



Summer 6-1-1997

Does Law Need an Analyst? Prospects for Lacanian Psychoanalysis in Law

Richard E. Redding

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Jurisprudence Commons](#), and the [Law and Psychology Commons](#)

Recommended Citation

Richard E. Redding, *Does Law Need an Analyst? Prospects for Lacanian Psychoanalysis in Law*, 54 Wash. & Lee L. Rev. 1119 (1997).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol54/iss3/9>

This Book Review is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Book Review

Does Law Need an Analyst? Prospects for Lacanian Psychoanalysis in Law

LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY. By David S. Caudill. Atlantic Highlands, NJ: Humanities Press, 1997. 206 pp. \$15.95 paper, \$49.95 cloth.

Reviewed by Richard E. Redding*

The debate continues over the merits of French psychoanalytic theorist Jacques Lacan — was he a "charlatan"¹ or an "intellectual hero?"² Enter David Caudill's book, *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory*.³ In providing practical applications of Lacan to the law, the book will no doubt be seen as an important contribution in resolving the debate. Caudill, a law professor with a Ph.D. in philosophy, demonstrates how, despite its complexity and obfuscatory tendencies, Lacan's psychoanalytic theory can illuminate our understanding of law and public discourse in new and important ways. To be sure, Caudill's project demonstrates that law needs an analyst. From contract interpretation to the role of religion in politics, Caudill employs Lacanian psychoanalysis not only to understand but to mediate the "culture wars" and some current controversies in law and public policy.

* Lecturer in Psychology, University of Virginia; B.A., Hampden-Sydney College; M.S., Vanderbilt University; J.D., Washington and Lee University; Ph.D., University of Virginia; Law Clerk, Hon. Michael W. Farrell, District of Columbia Court of Appeals.

1. See SEBASTIANO TIMPNARO, *THE FREUDIAN SLIP* 58 (1974) (noting Lacan's "charlatry and exhibitionism").

2. See STUART SCHNEIDERMAN, *JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO* (1983).

3. DAVID S. CAUDILL, *LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY* (1997). David Caudill is a professor at the Washington and Lee University School of Law.

Caudill sets out to provide the first comprehensive application of Lacan to law, within the tradition of critical legal studies (CLS) scholarship — thus the book's subtitle, *"Toward a Psychoanalytic Critical Theory."* Applying Lacan's tenets about the socializing power of language, the relation between the subject and others (including the "Otherness" of the law), and the internalization of the law in the Other, Caudill critiques mainstream legal theory and practice.⁴ Caudill "intends to ally Lacan's approach to critical movements in legal theory, such as critical legal studies, feminism, and critical race studies, each of which represents a challenge to mainstream legal theory."⁵ (Though, interestingly, Caudill finds Lacan useful in serving conservative as well as liberal politics.) These approaches view law as ideological and indeterminate, and as marginalizing certain communities by imposing hegemonic doctrines and practices.

Readers will appreciate Caudill's ability to make Lacan accessible, while at the same time writing in an engaging but rigorous style that avoids oversimplification. Caudill is a superb writer, but the book is in no sense an easy read because the subject matter is very complex and every paragraph in the book is packed with ideas. It is largely a compilation and substantial modification of Caudill's previously published essays that have appeared in legal and psychoanalytic journals. Part I, entitled "Coming to Terms with Lacan," discusses the difficulties in applying Lacan, explains the aspects of Lacanian theory most relevant to law and places the theory in the context of Freud and other psychoanalytic traditions, various philosophical schools of epistemology, and postmodern and critical legal theory. It concludes with an analysis of the problem of the self in relation to law, posing "law's need for an analyst." Part II, "Legal Analysis in Lacanian Terms," analyzes some current legal controversies from a Lacanian perspective, the most provocative of which are community and court hysteria surrounding false accusations of child abuse and religion's place in politics.

This review has four goals: (1) after discussing difficulties in applying Lacan, to introduce Lacanian theory and its applications to law; (2) to ascertain whether Lacan is consistent with current psychological theory and research; (3) to place the theory and the book in the context of ongoing controversies in the "culture wars" and postmodern/critical legal studies; and (4) to evaluate the prospects for Lacanian psychoanalysis in law.

4. Lacan provides a "psychoanalytic supplement to the critique of legal ideology, which critique attempts to disclose the inevitable political tilt of legal processes and institutions, even when — especially when — they appear rational or neutral." *Id.* at xiv.

5. *Id.* at 152. Lacan is appropriated "in support of critical theories of law as gendered, ideological or textual." *Id.* at 24.

Obstacles to Lacan

[I want] to leave the reader no other way out than the way in, which I prefer to be difficult.⁶

Chapter 1, "Trafficking in Lacan: The Next Intervention of Psychoanalysis in Law?," begins with the observation that Lacanian theory will be "bruised and beaten" by the time it becomes an established mode of legal analysis.⁷ Indeed, it will. It is impossible to provide an account of Lacan without mentioning a key criticism leveled at him by supporters and detractors alike, namely, that Lacan's writings are so complex, elusive, and (apparently) contradictory as to be almost indecipherable.⁸ (To be fair, no doubt something is lost in the translation from French.) Lacan's text "is often out of control," such that "even longtime readers find Lacan exceptionally difficult."⁹ Through tropes and other literary devices,¹⁰ Lacan illustrates that the meanings of language and psyche are never transparent, no matter how transparent they seem. Writing in a style "intended to subvert conventional understandings,"¹¹ Lacan *wants* readers to struggle with the meaning behind his words, perhaps to arrive at a deeper meaning,¹² perhaps as a

6. JACQUES LACAN, *The Agency of the Letter in the Unconscious or Reason Since Freud*, in *ÉCRITS: A SELECTION* 146, 146 (A. Sheridan trans., 1977) [hereinafter *ÉCRITS*], quoted in CAUDILL, *supra* note 3, at 5.

7. CAUDILL, *supra* note 3, at 3.

8. Consider the following paragraph, which is representative of the obtuseness in much of Lacan's writing:

Two lacks overlap here. The first emerges from the central defect around which the dialectic of the advent of the subject to his own being in the relation to the Other turns — by the fact that the subject depends on the signifier and that the signifier is first of all in the field of the Other. This lack takes up the other lack, which is the real, earlier lack, to be situated at the advent of the living being, that is to say, at sexed reproduction.

JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 204-05 (Jacques-Alain Miller ed. & Alan Sheridan trans., 1978).

9. CAUDILL, *supra* note 3, at 5. One Lacan scholar characterizes his writings as "a rare mix of profound insight and self-indulgent blather." Jeanne L. Schroeder, *The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis*, 16 *CARDOZO L. REV.* 805, 884 (1995). Lacan "made a very successful career out of saying things that just about no one could understand." SCHNEIDERMAN, *supra* note 2, at vi.

10. "Lacan explicates his thesis . . . through enigmas inside conundrums inside rebuses." JUDY JONES & WILLIAM WILSON, *AN INCOMPLETE EDUCATION* 436 (1995) (characterizing Lacan as psychology's "enfant terrible").

11. CAUDILL, *supra* note 3, at 71 (citing Ragland-Sullivan for notion that it is "impossible" to understand Lacan on our own terms).

12. "[For Lacan,] the idea is not to get a model, learn the model, and apply it

vehicle for teaching the ultimately indecipherable nature of language and psyche.¹³ Moreover, a true understanding of Lacan requires a grounding in epistemology, Freudian and neo-Freudian psychoanalysis, and knowledge of French literature and literary criticism.¹⁴ (Accordingly, Caudill's book contains many passages and discursive footnotes referring to the philosophical and literary foundations of Lacan.)

While Caudill acknowledges Lacan's complexity as a "barrier" to the use of Lacan in legal studies,¹⁵ I differ with Caudill in his conclusion that it "is justified by the ambitious nature of his critical project."¹⁶ True, psychoanalytic writings often are complex and sometimes tautological in nature — "psychobabble" at its best (or worst, depending on your inclination). Lacan, however, takes the art of obfuscation to new heights, making straightforward ideas unnecessarily opaque and complex.¹⁷ Lacan deserves no special dispensation from the principles of effective writing on the basis that his theory is too "complex" or "grand." Theoretical physics is similarly "complex" and "grand." Nonetheless, great thinkers in the field, like Stephen Hawking,¹⁸ can explain it in clear terms. Genius lies in the ability to com-

It is to re-think the matter everytime." Jacques-Alain Miller, *How Psychoanalysis Cures According to Lacan*, 1 NEWSL. FREUDIAN FIELD 4, 26 (1986), quoted in CAUDILL, *supra* note 3, at 43.

13. "Lacan, in a style intended to avoid oversimplifications and illusions of certainty, tells us what we are up against, and that *it is* ultimately indecipherable." CAUDILL, *supra* note 3, at 26. "[T]he lesson being taught is that lessons are not so easily taught . . ." *Id.* at 101.

14. For example, in his seminar on ethics, Lacan provides "a wide-ranging and disjointed account of the analytic situation, and of moral philosophy with reference to Plato and Aristotle, to Hegel and Bentham, and to Kant and the Marquis de Sade; along the way, Lacan explicates six or eight Freudian categories, a few episodes from art history, the text of *Antigone*, and the nature of beauty and even religion." *Id.* at 131.

15. Caudill discusses a number of other internal and external barriers to Lacan, some of which include that (1) Lacan assumes reader's familiarity with Freud and Western philosophers such as Hegel and Kant, French structuralism, and modern French fiction, *id.* at 6-7, (2) Lacan works on the level of grand theory, *id.* at 7, and (3) Lacan's principles are difficult to categorize into a particular psychoanalytic or philosophical school, *id.* at 12-13. See generally *id.* at 3-32 (discussing internal and external barriers).

16. *Id.* at xiii. However, I agree with Caudill's statement that "little is gained by endless references to the esoteric, almost secret, features of Lacanian theory." *Id.*

17. *But see id.* at 6 (noting that "[t]he consistency of Lacan's epistemology has all the aesthetic beauty of a mathematical theory or the cantos of Dante" (quoting ELLIE RAGLAND-SULLIVAN, *JACQUES LACAN AND THE PHILOSOPHY OF PSYCHOANALYSIS* 220 (1987)); Jacques-Alain Miller, *Introductory Remarks Before the Screening of Television*, 2 NEWSL. FREUDIAN FIELD 14 (1987) (arguing that Lacan's theory is "a tightly woven argument where every sentence is a consistent statement").

18. See generally STEPHEN HAWKING, *A BRIEF HISTORY OF TIME* (rev. ed. 1996).

municate complex ideas simply, and while Lacan may well be "an intellectual hero,"¹⁹ he could have used a good freshman writing course.

The opaque quality of Lacan's writings creates three major problems. First, and most important, it leaves him open to the criticism that the complexity obscures an infinitely malleable or even vacuous content²⁰ — in effect, that "the emperor has no clothes."²¹ Second, it makes it difficult to evaluate scientifically Lacan's notions about human behavior because they are not always reducible to empirical constructs. Third, it makes it difficult to apply the theory to law. If Lacanian scholars have a hard time understanding the theory, what hope is there for legal practitioners?

Caudill's book positively inclines the reader towards Lacan, notwithstanding all the barriers to understanding and applying the theory. Lacan's undue complexity is a serious obstacle to his use in law, but Caudill does a wonderful job of explaining Lacan's theory in clear terms, perhaps as clearly as it can be explained. Caudill explicates how the theory can be applied to law in practical terms, and herein lies one of the book's key contributions. Caudill demonstrates to critics that the emperor *does* have clothes.

Lacan's writings comprise many volumes, and this brief review cannot aspire to do justice either to them²² or to Caudill's fine discussion of Lacanian theory. But those unfamiliar with Lacan will appreciate a précis of those aspects of Lacan most relevant to law, wary, of course, that it necessarily represents a substantial redaction and oversimplification of the theory.²³

19. See SCHNEIDERMAN, *supra* note 2.

20. Caudill observes that "[to] critics and first-time readers of Jacques Lacan and his disciplined commentators, Lacan at times surely must appear like the "Reverend" Chadband in [Charles] Dickens's caricature Pretentiousness and even an audience appear, but nothing of substance appears to remain after the performance." CAUDILL, *supra* note 3, at 101. He also notes that "by the time Lacanianism is simplified enough to be easily understood, the application to legal problems is so simplistic as to raise the question of why one needs Lacan at all." *Id.* at 42.

21. See, e.g., NORMAN HOLLAND, THE CRITICAL I 208 (1992) (asking "[w]hat can [Lacan] contribute to literature, philosophy, or, quite simply, our understanding of the world around and within us? . . . I have to conclude, not much.")

22. As Wilden said in the introduction to his translation of Lacan, "[I]t is almost impossible to write any sort of substantial introduction to Lacan unless the reader has first been introduced to him." A. Wilden, *Translator's Introduction* to JACQUES LACAN, SPEECH AND LANGUAGE IN PSYCHOANALYSIS at I, IX (A. Wilden ed. & trans., 1968).

23. "Let us beware . . . of grappling with Lacan's ideas by minimizing or oversimplifying them. Many . . . do exactly this." ELLIE RAGLAND-SULLIVAN, JACQUES LACAN & THE PHILOSOPHY OF PSYCHOANALYSIS at x (1987), *quoted in* CAUDILL, *supra* note 3, at 26.

What is Lacanian Psychoanalysis?

"Man speaks . . . but it is because the symbol has made man."²⁴

"[L]anguage . . . imprints the cultural myths which adults later assume they have consciously deduced or learned."²⁵

Lacan saw parallels between a legal proceeding and psychoanalysis, in that the analyst and patient are "dialecticians in a [sort of inquest]"²⁶ conducted through language. For Caudill, this parallel provides the "starting point" for a Lacanian socio-legal psychoanalysis²⁷ that uncovers the unconscious beliefs, desires, and fantasies supporting law. Lacan viewed his theory as an explication of Freud's psychoanalytic theory, though his reinterpretation and revision of Freud is so complete as to make Lacan's theory sometimes unrecognizable as anything Freudian. Lacan does, however, begin with the Freudian psychoanalytic principles of an unconscious influenced by social forces as revealed through gaps or slips in language (e.g., slips of the tongue, misuse of language, gaps in language, dreams).²⁸ While for Freud, the unconscious is revealed through language that provides the "talking cure," for Lacan, the unconscious itself is a language.²⁹

Lacan saw law³⁰ as culture, and he would agree with Peter Gabel that "the social function of law is not to be found in its direct effect on socio-economic activity, but rather in its effect on people's minds."³¹ Lacan explicates the role of the subject of law and challenges the notion that there

24. JACQUES LACAN, *The Function and Field of Speech and Language in Psychoanalysis*, in *ÉCRITS*, *supra* note 6, at 30, 65, *quoted in* CAUDILL, *supra* note 3, at 8.

25. JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN, BOOK II: THE EGO IN FREUD'S THEORY AND IN THE TECHNIQUE OF PSYCHOANALYSIS, 1954-55*, at 63-64 (J.A. Miller ed. & S. Tomaselli trans., 1988), *quoted in* CAUDILL, *supra* note 3, at 165 n.97.

26. Patrick C. Hogan, *Structure and Ambiguity in the Symbolic Order: Some Prolegomena to the Understanding and Criticism of Lacan*, in *CRITICISM AND LACAN: ESSAYS AND DIALOGUE ON LANGUAGE, STRUCTURE, AND THE UNCONSCIOUS* 3, 8-9 (1990), *quoted in* CAUDILL, *supra* note 3, at 120.

27. CAUDILL, *supra* note 3, at 59-60 (noting that "the analyst listens to the dialogue with the Other, the *demande* for something that is only a substitute for that which is [insatiably] desired, like a judge 'hearing' a request for monetary damages to substitute for something irreplaceable that has been lost").

28. See CAUDILL, *supra* note 3, at 27.

29. For this reason, "the symptom resolves itself entirely in an analysis of language, because the symptom is itself structured like a language." LACAN, *supra* note 24, at 59, *quoted in* CAUDILL, *supra* note 3, at 50.

30. Lacan linked law with the "Name-of-the-Father," a "master signifier." CAUDILL, *supra* note 3, at 103.

31. Peter Gabel, *A Critical Anatomy of the Legal Opinion*, 5 *ALSA F.* 5, 10 (1980).

is an autonomous, free-willed subject. Four principles are central to Lacan's theory and its implications for law:

1. Language is the key socializing agent. Language structures the self, the unconscious, and social institutions. The human subject is "the slave of language [and] all the more so of a discourse . . . in which his place is already inscribed at birth" Culture itself, which alongside nature and society make up the human condition, 'could well be reduced to language.'³² The power of law exists in the power of legal language. Referring to Kafka's *The Trial*, for example, Peter Goodrich notes that "the metaphor for law is that of a jealously guarded yet fictive citadel, a gate beyond which there is nothing to learn . . . [except] the discovery that nothing is protected, that the law does not exist except as a secret that is exhausted in the very form of its transmission."³³

2. Given language's role in shaping psyche,³⁴ Lacanian psychoanalysis assumes that individual-level understanding cannot be divorced from social understanding³⁵ because "the language and meanings of legal institutions and processes do not *affect* people's lives but *constitute* them."³⁶ Thus, the self is "captured" by law: The law helps construct the self and the subject objectifies the self in law.³⁷

3. Language, a system of displaceable meanings, separates the subject from the self. Every time one speaks or is spoken to, the self is obscured. There is no "true" self, but a self shaped by the language and semiotics of society. This illusion of a true self is the illusion of man's experience.³⁸

4. Since we cannot escape the socializing and constraining forces of language, free-will is illusory. There is no cure as such; recognition of this

32. LACAN, *supra* note 6, at 148, *quoted in* CAUDILL, *supra* note 3, at 49.

33. Peter Goodrich, *Psychoanalysis in Legal Education: Notes on the Violence of the Sign*, in 1 *LAW AND SEMIOTICS* 193, 205 (R. Kevelson ed., 1987).

34. As an example of the power of spoken discourse, consider how the "openly gay" person is viewed more prejudicially than the closeted gay person whom everyone suspects is gay, but who has never said "I am gay" — as if speaking the words makes their sexual orientation unacceptable. For gays who never speak these words, society often represses its knowledge of their homosexuality. The presence or absence of the linguistic signifiers is central.

35. Unlike the traditional view that social forces derive from individual-level psychological processes, Lacan's postmodern stance is that individual psychologies derive from social processes. See BRENT D. SLIFE & RICHARD N. WILLIAMS, *WHAT'S BEHIND THE RESEARCH? DISCOVERING HIDDEN ASSUMPTIONS IN THE BEHAVIORAL SCIENCES* 77 (1995).

36. CAUDILL, *supra* note 3, at 50. For a classical psychoanalytic discussion of the relation between individual behavior and social institutions, see generally SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1930).

37. CAUDILL, *supra* note 3, at 68.

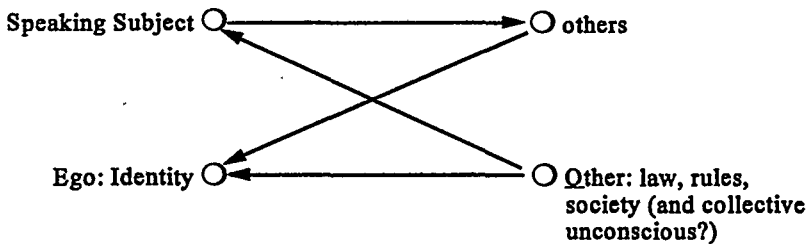
38. See LACAN, *supra* note 25, at 224.

fact is the only cure available. The psychoanalytic project, however, helps achieve increasingly veridical understandings of self — the unconscious text which "flows, evaporates, and oscillates."³⁹ Thus, Lacan at once delivers a candid assessment of "what we are up against," while "allow[ing] for the possibility of beginning to select what we take from others, from society, and from law."⁴⁰

Schema-L

[T]he outside is *within*, the self is *social*, and law is effective because it is internalized [N]either the psychic nor the social acquires the status of first cause, because neither one wholly or unidirectionally determines the other.⁴¹

Caudill begins by explaining Lacan's *Schema-L*, which depicts human intersubjectivity: how we know the self only in relation to knowing others, all of whom are embedded in the social system. The self is "a network of identificatory and linguistic relations"⁴² . . . "stretched over the four corners of the Schema."⁴³ The four interconnected parts of *Schema-L*⁴⁴ are mediated by the unconscious and language (depicted by arrows):



On the left side of *Schema-L* are the Speaking Subject (the subject we present to others, as mediated by language) and the Ego (one's identity).

39. Ellie Ragland-Sullivan, *Stealing Material: The Materiality of Language According to Freud and Lacan*, in LACAN AND THE HUMAN SENSES 72, 80 (A. Leupin ed., 1991), quoted in CAUDILL, *supra* note 3, at 26.

40. CAUDILL, *supra* note 3, at 40.

41. Tim Dean, *The Psychoanalysis of AIDS*, 63 OCTOBER 83, 85 (1993).

42. RAGLAND-SULLIVAN, *supra* note 23, at 7, quoted in CAUDILL, *supra* note 3, at 31.

43. JACQUES LACAN, *On a Question Preliminary to Any Possible Treatment of Psychosis*, in ÉCRITS, *supra* note 6, at 179, 194, quoted in CAUDILL, *supra* note 3, at 31.

44. The Schema-L depicted here is a slightly modified version of that found in Caudill's book. See CAUDILL, *supra* note 3, at 31.

The "Speaking Subject functions to *represent* itself, but in fact masks itself. It is a mechanism of defense and denial, pretending to be independent of the Other, while in actuality its language is imprinted with cultural myths."⁴⁵ Thus, the Speaking Subject is split from the Ego, both of which function at conscious and unconscious levels. Unlike the Freudian ego, which serves an adaptive and controlling function, the Lacanian ego represses society's influence on the self (producing a "privatization of desire" in Gabel's terms⁴⁶), resulting in a false image of self. On the right hand side of *Schema-L* are people ("others") and the social structure and law ("Other"), all of which transmit the "signifiers" and "signifying chains" (since all meaning is relational) that give meaning to the self.

Schema-L illustrates how our selves and others exist "on the other side of language," where they can never truly be reached. Constructed by the signifiers and social network of *Schema-L* that shape human relations and which we internalize, the self is spread out over all of *Schema-L* (as is the unconscious, implying a type of social or collective unconscious). Because we fail to recognize how the Ego, others, and the Other construct the self — "the outside-within-us" — we "get an idealized image, a misrecognition, of autonomy and freedom."⁴⁷

Lacanian psychoanalysis traces the relations among the parts of *Schema-L*, the interlocutory forces mediating human intersubjectivity. But "[i]f the subject is constituted by its discourses and its context, *who or what is in charge?*"⁴⁸ This question is at the heart of the Lacanian endeavor: What is the role of the subject (e.g., client, litigant, law professor, jury) and how does law, in attempting to appear objective and autonomous of desire, obscure the role of the subject? How does the law (on the right side of *Schema-L*) construct the subject (on the left side of *Schema-L*)?

Applications to Law

[P]articipants in the legal discourse socially constructed a language of representation and then collectively imagined that the metaphors were real.⁴⁹

45. *Id.* at 35.

46. Peter Gabel, *Dukakis's Defeat and the Transformative Possibilities of Legal Culture*, *TIKKUN*, Mar.-Apr. 1989, at 15, 15-16.

47. CAUDILL, *supra* note 3, at 32.

48. Pierre Schlag, *The Problem of the Subject*, 69 *TEX. L. REV.* 1595, 1739-40 (1991) (emphasis added), *quoted in* CAUDILL, *supra* note 3, at 70.

49. CAUDILL, *supra* note 3, at 180 n.148 (quoting Gary Peller, *The Metaphysics of American Law*, 73 *CAL. L. REV.* 1151, 1192-93 (1985)).

[Lacan's] concepts of hidden meanings and the distortion which comes about by the use or misuse of words is the very stuff with which lawyers grapple on a daily basis.⁵⁰

In applying *Schema-L*, Caudill makes the point that law is "unstable," driven by the shifting winds of social forces. Of course, this is not a novel suggestion. In the early 1900s the legal realists recognized that, far from being neutral, objective, or "scientific," law is influenced to varying degrees by the biases and cultural lens of those who make and interpret law. The Lacanian perspective, however, takes legal realism a step further, into the postmodern: the law in the Other constructs the Speaking Subject's reality and the Ego's illusion of self. *Not only do individual biases affect law, but law itself affects the individual in the first instance. We can never "objectively" make, interpret, or use law, because the law "captured" us long before we can get to that point.*

Caudill asks us to consider the legal fiction of equal bargaining power in financing agreements. In reality, that loan documents include boilerplate adhesive terms that give borrowers little or no negotiating power. Courts, but not always juries uneducated in law's mythology, preserve the fiction.⁵¹ This simple example shows how the subject's desire (e.g., a borrower's desire for equal bargaining power, a lender's desire to adhere to the legal fiction) is mediated by the network of "others" (e.g., the judge, the jury) and the Other (e.g., legal rules, social milieu) lying in *Schema-L*, controlled neither by the text of the law nor by lawyers. Rather, law is unstable, fluctuating with variations in the network of *Schema-L*.⁵²

50. Susan Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89, 152 (1986), quoted in CAUDILL, *supra* note 3, at 168 n.3. For an overview and interdisciplinary treatment of language, semiotics, and psychology as applied to law, see generally BERNARD S. JACKSON, *MAKING SENSE IN LAW: LINGUISTIC, PSYCHOLOGICAL, AND SEMIOTIC PERSPECTIVES* (1995).

51. Consider, for example, court opinions and legal texts:

[A] borrower presumably has bargaining power, equal to the lender, so as to eliminate unacceptable provisions in loan documents through negotiation. . . . In analyzing the transaction in the instant case, we find [no] imbalance of bargaining power.

CAUDILL, *supra* note 3, at 167 nn.125-26 (citations omitted). Compare these with a jury's explanation:

[We were convinced that the bank was liable because] the bank's witnesses lied so much. . . . One of those [who signed and approved the loan request] testified . . . that in "bank jargon," an approval doesn't mean the bank actually approved the request, it means something else.

Id. at 167 n.127 (citations omitted).

52. *Id.* at 77.

Chapter 3, "Legal Language: Meanings in the Gaps, Gaps in the Meanings," provides a more extensive example relating to problems of contract interpretation. According to Lacan, a text's meaning contains no meaning; rather, it has meaning only in relation to the unconscious meanings it conceals.⁵³ Caudill applies this seemingly tautological principle in a straightforward way, illustrating its use in legal interpretation. The genesis of many contract disputes lay in contract gaps — unforeseen contingencies that develop for which the contract is silent or ambiguous, forcing a court to supply the missing terms.⁵⁴

Lacanian theory about symptom and desire is important for understanding gaps in contracts. A symptom is a metaphor,⁵⁵ a "substitute sign or word,"⁵⁶ that is translated with reference to a repressed signifying chain.⁵⁷ The subject's desire, a fundamental but elusive aspect of *Schema-L*, is displaced as the desire of the Other and is never fulfilled: "[I]t is only displaced or substituted for, forming a 'chain of signifiers,' which always (like the unconscious) leaves traces of itself but eludes us The desire is forever displaced and disguised as something else" ⁵⁸ Acting as a metonymy, legal language displaces the desire.⁵⁹

The repressed signifiers provide the real meaning in the end. While the text ostensibly contains the contract's meaning, the true meaning (or "desire") is repressed into the underlying unwritten text. Unlike the written contract, the gaps in the text of the contract — what is unsaid — ultimately can handle any contingency. The written text provides the figure, but the unwritten text provides the ground, "another text to be interpreted" by courts.⁶⁰ "In this way, *the affairs of the parties are structured by a meaning*

53. *Id.* at 42.

54. Though lawyers often draft lengthy contracts in an attempt to address every contingency, no contract can do so, and excessive contract language may actually reduce clarity or introduce other contingencies. *Id.* at 44, 168 n.7.

55. In noting the metaphoric aspect of much of law, Caudill alludes to the symptomatic (or pathological) nature of law and all social institutions. See CAUDILL, *supra* note 3, at 61; see also MARK JOHNSON, *MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS* (1993) (discussing metaphoric basis of moral reasoning); GEORGE LAKOFF, *MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T* (1996) (discussing metaphoric basis of politics and public policy).

56. RAGLAND-SULLIVAN, *supra* note 23, at 260-61, *quoted in* CAUDILL, *supra* note 3, at 57.

57. CAUDILL, *supra* note 3, at 57-58.

58. Francoise Meltzer, *Unconscious*, in *CRITICAL TERMS FOR LITERARY STUDY* 147, 159-61 (F. Lentricchia & T. McLaughlin eds., 1990), *quoted in* CAUDILL, *supra* note 3, at 58.

59. CAUDILL, *supra* note 3, at 57-58, 63.

60. *Id.* at 64.

system beyond their control. . . . Lacan's shift in emphasis teaches that the unsaid is often more important than what is said."⁶¹ Like all language, legal discourse is incomplete and discontinuous, a "sure sign of something more, or of something lacking."⁶²

Lacan in the Service of Polity

Part II of Caudill's book addresses some current socio-legal controversies. Chapters 6 ("Name-of-the-Father,' the Logic of Psychosis and Real Estate") and 7 ("Two Ideological Monsters: The Subject of the Bar and the Object of Desire in Bleak House") provide an analysis of the indeterminate and symbolic nature of legal institutions and law practice. Law and literature enthusiasts will particularly enjoy the discussion of Charles Dickens's *Bleak House*, a novel about the Kafkaesque quality of the English Victorian legal system in which both barristers and litigants are captured by law. The Victorian lawyers repress any desire for truth and justice not comporting with legal symbolism.⁶³ Richard, the litigant, displaces his desire for truth to the legal system and the litigation of his case drags on endlessly and becomes his whole desire — "the object of [his] life."⁶⁴ But, it is a desire the courts can never satisfy. "[T]he evidence that Chancery is *not* bringing relief to its litigants tends to demonstrate, for Richard, how much more he needs it and how much harder he must work within its processes."⁶⁵ All this reveals the ideological and symbolic functions of law and lawyers.⁶⁶ Legal discourse and ideology do not mask reality, *but are illusions structuring our reality. They believe for us.*⁶⁷

Chapter 5, "Social Hysteria, Social Psychoanalysis, and Modern Witch-Hunts," shows the illusory quality of any boundaries between self and society. "Lacan provides a framework for analysis of doctrinal controversies *as* social rather than *in* a social 'context.'"⁶⁸ Caudill starts with Denis Brion's analysis of community-wide false accusations of child abuse as community hysteria that reflects an unconscious reaction to the breakdown

61. *Id.* at 64-65 (emphasis added).

62. RAGLAND-SULLIVAN, *supra* note 23, at 251, *quoted in* CAUDILL, *supra* note 3, at 63.

63. CAUDILL, *supra* note 3, at 126.

64. *Id.* at 120-21 (quoting CHARLES DICKENS, *BLEAK HOUSE* 358 (1953)).

65. CAUDILL, *supra* note 3, at 125.

66. *Id.* at 126.

67. *Id.* at 123.

68. *Id.* at 114.

of traditional family and communal values.⁶⁹ A conscious threat, child abuse, is the "alibi" for the unconscious threat.⁷⁰ Judges, juries, and prosecutors all participate in the social hysteria.⁷¹ Courts repress the hysteria and the unconscious conspiracy of the accusers,⁷² fail to exert sufficient evidentiary control over the proceedings,⁷³ and provide only an illusory "cure" in the final judgment.⁷⁴ Caudill devotes the rest of Chapter 5 to an analysis of the relation between individual (or clinical) hysteria and social hysteria, showing how the self merges with the social, how the conscious abuts the unconscious, and how hysteria is a symptom of social illusions and, perhaps, the breakdown of culture.

Mediating the Culture Wars: The Debate Over Religion in Politics

The basis on which religion is suspect in law and politics is its difference, its otherness, its irrationality, its particularity, its failure to be the same as other voices in the public square.⁷⁵

Chapter 8, "Lacanian Ethics and the Debate Over Religion in Politics," is the most eye-opening and useful chapter in the book from the standpoint of public policy. Caudill's book sets out to demonstrate how Lacan can mediate current controversies in law and politics by bridging mainstream and critical forms of socio-legal analysis.⁷⁶ Chapter 8 provides a very effective example of this bridging by applying Lacan's *Seminar on the Ethics of Psychoanalysis*.⁷⁷

Ethics, for Lacan, is not a matter of defining the social "good" versus the social "bad."⁷⁸ Rather, the ethics of psychoanalysis is about disclosure: "clearing paths and ways in the hope that what is called virtue will take

69. See Denis Brion, *The Hidden Persistence Of Witchcraft*, 4 LAW & CRITIQUE 227 (1993), cited in CAUDILL, *supra* note 3, at 87.

70. See CAUDILL, *supra* note 3, at 87.

71. *Id.* at 89-91.

72. *Id.* at 99.

73. One is reminded of the O.J. Simpson case in this regard. Did the hysteria surrounding all aspects of this case infect the Court, resulting in Judge Ito's failure to exert sufficient control over the proceedings?

74. CAUDILL, *supra* note 3, at 99. Caudill also cites other historical as well as modern trial and appellate court examples of communal hysteria. *Id.* at 90-92.

75. *Id.* at 148.

76. *Id.* at xii.

77. *Id.* at 129-51.

78. *Id.* at 131. For a contrary view, see generally WILLIAM DOHERTY, SOUL SEARCHING: WHY PSYCHOTHERAPY MUST PROMOTE SOCIAL RESPONSIBILITY (1995).

root."⁷⁹ Separating, to the extent possible, the subject's desire from the law clears paths. This is a difficult enterprise because the "dialectical relationship between desire and the Law causes our desire to flare up only in relation to the law,"⁸⁰ and the law is a barrier to knowing the ethics of our desire.⁸¹ Our laws and moral actions are never fully veridical to the ethics of our desire, since "desire slips beyond the barriers of our good deeds. Desire will not be controlled by a dominant political order, because it is our destiny, and it will keep returning as the law that we never completely know."⁸²

With this Lacanian view of ethics, Caudill proposes a postmodern framework for accommodating religion in law and politics, a highly contentious issue today. Caudill recognizes roughly two opposing camps: (1) the "liberals," who, seeking to keep religion private, appeal to shared communal values transcending religion; and (2) the "pluralists," for whom values cannot transcend religion, thus making any public-private distinction artificial.⁸³ Caudill's departure from both traditional psychoanalytic (which often views religion as neurosis) and CLS/postmodern perspectives is quite refreshing. Caudill comes down on the side of the religious pluralists. He argues that the liberal (or Rawlsian) approach (based on common-sense, science, or shared values) has failed because all sides offer differing interpretations of our shared values.⁸⁴

Three Lacanian principles argue for the religious pluralist view. First, Lacan's subject is inextricably bound to the Other, such that the subject locates his or her desire in the Other. This supports the pluralist position that there can be no private-public distinction. Second, from birth, the subject is constructed by the Other. This negates the liberal view of the individual as independent actor⁸⁵ and again supports the pluralist position of no meaningful public-private distinction. Third, each subject's desire is unique — in each subject resides an "ethics" or "truth" different from and more virtuous than that of either others or the Other.⁸⁶ *If there can be no public-private*

79. *Id.* at 136; see generally MICHAEL RUSTIN, *THE GOOD SOCIETY AND THE INNER WORLD* (1991) (psychoanalytic approach argues public morality advanced by providing healthy social environments that promote moral inquiry, rather than through externally imposed moral prescriptions).

80. CAUDILL, *supra* note 3, at 199 n.32.

81. *Id.* at 133.

82. *Id.* at 134.

83. *Id.* at 137.

84. *Id.* at 146.

85. See *id.* at 141-42.

86. "[T]here is no common sense in psychoanalysis . . . only particular, peculiar sense. The opposite of analytic 'discourse' is that of the master, which is 'the discursive structure of

distinction, and if the subject's desire is more virtuous than (but different from) the desire of others, there can be no basis for claiming that the liberal recourse to shared values is more "public" or objective than the pluralist recourse to religion. Shared values and religion exist in the public realm, to which the views of both secular and religious subjects are bound. The secular subject cannot claim to stand outside of ideology or social belief structures any more than the religious subject. Both are captured by the Other.

Caudill stands in good company with postmodern scholar Jane Flax⁸⁷ who argues that "reason" cannot transcend parochial interests because recourse to public reason hegemonizes and fails to respect otherness.⁸⁸ Rationalistic approaches are not "independent of the contingencies of intersubjectivity, embodiment, language, social relations, or the unconscious."⁸⁹ Flax probably would agree with Caudill that:

[t]he project of liberal individualism — advocating neutrality toward all values as a way of promoting certain values of liberty and tolerance — leads to a question: what "is to prevent that principled neutrality . . . from extending to those basic values of liberty and human dignity as well?" . . . This is not, however, merely an epistemological critique — it is also a vision of the subject of law as a subject of language, of cultural identities, and of desire.⁹⁰

Thus, Caudill forces us to disclose our ideology and consider who the "we" is in public discourse.⁹¹ While postmodern/CLS approaches may be "about disclosure of ideology, not about the claim to know the truth outside ideology,"⁹² critical theorists often forget that point in practice. They often fail to see themselves as captured by ideology;⁹³ nor do they see *their* ideologies as oppressive⁹⁴ — it's always the other guy's (read, the conservative's)

politics [in its] hegemonic ideological formation.'" Dean, *supra* note 41, at 96, *quoted in* CAUDILL, *supra* note 3, at 147.

87. JANE FLAX, *DISPUTED SUBJECTS: ESSAYS ON PSYCHOANALYSIS, POLITICS AND PHILOSOPHY* 111 (1993).

88. *Id.* at 50.

89. *Id.* at 116.

90. CAUDILL, *supra* note 3, at 146 (citations omitted).

91. *See id.* at 143.

92. *Id.* at 129.

93. *See id.* at 129.

94. One wonders, for example, whether "political correctness" imposes hegemony by effectively silencing, marginalizing, or even demonizing those whose socio-political views are politically incorrect. "Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, or reduced mode of being." CHARLES

ideology that is oppressive or hegemonizing. It is interesting, then, that Caudill takes what may be a radical turn in critical legal scholarship. Caudill uses Lacan to argue *in favor* of religion in politics, a view usually associated with right-wing causes.⁹⁵

Lacan and Modern Behavioral Science

A postmodernist would claim that the empiricist's view rests on fundamentally mistaken ideas. Postmodernists stress the dependence of thought on language and the epistemological consequences of this reliance. Language, a primary medium of psychoanalysis, cannot be a transparent, passive, or neutral instrument Language partially constructs our personhood including the structure, categories, and content of thought Experience cannot speak for itself or directly to us. Language speaks us as much as we speak it. Its effects are often hidden and inaccessible to us Attaining a transcendent standpoint would require cleansing the mind of all its social and linguistic determinants and acquiring a 'god's-eye' view. What mental agency could carry out such a cleansing? All the sense data, ideas, intentions, or perceptions we have are already constituted. They only occur in and reflect linguistically and socially determined practices.⁹⁶

Given the importance Lacan attached to language, it is not surprising that Lacan has found his greatest contemporary following in departments of English, modern languages, and linguistics. Lacan is neither well known nor highly regarded among behavioral scientists (most of whom worship at the god of empiricism),⁹⁷ who find him obtuse and unscientific.⁹⁸ Being the

TAYLOR ET AL., MULTICULTURALISM AND THE POLITICS OF RECOGNITION 25 (1992).

95. Caudill has also used Lacanian theory to question the view that creation science, decidedly not a left-wing ideology, cannot be taught in the public schools. See David S. Caudill, *Lacan's Social Psychoanalysis: Religion and Community in a Pluralistic Society*, 26 CUMB. L. REV. 125 (1995); David S. Caudill, *Law and Worldview: Problems in the Creation-Science Controversy*, 3 J.L. & RELIGION 1 (1985).

96. FLAX, *supra* note 88, at 49-50.

97. Modern psychology is so empirically oriented that an academic psychologist who publishes primarily theoretical work is often viewed pejoratively as "not a scientist." Scientists "do empirical research," and in most academic psychology departments, empirical research is the coin of the realm. Nonetheless, good theoretical work generally advances the field far more than any set of empirical studies.

98. Lacan's prose "is the antithesis of the supposedly transparent, resolutely non-figurative mode of traditional scientific discourse." CAUDILL, *supra* note 3, at 48 (quoting Dennis Porter, *Psychoanalysis and the Task of the Translator*, 104 MLN 1066, 1079 (1989)). Indeed, "Lacan considers the twentieth-century subject to be that of empirical science [The] empirical subject believes in a transparency and objectivity of its own perceptions and has faith in a continuity between the perceiver and the perceived and between consciousness

ultimate model of Enlightenment rationality and supposed ideological neutrality, empirical science is a particular object of attack from postmodernists⁹⁹ (few of whom are scientists). Science is captured by language and the Other, and thus is incapable of producing ultimate truth. Lacan said that "every science remains in darkness for a long time, entangled in language."¹⁰⁰

However, since Lacan's theory (while psychoanalytic) is a theory of human behavior, it is worthwhile to consider what current psychological research actually tells us about the scientificity of Lacanian/postmodern theory.¹⁰¹ Ironically, despite postmodernists' "attack" on science and scientists' attack on postmodernism,¹⁰² the findings of modern behavioral science appear to support some key tenets of Lacanian/postmodern theory.

Both theoretical and empirical psychology support the position that the development of self implicates the language of otherness,¹⁰³ with the onset of language producing a corresponding sense of the self in relation to the Other.¹⁰⁴ Lacan is consistent with modern psychology in arguing that one comes to know the self in the context of knowing others,¹⁰⁵ and interestingly,

and reality." CAUDILL, *supra* note 3, at 74; RAGLAND-SULLIVAN, *supra* note 23, at 7. To the extent that Lacanian theory finds sympathy with CLS and postmodern approaches, it may be antithetical to the empiricism of Western science. See JOHN MONAHAN & LAURENCE WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 29 (3d ed. 1994) (noting that CLS is skeptical of empiricism, with some CLS scholars finding it "the product of a closed capitalistic cultural system").

99. See FLAX, *supra* note 88, at 42, 48-49; see generally PAUL R. GROSS & NORMAN LEVITT, *HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARRELS WITH SCIENCE* (1994) (documenting and arguing against leftist-postmodern attack on science).

100. JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN, BOOK I: FREUD'S PAPERS ON TECHNIQUE, 1953-54*, at 2 (J.A. Miller ed. & J. Forrester trans., 1988).

101. For a discussion of the scientificity of Lacanian theory, see generally Richard E. Redding, *Socialization by the Legal System: The Scientific Validity of a Lacanian Socio-Legal Psychoanalysis*, 75 OR. L. REV. 781 (1996) (arguing that Lacanian theory has degree of scientific validity and proposing model for understanding how we are socialized by Other of law and how law becomes self) and David S. Caudill, *Why Would a Lacanian Socio-Legal Analyst Care About Scientific Validity?: A Response to Redding*, 75 OR. L. REV. 811 (1996).

102. See *supra* note 100; Kurt Gottfried & Kenneth G. Wilson, *Science as a Cultural Construct*, 386 NATURE 545 (1997); THEODORE SCHICK & LEWIS VAUGHN, *HOW TO THINK ABOUT WEIRD THINGS: CRITICAL THINKING FOR A NEW AGE* 4 (1995) (arguing that charlatans of pseudo-science would have you believe that there is no such thing as objective truth).

103. See Adrienne Harris, *Dialogues as Transitional Space: A Rapprochement of Psychoanalysis and Developmental Psycholinguistics*, in *RELATIONAL PERSPECTIVES IN PSYCHOANALYSIS* 119 (Neil J. Skolnick & Susan C. Warshaw eds., 1992).

104. See DANIEL N. STERN, *THE INTERPERSONAL WORLD OF THE INFANT: A VIEW FROM PSYCHOANALYSIS AND DEVELOPMENTAL PSYCHOLOGY* (1985).

105. See generally OTTO KERNBERG, *OBJECT RELATIONS THEORY AND CLINICAL PSYCHOANALYSIS* (1976); *RELATIONAL PERSPECTIVES IN PSYCHOANALYSIS* (Neil J. Skolnick

the sense of self apparently varies somewhat across cultures.¹⁰⁶ Like Caudill, psychologists conceptualize the self as simultaneously embedded in the Other while also unique from the Other.¹⁰⁷

Research also supports the Lacanian/postmodern argument of an important role for language in shaping thought and knowledge — even scientific research. Science is entangled in language, and it has been noted that labels used in research reflect implicit ideologies that constrain research questions.¹⁰⁸ More generally, research clearly shows that language affects choices and decision making.¹⁰⁹ Research also suggests that the particular language we speak affects our thinking and social behavior — for example, how we classify things, what we remember,¹¹⁰ and the structure of our social interactions.¹¹¹ At least in some domains, thought comes into existence through language,¹¹² the degree to which language shapes, or is necessary for thought, is highly debated in psychology, though.

Further, research supports the postmodern/Lacanian view that no one, not even judges or scientists, can escape ideology. A large body of research has demonstrated people's tendency to evaluate information in a manner

& Susan C. Warshaw eds. 1992); STERN, *supra* note 105; Susan Harter, *Developmental Perspectives on the Self System*, in 4 HANDBOOK OF CHILD PSYCHOLOGY: SOCIALIZATION, PERSONALITY, AND SOCIAL DEVELOPMENT 275 (Paul H. Mussen ed., 1983); Sandra Pipp, *Sensorimotor and Representational Internal Working Models of Self, Other, and Relationship: Mechanisms of Connection and Separation*, in THE SELF IN TRANSITION: INFANCY TO CHILDHOOD 243 (Dante Cicchetti & Marjorie Beeghly eds., 1990) [hereinafter SELF IN TRANSITION]; L. Alan Sroufe, *An Organizational Perspective on the Self*, in SELF IN TRANSITION, *supra*, at 281.

106. Robert A. LeVine, *Enculturation: A Biosocial Perspective on the Development of Self*, in SELF IN TRANSITION, *supra* note 106, at 99; *see also* R. Schweder & E. Bourne, *Does the Concept of the Person Vary Cross-Culturally?*, in CULTURE THEORY 106 (R. Schweder & R. Levine eds., 1984).

107. *See* Pipp, *supra* note 106, at 260.

108. *See* PAUL FEYERABEND, *AGAINST METHOD* (rev. ed. 1988); Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psycholegal Research* (1997) (unpublished manuscript, on file with author).

109. *See, e.g.*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Amos Tversky, & Paul Slovic eds., 1982).

110. *See generally* A.H. BLOOM, *THE LINGUISTIC SHAPING OF THOUGHT: A STUDY IN THE IMPACT OF LANGUAGE ON THINKING IN CHINA AND THE WEST* (1981); Curt Hoffman et al., *The Linguistic Relativity of Person Cognition: An English-Chinese Comparison*, 51 J. PERSONALITY & SOC. PSYCHOL. 1097 (1986); JOHN LUCY, *GRAMMATICAL CATEGORIES AND COGNITION: A CASE STUDY OF THE LINGUISTIC RELATIVITY HYPOTHESIS* (1992).

111. *See* LANGUAGE, INTERACTION AND SOCIAL COGNITION (Gun R. Semin & Klaus Fiedler eds., 1992).

112. P.R. Portes, *The Role of Language in the Development of Intelligence: Vygotsky Revisited*, 18 J. RES. & DEV. EDUC. 1, 7 (1985).

consistent with their own biases and prior beliefs.¹¹³ For instance, one study presented synopses of studies on the deterrence effect of capital punishment to psychology majors, and asked them to rate each study's persuasiveness and methodological soundness. Those favoring capital punishment rated higher the study finding a deterrence effect, whereas those against capital punishment rated higher the study finding no deterrence effect.¹¹⁴ Another study showed a socio-political bias effect among judges and law students in how they evaluated social science research evidence.¹¹⁵ Similarly, scientists' judgments about the methodological soundness and publishability of research studies varies significantly according to whether the research matches their theoretical orientation.¹¹⁶ Scientists also tend to overlook obvious and serious methodological flaws in research studies where they perceive the topic of the study to be important, but they generally detect those flaws in research they consider less important.¹¹⁷

Importantly, the biasing effects of ideology cannot be escaped *because bias often is located in the unconscious*. As empirical studies have shown, unconscious biases affect our conscious judgments.¹¹⁸ Using a technique

113. See, e.g., Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 4 J. ABNORMAL & SOC. PSYCHOL. 129 (1954) (classic empirical study in social psychology, documenting how a Dartmouth-Princeton football game was seen very differently by Dartmouth versus Princeton students). "It seems clear that the 'game' actually was many different games and that each version of the events that transpired was just as 'real' to a particular person as other versions were to other people." *Id.* at 132.

[T]here is no such "thing" as a "game" existing "out there" in its own right which people merely "observe." . . . For the "thing" simply is *not* the same for different people whether the "thing" is a football game, a presidential candidate, Communism, or spinach. . . . We behave according to what we each bring to the occasion . . . and except for these significances which we bring to the occasion, the happenings around us would be meaningless occurrences, would be "inconsequential."

Id. at 133; see also David Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984).

114. Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOCIAL PSYCHOL. 2098 (1979).

115. RICHARD E. REDDING, RELATIONSHIPS BETWEEN LAWYERS' SOCIO-POLITICAL ATTITUDES AND THEIR JUDGMENTS OF SOCIAL SCIENCE IN LEGAL DECISION MAKING (1997) (unpublished Ph.D. dissertation, University of Virginia) (on file with author).

116. Michael J. Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System*, 1 COGNITIVE THERAPY & RES. 161 (1977).

117. Timothy D. Wilson et al., *Scientists' Evaluations of Research: The Biasing Effects of the Importance of the Topic*, 4 PSYCHOL. SCI. 322 (1993).

118. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989); Charles W. Perdue et al., *Us*

called semantic priming, these studies used computer screens to flash words at participants at speeds so fast that they were consciously unaware of their content. In one study, the semantic priming consisted of pairing nonsense words with other words having either negative, positive, or neutral connotations. Afterwards, participants were presented, at the level of conscious awareness, each nonsense word and asked to rate its pleasantness. Participants rated the nonsense words as more pleasant when the word had been paired with a pleasant word in the semantic priming phase.¹¹⁹ In another study, participants were primed with words representing either neutral or negative stereotypes of African-Americans. They then read a paragraph describing an African-American in ambiguous terms and rated the individual described. Those primed with the negative stereotypes rated the character more negatively.¹²⁰

However, another study also demonstrates Caudill's point that *we can, to an extent, escape ideology if our unconscious ideologies can be brought to consciousness*. This study showed that the semantic priming effect can be overcome when participants are told about it and given instructions about how to compensate for its effects.¹²¹

Lacan and the Place of the Modern Self

[For Lacan, an] account of the subject is necessary to all the human and social sciences, and will necessarily require a subversion of the presumed subject-in-control.¹²²

[A]ll of Lacan's texts and controversies he created, arguably, are about the subject — a subject of the unconscious, of psychoanalysis, of desire, of knowledge, of language, and of culture. There is no inside (e.g., psyche) and outside (e.g., culture) in Lacan's account of the subject, so everything — identities, desire, language, society, law — seems to be involved in the constitution of the subject.¹²³

and Them: Social Categorization and the Process of Intergroup Bias, 59 J. PERSONALITY & SOC. PSYCHOL. 475 (1990).

119. Perdue et al., *supra* note 119.

120. Devine, *supra* note 119.

121. Irene V. Blaire & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142 (1996).

122. CAUDILL, *supra* note 3, at 74.

123. *Id.* at 73.

Postmodern psychologist (there are some!)¹²⁴ Kenneth Gergen observes that the complete saturation of the self, brought about by advances in technology that overwhelm us with data, knowledge, and communications, has resulted in a crisis of identity.¹²⁵ What is the place of the self, in modern (postmodern) society? Lacanian theory offers a compelling account of the ego in relation to the we — what Klein called the "we-go."¹²⁶ Lacan provides an understanding of the self in relation to society and, with David Caudill's analysis, of the self in relation to law.

Lacan's challenge to the self — *to a subject-in-control* — offers a critical insight: "the distance between 'self' and 'influential' power structures is collapsed," such that everyone is captured by ideology,¹²⁷ as we are captured by law and social institutions. Critical theorists often assume that disclosure breaks ideology's spell.¹²⁸ *But Lacan shows us that the spell of ideology cannot be broken; the self cannot be disembedded from others and Otherness. At the same time, however, Caudill demonstrates how the disclosure of Lacanian psychoanalysis allows us to know the self better, and knowing the self is important.* "If you know a lot, Lacan teaches, you will know how much you take (and will continue to take) from language, from others and from the Other."¹²⁹ We have a measure of control, and we each take different things from others and the Other.

David Winnicott said that there is no infant,¹³⁰ meaning the infant has no sense of self. Lacan could be caricatured as saying that "there is no *self*." However, this would only be a caricature. While Lacanian analysis positions the subject as caught in the web of *Schema-L* (including the law of the Other), recognizing the illusions of autonomy allows one to achieve some autonomy. The subject "can to some degree understand and navigate his or her way within the network . . . provid[ing] the basis for some genuine, as opposed to illusory, choices or selections as to whom or to what we will be

124. For postmodern approaches to psychology, see generally PSYCHOLOGY AND POST-MODERNISM (S. Kvale ed., 1992); THERAPY AS SOCIAL CONSTRUCTION (S. McNamee & K. Gergen eds., 1992); and Kenneth J. Gergen, *Exploring the Postmodern: Perils or Potentials?*, 49 AMER. PSYCHOLOGIST 412 (1994).

125. KENNETH J. GERGEN, *THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE* 1-3, 6-7, 60-80 (1991).

126. See GEORGE S. KLEIN, *PSYCHOANALYTIC THEORY: AN EXPLORATION OF ESSENTIALS* 178 (1976).

127. CAUDILL, *supra* note 3, at 140.

128. See *id.* at 129, 140.

129. *Id.* at 150.

130. See David Winnicott, *The Theory of the Parent-Infant Relationship*, in *THE MATURATIONAL PROCESSES AND THE FACILITATING ENVIRONMENT* (D. Winnicott ed., 1965).

subject."¹³¹ Caudill thus finds room for both individual free-will and for social determinism¹³² (though more of the latter than the former). The power of ideology, language, and the unconscious is strong, but not all powerful.¹³³ Some change is possible.

These seemingly contradictory notions — of a collapsed self, but a self different from the others and the Other — implies that an ethics of law and public policy be grounded *both* in: (1) a respect for the particularity of others; and (2) a recognition of others and the Other as part of the self. Flax asserts this as the essence of justice: recognizing the legitimacy of otherness while "manag[ing] the strain of being simultaneously public and private, alone and related to others, desiring and interdependent."¹³⁴ Thus, Lacanian ethics provides the framework for accommodating, while at the same time recognizing the interdependency of, self and other. It requires an understanding of "not merely what we share with others but the limits of what we share."¹³⁵

Lacan's Place in Contemporary Cultural and Legal Studies

[Lacan has brought] psychoanalysis . . . into its post-modern phase.¹³⁶

Instead of knowledge and the search for the truth, [postmodernists] promulgate a trendy relativism Nowadays, postmoderns of various sorts — neo-Marxists, radical feminists, racial advocates and gay activists — challenge the very idea of "truth and objectivity."¹³⁷

With its focus on the dependency on language, its indeterminate stance, and its challenge to the autonomous self, Lacanian theory finds a place within deconstructionism¹³⁸ and postmodernism, which have sparked a revival in

131. CAUDILL, *supra* note 3, at 81.

132. *Id.* at 153.

133. *Id.* at 153.

134. FLAX, *supra* note 88, at 123.

135. S. Hendley, *Liberalism, Communitarianism and the Conflictual Grounds of Democratic Pluralism*, 19 PHIL. & SOC. CRITICISM 293, 294 (1993), quoted in CAUDILL, *supra* note 3, at 147.

136. Henry Sussman, *Psychoanalysis Modern and Post-Modern*, in PSYCHOANALYSIS AND . . . 143 (R. Feldstein & H. Sussman eds., 1990).

137. Stanley Stewart, *Review of Higher Superstition: The Academic Left and Its Quarrels with Science*, SOCIETY, July-Aug. 1996, at 94, 94.

138. See MIHALY CSIKSZENTMIHALYI, *THE EVOLVING SELF: A PSYCHOLOGY FOR THE THIRD MILLENNIUM* 39 (1993). Csikszentmihalyi notes:

the humanities. Postmodern theorists argue that, in promoting the enlightenment view of rationality, Western society protects the interests of the powerful, whose authority is grounded in their ability to discover, produce, or protect the truth. Knowledge is power, in other words, and power resides in having "the truth;" those who do not have it (e.g., the uneducated, radicals who attack mainstream ideology, the non-expert) are marginalized.¹³⁹

Thus, critics have described postmodern/CLS (having roots in Marxist theory)¹⁴⁰ and psychoanalytic approaches to law and cultural studies,¹⁴¹ as tools used by left-leaning academics¹⁴² in the "culture wars."¹⁴³ In the view of conservatives¹⁴⁴ like Lynne Cheney (former President of the National Endowment for the Humanities), postmodernism is nothing more than a vehicle for the leftist ideology and political correctness dominant in today's academy.¹⁴⁵ These scholars find company with many (typically liberal)

[A]ccording to [deconstructionism] there is no way of knowing anything beyond direct experience itself. If I try to tell you about the sufferings of my childhood, the words I use will bring a first level of distortion into the tale, and your interpretation of my words will distort the story even further. Neither logic nor scientific discourse can avoid mystifying through their attempts at communication. There is no way to get at reality through words, all generalizations are suspect, and the sharing of meanings between minds is an illusion.

Id.

139. FLAX, *supra* note 88, at 38-42.

140. According to Marxist ideology, by characterizing their views as empirical truth, enlightenment rationality promotes the vested interests of the bourgeois class. PAULINE M. ROSENAU, *POSTMODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INTRUSIONS* 13 (1992).

141. *Id.* at 160-64.

142. See generally Arthur Austin, *The Top Ten Politically Correct Law Reviews*, 1994 UTAH L. REV. 1319 (1994); LYNNE CHENEY, *TELLING THE TRUTH* 15-21, 98-99 (1995). *But cf.* ROSENAU, *supra* note 141, at 166 (noting that "post-modernism is so abstract and obscurantist that it can be manipulated to fit any political orientation"). Though rare, postmodernism sometimes is appropriated by conservatives. See ROSENAU, *supra* note 141, at 155, 165; James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 266-67 (1991) (suggesting Judge Bork is now post-modern conservative).

143. See generally THE AMERICAN CULTURE WARS: CURRENT CONTESTS AND FUTURE PROSPECTS (James L. Nolan ed., 1996).

144. See ROSENAU, *supra* note 141, at 164.

145. In describing postmodernism, Cheney writes:

[I]n the view of a growing number of academics, the truth was not merely irrelevant, it no longer existed . . . [A]ll those things that we think are true are really the constructs of dominant groups, the creations of the powerful . . . In fields ranging from education to art to law, the attack on the truth has been accompanied by an assault on standards. The connection is seldom made clear. Indeed, one of the characteristics of postmodern thought is that it is usually asserted rather than

behavioral scientists. They both attack postmodernism on the basis that, in suggesting that there is no objective truth,¹⁴⁶ postmodernism is a fraud that promotes an irrational and unscientific nihilism.¹⁴⁷ Even some psychoanalysts bemoan a postmodern therapeutic *zeitgeist* which teaches that all values are subjective and relative; and that if it feels good, it must be right.¹⁴⁸

Caudill probably is correct that, in the end, Lacan is neither rationalist nor postmodern¹⁴⁹ (though Lacan is appropriated in postmodern scholarship), neither a conservative nor a radical,¹⁵⁰ and Lacan's subject is neither free-willed nor determined. For Caudill, these are all false dichoto-

argued, reasoned argument having been rejected as one of the tools of the white male elite. But the thinking seems roughly to be that absent external reality, distinctions of any kind are meaningless.

CHENEY, *supra* note 143, at 15-16, 18; *see also* ROBERT NISBET, THE DEGRADATION OF THE ACADEMIC DOGMA (1997); Gertrude Himmelfarb, *Professor Narcissus: In Today's Academy, Everthing Is Personal*, THE WEEKLY STANDARD, June 2, 1997, at 19, 20-21 (In postmodern academy there is no "truth." Instead, everything is "personal" and "political."); Richard Lacayo, *War of Words*, TIME, July 7, 1997, at 92 ("The bulk of academics cut their eyeteeth in the student revolution. They keep pushing the impulse to transform the country by transforming their students." (quoting Berkeley professor Robert Alter, reacting against the postmodernism of the academy)).

146. *See generally* GERGEN, *supra* note 126, at 81-110 (discussing lack of "objective truth" in postmodern academy).

147. Though at times postmodernism assumes such a relativist stance that even the meaning of postmodernism is relative: "[Postmodernism] has no single, stable meaning. It refers to so many different things . . . that the multiplicity of references has itself been theorized as a major 'lesson' of postmodernism . . ." Jay Clayton, *Dickens and the Genealogy of Postmodernism*, 46 NINETEENTH CENTURY LITERATURE 181, 184 (1991), *cited in* CAUDILL, *supra* note 3, at 194 n.9.

148. *See* Steve Perry, *Waking up with the House on Fire: An Interview with James Hillman*, UTNE READER, Jan.-Feb. 1997, at 53, 54-55. Indeed, a criticism of the relativistic, nonjudgmental stance of postmodern and psychoanalytic approaches is that they may lead to an extreme, almost nihilistic relativism, and thus no moral vision at all. *See* Isaac Prilleltensky, *Values, Assumptions, and Practices: Assessing the Moral Implications of Psychological Discourse and Action*, 52 AM. PSYCHOLOGIST 517, 528 (1997).

149. CAUDILL, *supra* note 3, at 155; *see also* Redding, *supra* note 102. Lacan has been criticized alternatively for being traditionalist and postmodern. *See* CAUDILL, *supra* note 3, at 17-21. *But see* William Kerrigan, *Terminating Lacan*, 88 S. ATLANTIC Q. 993, 1007 (1989) (arguing that Lacan is neither traditionalist nor postmodern, but "is on another road altogether").

150. Caudill notes Lacan's musings on the "scoundrel" nature of right-wing intellectuals (in their appeal to the harshness of the human condition), as compared to left-wing intellectuals who are "fools" (in their naive optimism about the human condition). CAUDILL, *supra* note 3, at 132. Lacan finds contempt for both. (Though one gets the sense that Lacan, like contemporary postmodern scholars, has far more sympathy for the latter than the former.)

mies,¹⁵¹ with Lacan "framed by the rocks and hard places we are between and seek to avoid."¹⁵² Caudill compellingly argues that Lacan does not fit neatly within either CLS or objectivist ("rule-of law") approaches to law, both of which see the subject as ultimately autonomous. The former sees the subject as oppressed and constrained by the law, whereas the latter views the subject as aided by an objective law "that works."¹⁵³ Neither sees the subject as *part of* a problem embedded in the complex network of subject-other/Other relations; the problem is always *located in the Other*. Both formulations limit "the cure," because how one conceives a problem largely predetermines the solution.¹⁵⁴

Law's Analyst? Prospects for Lacanian Psychoanalysis in Law

What are the prospects for Lacan to become law's analyst, for Lacanian psychoanalysis to be widely used in law? That remains an open question. The fact that Lacan's theory is psychoanalytic is problematic. Psychoanalytic approaches have fallen into disfavor in psychology and psychiatry, and psychoanalytic jurisprudence never has been popular in law.¹⁵⁵ At the same time, a cottage industry has developed in attacking psychoanalytic theory, demonstrating the enduring nature of psychoanalytic ideas.¹⁵⁶ While many aspects of traditional psychoanalytic theory are undoubtedly flawed,¹⁵⁷ the psychoanalytic view of the human condition — of the power of the unconscious and of instinctual drives — has fundamentally and forever changed our views of self and society.

The complexity and psychoanalytic nature of Lacanian theory will prevent all but the most scholarly and lettered of legal practitioners from putting it to use (not to mention the obstacles to interdisciplinary work, even

151. CAUDILL, *supra* note 3, at 153.

152. *Id.* at xvi.

153. *Id.* at 69-72.

154. See PAUL WATZLAWICK ET AL., CHANGE: PRINCIPLES OF PROBLEM FORMATION AND PROBLEM RESOLUTION (1974).

155. Leonard Kaplan & Vincent Rinella, *Jurisprudence and the Appropriation of the Psychoanalytic: A Study in Ideology and Form*, 11 INT'L J.L. & PSYCHIATRY 215, 216 (1988). The publication of three new books on psychoanalysis and law, however, may suggest a renewed interest. See Costas Douzinas, *Psychoanalysis Becomes the Law: Notes on an Encounter Foretold*, 20 L. STUDIES FORUM 323 (1996) (reviewing books by Caudill, Schroeder, and Goodrich).

156. See John Horgan, *Why Freud Isn't Dead*, 275 SCI. AM. 106 (1996); Thomas Nagel, *Freud's Permanent Revolution*, N.Y. REV., May 12, 1997, at 3A.

157. See generally Frederick Crews, *The Verdict on Freud*, PSYCHOL. SCI. 63 (1996); PAUL ROBINSON, FREUD AND HIS CRITICS (1993).

in the academy).¹⁵⁸ Caudill shows the value in doing so, and his book will likely be a watershed work in popularizing Lacan within the legal academy, where postmodern approaches are becoming fashionable.¹⁵⁹ Lacan helps mediate current academic controversies about the role of the subject, enlightenment rationality, and the determinacy of text and law,¹⁶⁰ and ongoing controversies in law and politics. To the extent legal scholars apply Lacan to doctrinal and public policy analysis, the Lacanian perspective (whether or not it is identified as such) may eventually filter into legal practice and lawmaking.

Caudill's book demonstrates that when in the hands of a careful and honest broker, postmodern psychoanalytic approaches promote a public discourse of inclusiveness and diversity. Caudill reminds us that ideology captures *all* (radical conservatives as well as radical liberals, and everyone in between) of us, and there is no escaping its inevitable tilt. Because Caudill finds a place for everyone, avoiding the tendency of some postmodern scholars to promote a liberal hegemony, his approach should be of great value to liberals and conservatives alike — a rare gift in the ongoing culture wars.

158. See generally J.M. Balkin, *Interdisciplinary as Colonization*, 53 WASH. & LEE L. REV 949 (1996).

159. See generally *THE FATE OF LAW* (Austin Sarat & Thomas R. Kearns eds., 1991).

160. CAUDILL, *supra* note 3, at xi-xii.

NOTES
