations among the linguistic elements available at a given moment is different from trying to figure out how a language has changed from one moment to another; and (iii) combination/selection: meaningful utterance depends on stringing words together in a way that obeys the rules of grammar and syntax (this is the dimension of combination), but also, obviously, on the selection of particular words from the indefinitely large set that could be used in that position in the utterance without violating the combination rules.⁷⁹

b. *The Gestalt Model*

Perception operates, always and necessarily, by jumping from a perceptual fragment to a conceptual whole. The jump is prerational, or arational, or “hard wired,” or “organic.” Take your pick. The point is that fragmentary stimuli, words and images, for

⁷⁹ See SAUSSURE, *supra* note 6.

example, cause the mind to jump to the full sign of which they are elements, without the mind having to go through any conscious processing or ratiocination. We just “see it that way” or “hear it that way” or “make the connection,” without thinking it through or being able to rationalize it. The lowest level example is that we turn the series of still images on the film into motion on the screen. Our interpretive activity is out of our control.⁸⁰

A given sign can be a fragment evoking more than one whole. This is the point of the ambiguous gestalt (woman or vase?), but the more important implication is that allusion is possible—i.e., we can move the listener’s or reader’s mind by sticking a fragment of an absent whole into a larger representation, and the fragment will instantly and involuntarily evoke the absent whole, thereby irrevocably “coloring” the overt message. In terms of the Saussurian contrast of combination and selection, this gestalt effect means that selecting a word or a phrase gets you lots of stuff beside that word or phrase—viz., everything that they uncontrollably evoke.

This is the opposite of the part/whole relation described under organicism, in which what looks like a whole turns out to get its meaning from a larger complex with which it is associated.⁸¹ Here, the whole comes into existence at the bidding of the part, rather than the whole turning out to owe its being to the larger whole of which it is a part.

c. *Generalizing the Language/Gestalt Model*

The second step was to look at other complex social phenomena as analogous to language in the specific sense of having this same structure: a set of resources (signs and rules of combination—*langue*) for producing something like an utterance (*parole*) by picking and choosing, arranging and rearranging, maintaining and modifying the given pieces. The first striking example of this seems to have been the Russian formalist insight, elaborated by Jakobson, that the linguistic analysis of poetry was the analysis of a “code within a code.” A poem is “in” English, say, but in order to be a poem it has to be an utterance “in” the *langue* of poetry as well. The conventionally available meters, rhyme schemes, and poetic figures (O wind!), like the rules of English grammar and syntax and the lexicon of available English words, make it possible to “utter” an indefinitely large number of poems, while at the same time radically restricting what is

⁸⁰ See WOLFGANG KÖHLER, *GESTALT PSYCHOLOGY: AN INTRODUCTION TO NEW CONCEPTS IN MODERN PSYCHOLOGY* (1947).

⁸¹ See HUSSERL, *supra* note 7.

recognizably poetic.⁸²

Piaget's analyses of childrens' behavior, which differentiated a limited set of "schemas" of action (touching, sucking, etc.) and reconstructed particular behaviors as combining them in a sequence with a purpose, is analogous.⁸³ The action schemata are like words, and the "behavior" is like an utterance. But this direction was less fruitful than extending the language within a language idea to other systems that involve representation, first verbal and then nonverbal. Lévi-Strauss analyzed myths as utterances in a symbolic language within a language. Myths from all over the world seemed to use the same set of elements, suggesting a universal language behind the infinite diversity of myth as *parole*.⁸⁴

Lacan's famous *mot* that the unconscious is structured like a language signified the extension of the Saussurian schema to psychoanalytic theory.⁸⁵ In place of Freud's emphasis on chaos—the relaxation of the rules against contradiction and requiring spatio-temporal organization—Lacan produces an opposite emphasis on the unconscious as repository of elements from which images and associated feeling-states unfold by free association (metaphor and metonymy) somewhat as in poetry.⁸⁶ The language within a language of "film" (*langue*) provides the elements for a movie, and architecture as *langue* provides a vast repository of elements from which to produce a building (*parole*).⁸⁷

Barthes's most interesting contribution, to my mind, is the clarification of the application of the denotation/connotation distinction to languages within languages by showing that there are two sets of rules being applied. For example, to be "dressed" (to make an utterance in the language of fashion), one must combine a set of elements into a costume according to set rules (like the rules for uttering a sentence). The costume then expresses, according to another set of rules, a meaning or set of meanings about the wearer in relation to other wearers. Each element is simultaneously, say, a pair of pants and an indicator, say, of

⁸² See ROMAN JAKOBSON, *Linguistics and Poetics*, in LANGUAGE IN LITERATURE 62 (Krystyna Pomorska & Stephen Rudy eds., 1987).

⁸³ See JEAN PIAGET, SIX PSYCHOLOGICAL STUDIES (Anita Tenzer trans., Random House 1967) (1964).

⁸⁴ See CLAUDE LÉVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (Claire Jacobson trans., Basic Books 1963) (1958).

⁸⁵ See JACQUES LACAN, ÉCRITS (1966).

⁸⁶ See *id.*

⁸⁷ See PAOLO PORTOGHESI, THE ROME OF BORROMINI: ARCHITECTURE AS LANGUAGE (Barbara Luigia La Penta trans., George Braziller 1968) (1967); see also PAOLO PORTOGHESI, ROMA BAROCCA: THE HISTORY OF AN ARCHITECTONIC CULTURE (Barbara Luigia La Penta trans., MIT Press 1970) (1966).

“macho” or “role reversal,” depending on the cut and color of the pants and the other elements in the costume (the context).⁸⁸ We can do the same kind of analysis of architecture (a roof is a necessary element in the combination of materials called a house, but a particular roof may connote a hunting lodge and therefore that the owner is an aristocrat).

The particular utterance called a legal argument can be analyzed using the language within a language idea. There is a set of necessary elements—a rule, facts, and an application—at least one of which must be in question. When the rule is in question, we can identify the “argument bites,” such as, for example, “no liability without fault” or “your rule would be too difficult to administer,” that legal arguers select, arrange, modify, and supplement in order to produce an argument for the choice of a rule, an argument recognizably spoken in the legal *langue* just because it uses the bites that compose this part of it.⁸⁹

What makes all this the rationalist side of semiotics is that we are looking to establish the lexicon, or collection of signs, and the rules for their combination and transformation to produce a meaning, on the assumption that the “speaker” in the system in question has something in mind, and the “speech” straightforwardly does or does not “represent” what he has in mind. If the something is an inner state, it preexists its expression; if it is an image of the external world, the speech represents that image as well. If it is an “ought,” why then it represents the ought.

2. Irrationalist Semiotics: Deconstruction

What I get from the radicalization of semiotics by de Man⁹⁰ and Derrida⁹¹ and Butler⁹² is a critique of the presupposition in rationalist semiotics that the *langue*, whichever it may be, exists as the instrument of a preexisting subject who is representing a preexisting something. There are three parts to the critique.

⁸⁸ See ROLAND BARTHES, *THE FASHION SYSTEM* (Matthew Ward & Richard Howard trans., Jonathan Cape 1985) (1967).

⁸⁹ See Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

⁹⁰ See PAUL DE MAN, *ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST* 3-19 (1979) [hereinafter DE MAN, *ALLEGORIES*]; PAUL DE MAN, *The Resistance to Theory*, in *THE RESISTANCE TO THEORY* 3 (1986) [hereinafter DE MAN, *Resistance*].

⁹¹ See JACQUES DERRIDA, “... *That Dangerous Supplement...*”, in *OF GRAMMATOLOGY* 141 (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1974) (1967).

⁹² See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

a. You Can Neither Say What You Mean nor
Mean What You Say

The first, which seems to have been first beautifully articulated by Lévi-Strauss in *The Savage Mind*,⁹³ can be simplified down to: you can never say what you mean and you can never mean what you say. You can never say what you mean because you have to say it in language, which makes available only one particular repository of signs and rules for expressing yourself. A particular thing you have in mind to represent is particular in the sense of irreducible to any pre-given set of elements. “The real,” by definition, is that which exceeds, can’t be grasped by, unpredictably disrupts any attempt to reduce it to what can be represented in the *langue* in question. What you do when you try to express yourself is to “jerry build” some utterance out of the pre-given elements of *langue*, rather than “engineering” your utterance to fit exactly your meaning. (This is the famous category of *bricolage*.)⁹⁴

You can never mean what you say because once you’ve produced the representation it floats out into the world as an utterance whose interpretation by those who register it as speech you can’t control. The signifiers that compose the utterance are loaded with denotative ambiguity and proliferate connotations. Your sentence will mean all kinds of things you not only never intended, but also could never have imagined in advance no matter how careful you were to guard against misinterpretation (of an utterance that was already a misrepresentation of what you meant).

It seems appropriate to call this irrationalism in semiotics because the two points unmoor the utterance, in whatever *langue*, from the speaker and from any particular audience. It becomes a “thing” in the world, like a rock, or a cloud, accessible to anyone who comes upon it and interpretable by them according to whatever system of meanings they end up incorporating it into. But there is a little more to it than that, so long as the utterance is understood as an utterance—that is, so long as the people who deal with it once it is out there interpret it as the production of an other who intended to communicate something.

If those who come upon it interpret it as utterance, they “animate” it, and it can affect them through their real or imagined

⁹³ CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* 1-34 (George Weidenfeld & Nicolson Ltd. trans., Univ. of Chi. Press 1966) (1962).

⁹⁴ *See id.*

connection to the other who spoke it.⁹⁵ The utterance is then a “force of nature” rather than just a thing. What might be called paranoid irrational semiotics arrives when we try to figure out our relationship to this force.

b. *Producing Signs as Acting in the World*

The idea of the “illocutionary” is that when we say things, we may be doing something other than expressing a true or false meaning. We often intend not to speak true or false, but to change things in the world. Some classic examples: words like “I promise” or “I thee wed” or “I resign,” spoken in the context of ceremony, are neither true nor false (though they might be fraudulent or void) but rather intended to change the speaker’s relationship to another.

Statements that can be true or false can be uttered in different “registers,” and, like illocutionary utterances, can be analyzed as actions. The sentence, “There is a bull in the field,” may be designed as “just” a statement, but even then it has, as baggage, a commitment of the speaker to its truth—making it hard, for example, for the speaker to criticize you when you later affirm that there is a bull in the field (unless things have changed in the meanwhile). But it may be intended to warn you, as well as to inform you, an action of a wholly different kind. Furthermore, speech has impacts willy-nilly, that may have nothing to do with intention, so that “there is a bear in the woods” may empty the woods of people, even though that purpose never entered the mind of the speaker. This is the “perlocutionary” force of utterance.⁹⁶

We can generalize this point: any utterance—indeed, any production of a selection of signs from a given vocabulary or lexicon of signs, whether we are talking about words, clothes, or architectural elements, or about a production in a language within a language, like legal argument—may do (and be intended to do) more than express a meaning. For example, utterance may

⁹⁵ I am not sure which famous living or dead European goes along with this idea, but I developed it, in the legal context, in Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

⁹⁶ See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975). Of particular use, in Austin, for the purpose of preserving our jurists’ sense of our place in the universe, is the following:

When the saint baptized the penguins, was this void because the procedure of baptism is inappropriate to be applied to penguins, or because there is no accepted procedure of baptizing anything except humans? I do not think that these uncertainties matter in theory, though it is pleasant to investigate them and in practice convenient to be ready, as jurists are, with a terminology to cope with them.

Id. at 24.

function to persuade its audience that particular things do or do not exist, although the utterance is not in any way “about” the existence or nonexistence of the thing in question.

In Butler’s theory,⁹⁷ for example, our strong sense that gender “exists” as a deep distinction among persons, and that the person we are dealing with “is” gay or straight, masculine or feminine (in the butch/fem rather than the penis/vagina sense), top or bottom, in gender, is an “effect.” That is, it is a consequence of the strong social pressure on us to represent ourselves, to “perform” through speech, appearance, gesture, and so forth, according to one or another gender category provided by the gender system. We all think these categories describe reality because we are all constantly performing them for one another. (That it seems clear to me that I fit into one of the categories is beside the point, since we are dealing with my sense that the category “holds” for others, indeed all or almost all others, rather than that it usefully describes me in particular.)

A person who is aware of the way in which a social practice of coerced self-representation within a set of social categories at least reinforces and may actually cause belief in the categories . . . can try to screw the system up by producing representations that undermine or disrupt the categories. The world is full of categories that we might try to disrupt (as well as, or instead of, critiquing them) in this way. More, it is full of categories that have already been in some wise disrupted as well as critiqued in this way, including God, rights, nationality, race, and, in cls, the effect of legal necessity or legal correctness.

c. *Representation = Rhetoric but “There Is No Extra-Textual Domain” (Pas d’Hors Texte)*

Rhetoric is the art of convincing by manipulating aspects of the situation that are “strictly irrelevant to the logical argument” we are making, but nonetheless will sway the audience in one direction or another. For example, hyperbole, sarcasm, understatement, and irony are all rhetorical devices. The effects of rhetorical devices fall into the more general category of the perlocutionary, but compose a subcategory because they involve denial of their own nature (no one says “be persuaded by me because of my rhetoric, even though there is no substance to my argument”).

The rhetorical, prerational argument built into *langue* itself, the arational perlocutionary force of utterance, is a claim roughly

⁹⁷ See BUTLER, *supra* note 92.

analogous to the claim that we are all gendered beings. Implicit in the posture of representation is the claim that representation is possible, that is, the denial of the “inevitable” suppression or effacement in the representation of all the aspects that can’t be grasped within the linguistic (*langue/parole*) “logic” of representation. The practical meaning of this insight is that living as the objects of utterance, and spending our lives sucking up utterance, closes us down to the inexpressible. The final irrationalist twist is that both love and justice, “if they exist,” belong to the inexpressible. A point of view closely analogous to the antinomian insistence that we can’t be ethical without faith and inspiration.⁹⁸

The final critical (as opposed to irrationalist) twist is that if we ask where we can go for faith and inspiration, we find that it is hard to understand any aspect of existence otherwise than as utterance constrained both by the particular *langue* in which it is spoken (i.e., in which it “exists”) and by the constricting logic of *langue* in general. In particular, it seems impossible to “retreat into the self,” because it is hard to conceive of a self outside language. At this point, another Lacanian *mot*—that what we mean by the ego is self-in-language—acquires a somewhat sinister spin. It is not just that we can’t say what we mean because language constrains us; it is that we cannot *be* at all, let alone *mean*, even for ourselves, outside language.⁹⁹ As for “the other,” once we’ve gone down the semiotic rabbit hole, we are left with the immortal words of Roy Orbison: “All I can do . . . is . . . dream you.”¹⁰⁰ Though they don’t like Sartre, the deconstructionist line brings us back quite close to his notion that human being is being that cannot be sure of its own being.¹⁰¹

3. Uses of Semiotics

To paraphrase Weber on religion, I am philosophically unmusical. I see the “linguistic turn” as immensely valuable in the same way that the paranoid structuralist turn is immensely valuable. The language within a language idea provides a model

⁹⁸ See DE MAN, ALLEGORIES, *supra* note 90; DE MAN, *Resistance*, *supra* note 90; DERRIDA, *supra* note 91; see also Jacques Derrida, *Force de Loi*, 11 CARDOZO L. REV. 919 (1990).

⁹⁹ A bizarre American misreading, parallel to the idea that Saussure completely de-links signifiers and “reality,” is the idea that Derrida thinks that “there is nothing outside the text,” when a better and far less bizarre meaning for “il n’ya pas d’hors texte” would be “there is no extratextual domain accessible to us as human subjects—we ‘are’ in language.”

¹⁰⁰ ROY ORBISON, *In Dreams (I Walk with You)*, on THE ALL-TIME GREATEST HITS OF ROY ORBISON (Sony 1990) (song lyrics quoted as performed in a live concert).

¹⁰¹ See SARTRE, BEING AND NOTHINGNESS, *supra* note 32.

to use when trying to make the chaos of the world more intelligible by showing that what looks infinitely various is “just” the combination and recombination of a set of elements radically fewer in number than the utterances we can produce from them. It has another value, in its deconstructive mode, which is that it was developed as and still provides a tool for critiquing the other genealogies. The performative idea, both as a way to understand how, for example, legal necessity can be ontological for so many people, and how to strategize resistance to it, is really cool.

This brings us finally to the question of the relationship among the genealogies, by which I mean not their “structural” relationship as arrangements and rearrangements of common elements, but their historically sequenced critical relationship to one another.

II. THREE WAYS OF RELATING THE FOUR GENEALOGIES

In this Part, I present three ways of relating the genealogies to one another (plus a serious qualification of my pretty mechanical schema).

A. *Antinomianism & Semiotics vs. Organicism & Structuralism*

Antinomianism attacks the pretensions of organicism to provide rational closure in ethics and social theory, and semiotics likewise attacks the pretensions to “scientificity” of paranoid structuralism, in each case arguing “false necessity.” Thus, Kierkegaard and Nietzsche are critics of Hegel, arguing that his vision of spirit transcending itself toward a moment of completely ordered self-transparency was way off. This is the original critique of “totalizing logics.” Sartre makes existentialism the enemy both of structural functionalism and of scientific (organicist rather than critical) Marxism.

The irrationalist semioticians are passionate opponents of the Marxism and Freudianism of their day, and the performativity feminist semioticians (Butler) are equally enemies both of the “identity” construction of cultural feminism (a form of organicism) and of the paranoid structuralist construction of radical feminism (MacKinnon).

For me, the dramatic moment in this encounter is Derrida’s article, *Structure, Sign, and Play in the Discourses of the Human Sciences*,¹⁰² a careful, respectful, and also deeply original argument

¹⁰² JACQUES DERRIDA, *Structure, Sign, and Play in the Discourses of the Human Sciences*, in *WRITING AND DIFFERENCE* 278 (Alan Bass trans., Univ. of Chi. Press 1978) (1967).

that the correct understanding of the structuralism of Lévi-Strauss, and by implication of Marx and Freud, is that it is “just” semiotics. There are two parts to the arguments.

First, “the structure has no center.” We should not look for (or maybe we can never find?) an ordering of the phenomenon in which one part of the structure is grounded outside the structure and then privileged as the source or principle or cause of the other parts. Thus a biologized unconscious is not the “origin” of psychic structure; a “material” base does not determine the superstructure even in “the final instance”; sexism rooted in male biology does not rule men and women through the structure called patriarchy—both men and women perform within it, submitting and resisting in the vocabulary it provides. Second, the “human sciences” should conceive themselves as about the way actors “play,” that is, invent, using the materials available, the materials we figure out through our organicist or paranoid structuralist or semiotic analyses of the world. Play is *bricolage* is *parole*.

When we judge the situation oppressive (as we certainly are entitled to do if that’s the way we see it, even within the most extreme versions of poststructuralism), it is because all the interactions deploying the elements of the structure have produced, as a kind social “utterance,” an unjust historical outcome. It is not because we have found the smoking gun, the guilty stain, the conclusive link between the outcome and *something else* whose revelation simultaneously explains and discredits it. All we can hope for from structural analysis is the identification of a lexicon (vocabulary) and rules of combination, and then the analysis of particular social or discursive vicissitudes as *parole*.

antinomianism (Kierkegaard, Nietzsche, Sartre) vs.
 organicism (Hegel, Ruskin, Parsons)
 +
 semiotics (Saussure, Lévi-Strauss, Derrida) vs. structuralism
 (Marx, Freud, Foucault)
 =
 the genealogy of internal critique: totalizing logic is “*false
 necessity*”

B. *Structuralism & Semiotics vs. Organicism & Antinomianism*

In another arrangement, Marx, Freud, and Foucault demonstrate the hidden partial logic of the supposedly universally logical organic. Here, the point is not at all that the organicist is a determinist arguing necessity where we should rather see freedom.

The supposedly universal is a mere superstructure determined in the final instance by the relations of production or the unconscious or the mechanisms of discipline. Their paranoid structuralist logic is even more powerful than the benign organicist logic of the whole that it displaces. They are particularly hard on irrationalist organicists who believe in the unfolding of the spirit, or progress, or “the life force,” or any other vitalist conception.

In parallel fashion, semiotics shows the hidden logic of antinomianism, which is “always already” linguistically and culturally embedded, despite its pretensions to combine spontaneity with authenticity. The notion that you “just decide,” whether inspired by God or out of the will to power or through an existential leap into an ultimately absurd commitment of some kind, gives “you” way too much credit. “The language speaks the speaker,” rather than the reverse, by first channeling and then hijacking him or her (you can neither say what you mean nor mean what you say). And the speaker doesn’t even exist, except as “an intersection in language.” These people are really hard on the “auteur.”

structuralism (Marx, Freud, Foucault) vs. organicism (Hegel,
Ruskin, Parsons)
+
semiotics (Saussure, Lévi-Strauss, Derrida) vs. antinomianism
(Kierkegaard, Nietzsche, Sartre)
=
the genealogy of “*discreditable hidden logic*” critiques of the
apparently universal or spontaneous

C. *The Temporal Sequence of Critiques*

In yet a third arrangement, antinomianism and structuralism are critiques of organicism. Antinomianism accuses it of false necessity, while structuralism makes the opposite accusation that it is ruled by a hidden logic. Semiotics in turn critiques both of the critiques. Structuralism (Marx, Freud, Foucault) has its own false claim to “scientificity,” critiqued by semiotics in the spirit of antinomianism. But then semiotics turns around and deploys structuralism against antinomianism, arguing that the apparently spontaneous and authentic is “always already” embedded. The historical sequence suggests a Weberian process of “*disenchantment of reason*.”

Organicism, antinomianism, and structuralism attack semiotics either as “*nihilism*” or as “*mysticism*.”

To sum up:

1. necessity critiqued as false necessity:

antinomianism vs. organicism
semiotics vs. paranoid structuralism

2. spontaneity (vitalism) critiqued as subject to a hidden logic:

paranoid structuralism vs. organicism
semiotics vs. antinomianism

3. temporal sequence: disenchantment of reason:

Structuralism
Semioticism vs. vs. Organicism vs. Semioticism
Antinomianism

D. *Qualification*

Foucault, a paranoid structuralist, is a major internal critic of other paranoid structuralists, and the word “scientificity” (the quality of being scientific) is his description of the now discredited pretensions of Marxists and Freudians. Marx’s *Essay on the Jewish Question*¹⁰³ and his analysis of the fetishism of commodities¹⁰⁴ are, to my mind, the most brilliant nineteenth-century examples of the critique of false necessity. So, structuralism, no less than antinomianism and semiotics, has a false-necessity critique (along with its “discreditable hidden logic” critique). Procrustes couldn’t always make it work either.

III. THE WOLF PACK: DEPLOYING THE GENEALOGIES AGAINST SOME BASIC LIBERAL IDEAS

A person could be into all four of these genealogies, and into their vertiginous mutual critique, and still believe passionately in majority rule, the rule of law, individual rights, constitutionalism, due process, principle, tolerance, and, above all, individuality, autonomy, liberty, choice, and consent as the foundational categories for describing, critiquing, and legitimating social arrangements. But I hope that I have, by subtle indirection, convinced the reader that a liberalism that managed this feat of incorporation would in some not clear sense be operating against

¹⁰³ MARX, *On the Jewish Question*, *supra* note 54.

¹⁰⁴ See KARL MARX, *On the Fetishism of Commodities and Its Secret*, in 1 CAPITAL, *supra* note 54, at 81.

the grain of liberal culture or in tension with what we loosely call a liberal temperament. Why so?

A. *The Genealogies Breed Distrust of Liberal Categories
When Deployed by Others*

Without belaboring the point, it seems that each genealogy goes after a number of important liberal ideas. These are just illustrations of how each can be mustered against the idea of the consent of the governed: Organicism teaches us that we are functions of normative systems beyond our control, historically and in cross-cultural comparison consenting to whatever the whole dictates. Antinomianism teaches that whatever order we consent to will underdetermine choices with large stakes, putting us at the mercy of Schmittian dictators, in the shadow of the war of all against all. Paranoid structuralism suggests that this same underdetermined order is overdetermined by sinister forces we deny and reproduce through denial. Semiotics tells us that because consent is an interpersonal concept, we can consent only to a text, which will neither say what we mean nor mean what we say, will be performed rather than authored, floating, endlessly privileging something or other, caught in the phallogocentric logic of representation.

B. *The Genealogies Breed Distrust of Oneself as a Principled
Actor, Liberal or Otherwise*

What is left of the “Western conception” of the ego, the I, the self, after all this? The wolf pack offers only the organicist, antinomian, structuralist denunciation of semiotics as mystical or nihilist. To my mind, the nihilism charge signifies the refusal of critique to take itself seriously. But maybe we shouldn’t take critique seriously. And so on. Nothing logically precludes maintaining one’s faith in the face of the wolf pack. But if one were to lose one’s faith, one would no longer be a liberal. A path beginning from loss of faith would be to adopt one or another of the wildly diverse variants of left, center, or right nonliberal politics, although the critiques would seem to preclude affirming one’s commitment in any mode that would replace liberalism with another faith. The political posture that I sketched in *Critique*, calling it, for want of a better name, left-modernism/postmodernism, is one of these nonliberal options.

C. *Four Characteristic Liberal Responses*

I have encountered many responses to nonliberalism. These are prominent. (The quotes are my invention.)

1. Esoteric Liberalism¹⁰⁵

“I fully recognize the potential incoherence of liberalism, indeed I have read all the classics of the critique and see that they pose a massive problem. But, first, the problem they pose is less than the problem posed by the Holocaust and the Gulag, and, second, a close reading of these sources shows that critics of liberalism often criticize it from within projects that are implicated in the Holocaust and the Gulag, and that although they do pose massive problems, they do not establish the invalidity of liberal faith.”

2. Militant Liberalism¹⁰⁶

“Please respond to the following query: Does your antiliberalism lead you to advocate exterminating the Jews, organizing a Gulag, being Pol Pot, or the like? If so, you are despicable. If not, you are of no interest. You are merely an exhibitionist looking to free ride on, to be a parasite on, the cultural *cachet* your more authentic murderous co-anti-religionists acquired by being willing to ‘go all the way.’ You want the elitist *frisson* of being a very bad boy, while all the while relying on our liberal tolerance and your own cowardice to protect you from the logical implications of your ideas.”

3. The Liberal from Missouri

“Don’t know much about *theoree*, don’t know much *phenomenologiee*, but I do know that I love the way things are here in the United States compared to the Holocaust, the Gulag, Cambodia, Rumania, Rwanda, Sierra Leone, and the rest of them. You haven’t proposed a program for organizing society that meets the burden of showing that more likely than not it will do better than we in the United States have done over the last two hundred years, and, indeed, your ideas sound like the ideas that led to the outcomes (to put it delicately) in those foreign countries. And, by the way, if you would prefer to live in *any* foreign country, be my guest.”

4. Engulfing Liberalism¹⁰⁷

“Liberalism (like the Republican Party) is a big tent, much bigger than people who think of themselves as nonliberals tend to

¹⁰⁵ An example in this genre is Howse. See Howse, *supra* note 44.

¹⁰⁶ An example in this genre is Stephen Holmes’s *The Anatomy of Antiliberalism*. See STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* (1993).

¹⁰⁷ An example in this genre is Martha Nussbaum’s discussion of Catharine MacKinnon in her *Sex and Social Justice*. See MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 67-79 (1999).

realize. As a matter of fact, the insights of organicism, antinomianism, paranoid structuralism, and semiotics are in no way incompatible with liberalism. Some of them are integral to or were even invented by liberalism; some can be easily incorporated to the benefit of both liberalism and the critique; and some identify problems of our imperfect modern societies that liberals, much more than those who call themselves radicals, are working hard to overcome.”

Rather than answer any of these, here is a:

CODA: HOW TO GET STARTED

There are four steps to follow as one gets ready to do some critical theory within law—critical theory, that is, of the particular type semioticized above.

First: Identify a distinction that drives you crazy when it is trotted out to justify things you can’t stand, and that you feel people don’t really believe in except when they need it to justify those things (to take an example at random, the distinction between adjudication and legislation).

Second: Find in each half of the distinction the things, traits, aspects, qualities, characteristics, or whatever that were supposed to be located in the other half, and vice versa. This is the move classically called *chiasmus*, and practiced most notably and repetitively by Marx and then by Derrida, theorized in an irrationalist semiotic manner in *Of Grammatology*.¹⁰⁸

Third: Put the question of whether the distinction you have just destabilized corresponds to a real division in reality on hold, suspend it, or put it in parentheses or in brackets (Husserl calls this the *epoche*)—turn your eyes away from it, and instead try to figure out why the people who use the distinction work so hard to maintain belief in it in the face of their own doubts, which you can intuit by imagining that they are just as capable of destabilizing it as you are.

Fourth: Trace the consequences of the distinction by hooking it up to one or many of the organicist, antinomian, paranoid structuralist, and semiotic moves discussed above. My own project, subject always to critical unraveling per supra, has been to ask about the distributive consequences of liberal distinctions, that is, to ask how belief in them contributes to inequality, domination, alienation, and unhappiness, in different measures for different people, for some much more than for others.

Good luck.

¹⁰⁸ DERRIDA, *supra* note 91.