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Identifying Law's Unconscious: Disciplinary and Rhetorical Contexts

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Identifying Law's Unconscious: Disciplinary and Rhetorical Contexts

David S. Caudill*

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Each time I tried to do a piece of theoretical work, it had as its starting point elements of my own experience and was always in relation to processes that I saw going on around me. It's because I thought I could recognize in the things I saw, in the institutions that I was dealing with, in my relations with others, some cracks, mute tremors, malfunctionings, that I undertook a particular piece of work — some fragments of autobiography.¹

Each of us, of course, thinks and writes on the basis of our own experiences and in relation to what each of us sees going on. Several years ago I attended a paper presentation at a conference, after which a member of the audience responded critically to the presenter with the remark, "Your paper tells me more about you than the topic you addressed." Not surprisingly, perhaps, the theme of the conference was psychoanalysis and the respondent an analyst (thus, the joke about two analysts meeting on the street, one

* Professor of Law, Washington and Lee University. This Article is based on an address presented at the Washington and Lee School of Law on March 28, 1997, in connection with the *Lacan and the Subject of Law* Symposium.

1. Interview by Didier Eribon with Michel Foucault, in *Est-il donc important de penser?*, LIBÉRATION, May 30-31, 1981, *quoted and translated* in DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 234 n.61 (1995).

saying, "Hello, how am I today?" and the other answering, "Fine, how about me?"). Nevertheless, while a scholarly paper on any topic should reveal something more than the scholar herself, some degree of self-revelation is inevitable. Indeed, the turn to personal narratives in legal scholarship is theoretically justified as an acknowledgment that we are each socially situated and constructed, that we each have a history, and so forth.

I like the texts of Jacques Lacan, and I think that his theory of the human subject is both compelling and useful in the analysis of legal processes and institutions. If I did not like Lacan's texts, I might nevertheless have written *Lacan and the Subject of Law*,² but the subtitle would have been something like "A Useless Enterprise" (there *is* an industry in, and impliedly a market for, books criticizing Lacan). Similarly, if I spent as much time reading Foucault as I have Lacan, this conference might be titled "Foucault and the Subject of Law." My point is not simply the obvious one that I did study Lacan (and not Foucault) and that I became a Lacanian (and not an anti-Lacanian), but also that my interest in Lacan says something about me and not just about Lacanian theory. Norman Holland, a critic of Lacan, actually suggests, quite rudely I think, that Lacanian theory is attractive to some because it allows one to do anything (immoral) one wants.³ While that point is not well taken, Lacan's notion of the subject as constituted in symbolic and imaginary relations — through networks of language and by identifying with other people — does imply that I am not a wholly rational and autonomous subject freely exercising my objective preferences. Rather, I am positioned in such a way that Lacanian theory is attractive. And, moving from self-criticism to social criticism, everyone else is positioned in ways that matter when they hear about Lacan.

In Part I below, I discuss the recent opinion by the United States Court of Appeals for the First Circuit in *Cohen v. Brown University*⁴ because I think it is a very Lacanian analysis of Title IX's requirement of gender equity in college athletics.⁵ I use the word "Lacanian" loosely, as Terry Eagleton did in referring to a Lacanian Irish Rebel song,⁶ to refer to the

2. DAVID S. CAUDILL, *LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY* (1997).

3. See NORMAN HOLLAND, *THE CRITICAL I* 199 (1992). Holland wrote: "I once asked a graduate student why he liked Lacan so much. He replied: 'It means I am not responsible for *anything*, not society, not my words, not me. Also, it helps me get girls.'" *Id.*

4. 101 F.3d 155 (1st Cir. 1996).

5. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1997).

6. See TERRY EAGLETON, *HEATHCLIFF AND THE GREAT HUNGER: STUDIES IN IRISH CULTURE* 142 (1995) ("When we were savage, fierce and wild/She came like a mother to her

court's conclusion that evidence of women's lack of interest in sports must be viewed with suspicion: rather than indicating a lack of discrimination against women's sports programs, the lack of interest may signal the "historical lack of opportunities to participate in sports."⁷ The *Cohen* opinion provides an opportunity not only to consider the relevance of Lacanian theory for the types of problems that arise in law, but also to describe certain aspects of Lacanian theory as background for the remainder of this essay.

In Part II, I consider the question of why I chose, in my book on Lacan, to begin with a catalog of criticisms of Lacan — with what one reviewer called a "tone of slightly embarrassed defense."⁸ The reasons I give may end up saying more about me than about Lacan, but that too becomes a very Lacanian exercise in legal scholarship.

I. Lacan, Law, and Women in Sports

Class, race, gender, hegemony, imperialism, ritual, liminality, sex and discourse! Everyone's favorite analytical instruments — and never more useful than in the interpretation of England's national game, cricket⁹

Sport is a mirror of many things. It illuminates political, social, economic and legal systems.¹⁰

This academic year, as I was preparing for this symposium, my teaching assignments included Contracts, Law and Psychology, Professional Responsibility, and Sports Law. The law school administration here at Washington and Lee University — and this is likely not unique — encourages each member of the faculty to engage in scholarship related to his or her teaching, for the obvious reason that students will benefit from being taught by scholars in their respective teaching fields. This is not a written directive, but it's part of the culture here. In my appropriation of Lacan for law, I have described in earlier publications the relevance of Lacan for three of my courses this year: for contracts (with respect to legal interpretation),¹¹

child/And gently raised us from the slime"). Eagleton indicates displaced rage and compliance as a way of not complying with a mother (England) who misconceives a child's (Ireland's) need for recognition. *Id.*

7. *Cohen*, 101 F.3d at 179.

8. See Costas Douzinas, *Psychoanalysis Becomes the Law: Notes on an Encounter Foretold*, 20 LEGAL STUD. F. 323, 325 (1996).

9. Patrick Allitt, *English Cricket and Literature*, 95 S. ATL. Q. 385, 385 (1996).

10. Colin Tatz, *Racism and Sport in Australia*, RACE & CLASS, Apr.-June 1995, at 43, 43.

11. See generally David S. Caudill, *Lacan and Legal Language: Meanings in the Gaps, Gaps in the Meanings*, 3 LAW & CRITIQUE 169 (1992).

for professional responsibility (with respect to Lacanian ethics),¹² and for law and psychology (with respect to the presumed subject of law).¹³ I did not expect Lacan to be relevant for Sports Law, until I read the *Cohen* opinion decided Nov. 21, 1996. For anyone interested in psychoanalytic jurisprudence, the gender discrimination claim in *Cohen* has it all: surface consciousness, hidden unconscious, culturally mediated desires, collective repression, refusal to submit to symbolic conventions, bodies colonized by language, and conflict between biological nature and cultural subjectivity. Sports and Culture theorists have for years argued that there is more going on in athletic events, in terms of social production and reproduction, than meets the eye, and the First Circuit has now validated that sub-discipline at the margins of sociology, cultural studies, and psychology.

Cohen v. Brown University, a class action brought by student members of the women's gymnastics and volleyball teams, involved an allegation of Title IX violations by the university in demoting those teams from university-funded varsity status to donor-funded varsity status.¹⁴ The district court's finding of Title IX violations was affirmed by the Court of Appeals for the First Circuit, but was remanded for reconsideration of the appropriate remedy.¹⁵ The major issue on appeal was the proper interpretation of the so-called three-part test used to determine compliance with Title IX's requirement for equal athletic opportunity for members of both sexes.¹⁶ Briefly, the three-part test inquires as to:

- (1) whether participation opportunities for male and female students are provided in substantial proportion to their respective enrollments;
- (2) where one sex is underrepresented, whether the institution can show a history and continuing practice of program expansion responsive to developing interest and abilities of members of that sex; or
- (3) where there is underrepresentation and no showing of program expansion, whether the institution can demonstrate that the interests and abilities of the underrepresented sex have been fully and effectively accommodated by the present program.¹⁷

12. See generally David S. Caudill, *Lacanian Ethics and the Desire for Law*, 16 CARDOZO L. REV. 793 (1995).

13. See generally David S. Caudill, *Pierre Schlag's "The Problem of the Subject": Law's Need for an Analyst*, 15 CARDOZO L. REV. 707 (1993).

14. *Cohen v. Brown Univ.*, 101 F.3d 155, 161 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1997).

15. *Id.* at 188.

16. *Id.* at 166.

17. *Id.*

Brown University could not satisfy the first two prongs¹⁸ and attempted to meet the third prong by arguing that "the gender-based disparity in athletics participation opportunities at Brown is due to a lack of interest on the part of its female students, rather than to discrimination, and any attempt to remedy the disparity is, by definition, an unlawful quota."¹⁹ That approach, the *Cohen* majority found, is entirely contrary to federal mandates and makes it virtually impossible "to eliminate sex discrimination in intercollegiate athletics."²⁰

Brown University's argument that "women are less interested than men in participating in intercollegiate athletics" ignored "the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities."²¹ Significantly, Brown University offered "statistical evidence purporting to reflect women's interest," but that evidence "instead provide[d] only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."²²

Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience

. . . .
 . . . We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletic opportunities for women than for men.²³

The link between lack of interest and lack of opportunity was made explicit by the court. Brown University, in effect, argued that the two are unrelated by relying on evidence of interest alone, which seems consistent with the language of the third prong of the three-part test.²⁴ The court, however, noted that the Policy Interpretation (issued by the U.S. Department of Education's Office of Civil Rights in 1979) that sets forth the three-part test requires institutions to take into account "the nationally increasing levels of women's interests and abilities" in athletics.²⁵ Since that phenomenon is

18. *Id.* at 175.

19. *Id.* at 176.

20. *Id.*

21. *Id.* at 178-79.

22. *Id.* at 179.

23. *Id.* at 179-80.

24. *Id.* at 178.

25. *Id.* at 179 n.15 (quoting Policy Interpretation, 44 Fed. Reg. 71,413, 71,417 (1979)).

attributable in part to Title IX,²⁶ the link between interest and opportunity is established. Brown University's approach "contravenes the purpose of [Title IX and its regulations] . . . to remedy a gender-based disparity in . . . opportunities" and actually "freezes that disparity by law, thereby disadvantaging further the underrepresented gender."²⁷

This train of thought might lead quickly to the conclusion that our expressed interests, our conscious desires, may not be genuinely "ours" — they are fabricated or socially constructed by a history of opportunities and experience. That is, Brown University's women who answered a questionnaire about interest in athletics are not the presumed, free and autonomous, subjects of law. Rather, they are split subjects with surface interests (*written* on the questionnaires *after* they have been written by social conventions on the subject, the former being only a recording of the latter) and with repressed interests (erased by social conventions). The purpose of Title IX is to change the social conventions that have reduced opportunities and experiences. The purpose of legal analysis under Title IX is only indirectly to "treat" the student athlete by revealing those with whom she identifies and by tracing the societal expectations and narratives that structure her desires. More directly, the court engaged in social psychoanalysis by identifying the "traditional myth that women aren't interested in sports"²⁸ and by showing the "lack of interest defense" to be an "instrument of further discrimination,"²⁹ neither of which were obvious in the statistical interpretation of the questionnaires. As in clinical psychoanalysis, the patient, here the university, would not be blamed for intentional discrimination. Brown University did not force or teach its women to eschew sports. Rather, the university failed to recognize, in Foucault's terms, that "power is everywhere."³⁰

Modern liberalism has eliminated certain modes of domination only to produce many others (which do not present themselves as modes of domination and are all the more difficult to challenge or oppose); it has championed an ethic and an ideal of personal freedom while making the exercise of that freedom conditional upon personal submission . . . to mechanisms of constraint.³¹

26. *Id.* at 180 (citing Mike Tharp et al., *Sports Crazy! Ready, Set, Go. Why We Love Our Games*, U.S. NEWS & WORLD REP., July 15, 1996, at 30, 33-34 (attributing explosive growth of number of women in sports in part to Title IX)).

27. *Id.*

28. *Id.*

29. *Id.*

30. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 93 (R. Hurley trans., 1978).

31. HALPERIN, *supra* note 1, at 19.

The deeply internalized "mechanisms of constraint" become the field of psychoanalysis, which is where the court in *Cohen* was headed.

That train of thought, however, was soon derailed in the opinion because the specific facts of the case rendered the lack-of-interest arguments inconsequential.³² Brown was eliminating varsity level teams where interest and ability already existed, so the entire staging of psychoanalytic inquiry was somewhat beside the point. The dissenting judge, however, immediately recognized the danger of the majority's inquiry: "[I]t is inevitable [in Title IX disputes] that statistical evidence will be relevant. There is simply no other way to assess participation rates, interest levels, and abilities."³³

Moreover, the majority approvingly cites statistics regarding proportionality of women's participation in sports, but then becomes critical of statistics on the issue of interest.³⁴ If the latter statistics simply reflect past discrimination, then what indicators should be used? The dissent stated that "the majority rejects the best — and perhaps the only — mechanism for making" a showing of lack of interest.³⁵ In short, there is no way for a university to determine Title IX compliance (under the third prong) without such surveys.³⁶ If you cannot believe the speaking subject, then who can you believe?

One of Lacan's most controversial procedures in his own psychoanalytic practice was the so-called "short session." Briefly, on the basis that very little of the speaking subject's words are to be believed, Lacan would cut short the analytic session when the ego started to lie, when the unconscious was no longer speaking.³⁷ If the majority opinion in *Cohen* demonstrates the promise of psychoanalytic jurisprudence, the dissenting opinion demonstrates how problematical psychoanalysis is for law. Pierre Legendre, whose work

32. *Cohen*, 101 F.3d at 180.

33. *Id.* at 197 (Torruella, C.J., dissenting).

34. *Id.* Chief Judge Torruella's revelation of the majority's selective use of statistics confirms the findings of Charles Lord, Lee Ross, and Mark Lepper. *Id.* "People who hold strong opinions on complex social issues are likely to examine relevant empirical evidence in a biased manner. They are apt to accept 'confirming' evidence at face value while subjecting 'disconfirming' evidence to critical examination." Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979). Of course, that study is itself empirical evidence.

35. *Cohen*, 101 F.3d at 198 (Torruella, C.J., dissenting).

36. *Id.*

37. See STUART SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO 132-42 (1983).

in the genealogy of legal institutions is psychoanalytic and Lacanian in orientation, highlights a difficulty in integrating psychoanalysis into law "because . . . this notion of the unconscious . . . seems to contradict the whole idea of knowledge."³⁸ The "order of causality discovered by Freud," the genealogical construction of the subject, and the determinism of the symbolic order of language, fundamentally challenge the discourse of reason and the "*representation of choice* [that] presides over this construction."³⁹ I mention Legendre and his notion that introducing psychoanalysis into law requires something on the order of a revolution to explain how I deal with psychoanalytic jurisprudence. *Cohen* does less to show how relevant psychoanalysis is for law than to show how problematical, even traumatic, psychoanalysis can be.

II. *In Defense of [My Defense of] Lacan*

So let me make it official. I may not have worshiped Foucault at the time I wrote *One Hundred Years of Homosexuality*, but I do worship him now. As far as I'm concerned, the guy was a [expletive deleted] saint.⁴⁰

I do not think Jacques Lacan was a saint. Despite my admiration for Lacanian theory, and my tendency for *intellectual* hagiography (as in *intellectual* biography), I am not concerned to defend his personal life, nor do I think such a defense is necessary to the appropriation of Lacan for law. Nevertheless, rumors about Lacan circulate,⁴¹ and I cannot help but be defensive. Apart from Lacan's personal idiosyncracies, theoretical controversies surround Lacanian theory as well. To the extent that faculties in most disciplines nowadays are divided over the so-called postmodern critiques of traditional or mainstream (though in some disciplines postmodernism has *become* mainstream) theory, one must be careful not to be categorized and dismissed by one side or the other in one's writing. However, I find fascinating the capacity of Lacanian theory to offend postmodernists *and* traditionalists all at once, a phenomenon that exacerbates the problem of persuasion for a Lacanian. That might sound like academic whining or like an adoption of victim-like status (postmoderns and traditionalists both claim

38. Pierre Legendre, *The Other Dimension of Law*, 16 CARDOZO L. REV. 943, 957 (1995).

39. *Id.* at 944.

40. HALPERIN, *supra* note 1, at 6.

41. See ELISABETH ROUDINESCO, JACQUES LACAN 18 (1997) (Lacan's arrogance); *id.* at 75-79 (unfaithfulness); *id.* at 161 (insensitivity); *id.* at 180-85 (misogyny, favoritism); *id.* at 196, 205, 387 (unethical acts); *id.* at 303 (rudeness); *id.* at 329, 377-79 (susceptibility to rages); *id.* at 389, 397 (greediness).

marginal status in contemporary theory wars), but my sense is that Lacan is particularly risky. Add the facts that Lacan is a Freudian and that we are in an era of Freud-bashing in the academic and popular press, and a Lacanian theorist might become defensive.

My own defensiveness is apparently evident in *Lacan and the Subject of Law*, as highlighted by Costas Douzinas in his review of my book.⁴² I should confirm at the outset that I appreciate that review, which I think is fair. My response below is not in the genre of an angry author's letter to the editor of the *London Review of Books* ("Did your reviewer even *read* my book?"; "Does your reviewer ever read *any* books?"; "Can your reviewer *read*?"; etc.). I simply think the review provides an opportunity to explore the question of how best to present interdisciplinary scholarship in the context of legal academe. I hope not to embarrass myself (or Professor Douzinas) by writing a "Reply to My Critics" essay too soon, with only one critic, or to appear overly defensive by reacting strongly to the first review. However, the issue raised in the review is the propriety of my defensiveness about Lacan as well as the manner in which that defensiveness structures or dictates how I present Lacan.

A. Rhetorics of Modesty

[Caudill's *Lacan and the Subject of Law* attempts] to introduce Lacanian psychoanalysis to the Law School and to make it relevant to the doctrinal and theoretical concerns of legal education . . . , an admittedly Herculean task [that leads Caudill to adopt] a certain apologetic tone about the difficulties one faces in dealing with the convoluted thought and occasionally extravagant *linguisticeries* of Lacan. Chapter 1 captures this tone of slightly embarrassed defense.⁴³

Professor Douzinas's critical observation — that I open my argument for Lacan's relevance to law with a strikingly defensive tone — is not surprising to me. I have heard it before, both from publishers' referees and from my law faculty colleagues who point out that a lawyer should know better than to begin an argument with a catalog of challenges to a not-yet-explicated position. My goal in this paper is to reflect upon why I chose that approach, that is, on what there is about Lacan and about me that might explain my "tone of slightly embarrassed defense."⁴⁴

42. See Douzinas, *supra* note 8, at 325.

43. *Id.*

44. *Id.*

Of course, I worry about writing a scholarly paper that is not primarily about Lacan or law, but rather is about me. My first reaction is to apologize, but then I would be doing the same thing of which Douzinas was critical. My second reaction is to note, along with Douzinas, that legal scholarship often effaces or forgets the emotional aspect of law — our passions and "personal experiences, our history with its traumas and symptoms."⁴⁵ To the extent that psychoanalysis is associated with subjectivity, with unconscious desire below the surface of conscious speech, a paper on Lacanian psychoanalytic jurisprudence arguably *should* begin with self-analysis, with unedited free associations that reveal doubts and fears about one's own importance and about the importance of Lacan. Indeed, Lacan warned analysts never to forget that knowledge is characterized by a certain forgetfulness of its origins, its constitution, its creative function.⁴⁶ Science, for example, "has no memory. Once constituted, it forgets the circuitous path by which it came into being; otherwise stated, it forgets the dimension of truth that psychoanalysis seriously puts to work."⁴⁷ The error "that what science constitutes . . . has always been true, that it is given," "exists in all knowledge."⁴⁸ Thus, I might also argue that all legal scholarship, and not just mine, should begin with a self-analytical acknowledgment of subjectivity, of a personal history with emotional attachments and investments.

Douzinas, after identifying my tone of slightly embarrassed defense, offers his own interpretation of my strategy. Because of my concern that I might appear to be an uncritical, fanatical disciple of Lacan, of which there are many, I present the evidence for and against Lacan as if to let the reader decide for herself, as if I am not interested. Moreover, because of my concern that legal academics are suspicious and reluctant regarding psychoanalysis, I argue that Lacan offers helpful insights, as if I see little hope for a thorough-going psychoanalytic jurisprudence. I think Douzinas is right — because of its controversial and complex features, Lacanian theory is a hard sell, and to proceed otherwise would be risky. Moreover, psychoanalytic theory in any form is a hard sell nowadays. Interdisciplinary work in general is not so difficult to introduce, but the discipline of law is always hesitant to yield turf to outsiders, especially if they appear radical or other-

45. *Id.* at 323.

46. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK II: THE EGO IN FREUD'S THEORY AND IN THE TECHNIQUE OF PSYCHOANALYSIS, 1954-1955, at 19 (Jacques-Alain Miller ed. & Sylvana Tomaselli trans., 1991).

47. Jacques Lacan, *Science and Truth* (1965), reprinted in 3 NEWSL. FREUDIAN FIELD 17-18 (1989).

48. *Id.* at 17.

wise nontraditional. A certain modesty and defensiveness thus seems to be in order.

A less flattering interpretation of my "tone of embarrassed defense," which could only be made by someone familiar with my personal history, might be that I have a pathological attraction to causes that require embarrassed defenses. In high school speech competitions, I argued in favor of pacifism, and the defense I gave of my position several nights a week to my father, a career Air Force veteran, was always slightly embarrassed. My embarrassment receded in my university years when protests against the Vietnam War were common, but returned when I joined the Air Force to fly fighter jets. Later, in graduate school, I adopted a tone of slightly embarrassed defense because I was interested in Christian philosophy. Following law school, in law practice, I became interested in critical legal studies, and my tone among fellow lawyers was always one of slightly embarrassed defense. As a law professor, I have written in defense of the legal position of creation science advocates and in defense of land-use developers who challenge environmental regulations, both of which required in academic culture a certain level of embarrassment. Dealing with a controversial thinker like Lacan is, therefore, not unlike many of my prior projects.

B. Rhetorics of Immodesty

Others who have been inspired by Lacan, however, are less modest and defensive in appropriating or arguing for Lacanian theory. Ellie Ragland, for example, whose *Lacan and the Philosophy of Psychoanalysis*⁴⁹ was one of the earliest and most widely-read introductions to Lacan, is much less defensive about Lacan. Her book, we might say, is properly organized, with powerful arguments at the beginning and defenses to criticism at the end. The last chapter, in fact, deals with the place of feminist theory in Lacan, which is perhaps the most controversial aspect of Lacanian theory. Now, that's the way we teach our law students to write trial or appellate briefs, or otherwise to argue to a judge or jury: best arguments first, weakest (or most controversial) arguments last.

That was 1986. A decade later, I might argue, Lacan has become more popular, more controversial, and subject to more criticism, so one cannot begin a book on Lacan today without taking account of the critical context. However, Mark Bracher, in the current issue of the *Journal of the Psychoanalysis of Culture and Society*, introduces Lacan's newly translated lecture

49. See generally ELLIE RAGLAND, *LACAN AND THE PHILOSOPHY OF PSYCHOANALYSIS* (1986).

on criminology without apology or any acknowledgment of Lacan's critics: "Lacan's paper . . . functions to clarify, elaborate, or critique many of the formulations of Freud's book concerning the most fundamental psychological consequences of civilization, as well as the psychological roots of the most serious problems facing civilization."⁵⁰ As to the difficulties facing readers of Lacan, Bracher simply says Lacan speaks "in typically laconic fashion."⁵¹ That's it — no apologies, no concerns over Lacan or psychoanalysis or their utility for social theory.

Douzinis, in his review essay, also reviews Peter Goodrich's *Oedipus Lex: Psychoanalysis, History, Law*,⁵² and notes favorably that:

Psychoanalytic terms and references litter the text, but nowhere are we treated to a sustained theoretical discourse as to the importance or relevance of Freud or Lacan for the business of historiography or law. This may upset the converted. But this low key almost playful approach to theory coupled with the unargued assumptions about the value of psychoanalysis seems to lower the critical defenses of the agnostic.⁵³

If unargued assumptions lower the critical defenses of the unconverted, why would I begin my own book with grave concerns over the reception of Lacan?

My hesitance regarding Lacan, I believe, is not just a ploy to win support, not just a rhetorical move to gain sympathy or empathy just before I sneak Lacan the Master into law. Nor is my style of argument an attempted rejection of rhetoric, as if I "identify rhetoric primarily with ornament, passion, specious argument, and deceit . . .";⁵⁴ I do not. But I do appear paranoid, because I see problems everywhere. (My defense is the "sometimes a cigar is just a cigar" aphorism, or in terms of *Cohen*, "sometimes expressed lack of interest is just lack of interest;" in the case of paranoia, sometimes everybody *really* is after you.) Let me briefly outline my concerns.

1. Traditional/Postmodern Tensions

As lawyers, we tend to think in terms of two-sided disputes — plaintiff and defendant, prosecutor and accused, labor and management, government

50. Mark Bracher, *Editor's Column: Lacan's "Civilization and Its Discontents,"* J. PSYCHOANALYSIS CULTURE & SOC., Fall 1996, at 1, 1.

51. *Id.*

52. See generally PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW* (1995).

53. Douzinis, *supra* note 8, at 334.

54. See J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason,* in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 211, 212 (Peter Brooks & Paul Gewirtz eds., 1996).

and business, and so forth — and of issues with two possible answers. So it is understandable, if somewhat oversimplified, for me to see contemporary academic and scholarly discourse in terms of grand debates, each with two warring factions. Indeed, I often sense a "which side are you on?" mentality, and the notion of a bloodless war of ideas is commonplace. Consider the ongoing "culture wars," a term of art nowadays, which is represented most easily by the argument between Allan Bloom in *The Closing of the American Mind*,⁵⁵ which mourned the loss of great books by great men with great ideas, and the corrective book by Lawrence Levine, *The Opening of the American Mind*,⁵⁶ which in psychoanalytic fashion revealed Bloom's fear to be not the closing of the American mind but its opening to diverse ideas and people and theories.⁵⁷ Then there is the ongoing division in almost every discipline of the university between scholars oriented to so-called postmodern approaches and their critics who fear relativism or nihilism. Some easy examples include: (1) the debates over cultural studies in English departments, which enterprise both breaks down disciplinary boundaries and destabilizes the presumed object of literary study (thus baseball, Madonna, and cannibalism replace Shakespeare and Dickens, critics point out);⁵⁸ (2) the debates over post-colonial studies, which is for proponents a rich theoretical orientation focusing on non-western cultures, but is for critics a subdiscipline with an identity-crisis, with a desire to study "four centuries and most of the planet as its domain;"⁵⁹ and (3) the so-called "science wars," an identifiable front in the "culture wars," which pits social and literary critics of the scientific enterprise against those who uphold the rationality and logic of scientific evidence.⁶⁰ And, of course, postmodern theory, cultural studies, post-colonial studies, and science studies are vaguely associated with the new, the young and the left, while their critics end up sounding traditional and conservative.

My concern with Lacanian theory is not so much that it is all too classifiable, for example, as belonging to the postmodernist side of the culture wars. Rather, my concern is that Lacanian theory tends to fall

55. See generally ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

56. See generally LAWRENCE LEVINE, *THE OPENING OF THE AMERICAN MIND* (1996).

57. See Sheldon Hackney, *The University Is Not the U.S. Army: A Conversation with Lawrence W. Levine*, *HUMANITIES*, Jan.-Feb. 1997, at 4, 5.

58. See *Forum*, *PMLA*, Mar. 1997, at 257, 257-86; Marc Wortman, *The Coming of "Cultural Studies"*, *YALE*, Apr. 1993, at 27, 27-31.

59. See Russell Jacoby, *Marginal Returns: The Trouble with Post-Colonial Theory*, *LINGUA FRANCA*, Sept.-Oct. 1995, at 30, 30.

60. See Michael Albert, *Science, Post Modernism, and the Left: Lessons from Alan Sokal's Parody in Social Text*, *Z MAGAZINE*, July-Aug. 1996, at 64, 64-69.

through the cracks of contemporary classification schemes. Lacanian theory is very much like the rental car agencies that compete with Hertz as they are represented in Hertz's recent television advertising campaign as "not exactly" Hertz. Lacan is "not exactly" traditional or postmodern. Marcia Ian remarks that while psychoanalysis as a method "can and does enrich the practice of cultural studies," it "has been accused of knowing little and caring less about culture."⁶¹ Judith Levy finds in post-colonial discourse a "contradictory and ambivalent response to psychoanalysis," which approach was completely absent in the recent *Post-Colonial Studies Reader*.⁶² With respect to the critique of science, Lacan was notoriously ambiguous in his critique of scientism alongside his desire to make psychoanalysis scientific.⁶³ Thus, a tendency persists to view Lacan as part of a tradition in psychoanalytic theory that is associated with determinism, with the individual rather than with culture, and with Western narrow-mindedness.

Nevertheless, if Lacan does not exactly fit on the left in academia, he certainly doesn't fit traditional modes of analysis in social and literary theory. Indeed, from the perspective of those who are uncomfortable with postmodern approaches, Lacan often epitomizes what is most discomfiting. For example, postmodern theorists are frequently accused of using obtuse terminology, a jargon for insiders, and reading Lacan requires some introduction to his specialized concepts like the other, the imaginary, lack, *jouissance*, and the Name-of-the-Father; even familiar terms like desire, knowledge, and agency take on unfamiliar meanings in Lacan's seminars. Yet the critic who asks, "why not use familiar terminology and everyday language?" reveals a certain level of discomfort with one of the primary lessons of both postmodern and Lacanian theory. Everyday discourse is already jargonistic; the terms with which we are familiar *are* a specialized vocabulary for insiders, and they always limit the possibilities of our discourse. Thus, language is not a mode of communication for ideas, but is itself ideological. That situation would not be so very uncomfortable if Lacan offered a method for rising above ideology, for finding a meta-discourse that was not ideological, but Lacan offers no such hope. The best we can do is to recognize our place in language and how it constructs us, and then to choose carefully the discourses in which we are trapped.

61. See *Forum*, *supra* note 58, at 279 (Letter from Marcia Ian).

62. See Judith Levy, *From Oppression to Repression, from Subjection to Subject*, J. PSYCHOANALYSIS CULTURE & SOC., Fall 1996, at 113, 113.

63. See generally David S. Caudill, *Why Would a Lacanian Socio-Legal Analyst Care About Scientific Validity?: A Response to Redding*, 75 OR. L. REV. 811 (1996).

I hope that explains a bit more clearly why a Lacanian theorist might be modest — self-analysis is always part of the practice of psychoanalysis. That is why psychoanalysts are always subjected to analysis as part of their training. But is that enough? Is psychoanalysis an appropriate mode of self-critical reflection? Lacan's place in the psychoanalytic tradition, significantly, is also problematical for critics of postmodern theory. Some traditional theorists admire Freud, because he promises a method for getting control of one's life. Lacan's notions that we are caught up in relations of identification with others, in addition to our relations with language, are troubling to traditional Freudians. On the other hand, those traditional theorists who have rejected Freud as outdated and unscientific find enough Freud in Lacan to reject Lacan.

Now, perhaps you can see what I'm worried about. Lacan stands for — is a token for — too many things. For postmodern theorists, Lacan often represents a traditional approach to knowledge — Lacan *is* a Freudian to the extent that he believes we can identify our place in language, that we can trace the effects of other people and of culture and of law, not simply *on* our otherwise independent *selves*, but in constructing or constituting our highly dependent selves. Just when you think that at least the Freudians would appreciate Lacan, however, Lacan's notion of the limits of psychoanalysis is *too* postmodern. And for traditional theorists, Freudian or not, Lacan represents what is wrong with postmodernism — confusing jargon, the disappearing self, determinative and ideological language, and relativism. I agree, however, with Thomas Brockelman that:

reducing Lacan to such a token, to a marker for a certain radical stance — whether "modernist" or "postmodernist" — empties his work of its originality. Moreover, not only does such a reduction foreclose any real access to Lacanian psychoanalysis, it also cuts off the possibility that Lacan might be seen to offer an alternative to the facile understandings of "modernism" and "postmodernism" shared today by critics and advocates of the postmodern alike. In other words, we lose the possibility that Lacan might actually teach us something important about the contemporary world.⁶⁴

2. *Lacan the Person*

Why can't we leave well alone? Why aren't the books enough? Flaubert wanted them to be: few writers believed more in the objectivity of the written text and the insignificance of the writer's personality; yet still we disobediently pursue.⁶⁵

64. Thomas Brockelman, *Lacan and Modernism: Representation and Its Vicissitudes*, in *DISSEMINATING LACAN 207, 207-08* (D. Pettigrew & François Raffoul eds., 1996).

65. JULIAN BARNES, *FLAUBERT'S PARROT* 12 (1990).

As more and more work is being done concerning Lacanian theory, the personal attacks multiply. Without confirming or denying the distasteful aspects of his life, I tend to focus on the texts of his seminars. That is sometimes difficult, because numerous scholars challenge Lacan (and sometimes his followers, like me) as a fraud, a charlatan, and so forth, but reading Lacan's work is like reading anybody's work — some of it is compelling and useful, some of it less so. I do not focus, as Halperin does with respect to Foucault,⁶⁶ on the "phobic constructions" of Lacan and their significance, though an argument could be made that Lacan is a threat. Yet even as I try to ignore personal attacks on Lacan, they influence my work. I know that I am dealing with an offensive figure, whether personally or theoretically offensive, and I become circumspect about the terms Master, Disciple, and so forth. Who wants to be a disciple? Who wants to have a master? Nobody. Yet we're all disciples of some master(s), and we'd best be self-critical.

III. Conclusion

In a symposium on Lacan, I realize that I have revealed far too little about Lacan and, probably, far too much about myself — my concerns, my emotional attachment to Lacanian theory. I probably couldn't have fooled you anyway. If I had forcefully argued for Lacan's unproblematic entry into legal education, I might have slipped by saying "Fraud" instead of "Freud," or otherwise looked over my shoulder for those who are after me.

66. See HALPERIN, *supra* note 1, at 6.