

UNIVERSITY OF PITTSBURGH LAW REVIEW ONLINE

Vol. 85 • 2024

NOTE

JUSTICE IN HER LABYRINTH: DOCTRINAL REASONING, LACANIAN PSYCHOANALYSIS, AND LEGAL FORMALISM'S PROBLEM OF THE SUBJECT

Daniel R. McTiernan

ISSN 1942-8405 (online) • DOI 10.5195/lawreview.2024.1023

<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 United States License.



This journal is published by [Pitt Open Library Publishing](http://pittopenlibrarypublishing.com).

NOTE

JUSTICE IN HER LABYRINTH: DOCTRINAL REASONING, LACANIAN PSYCHOANALYSIS, AND LEGAL FORMALISM’S PROBLEM OF THE SUBJECT

Daniel R. McTiernan*

I. IN DEFENSE OF PSYCHOANALYSIS

In the cliché-soaked first act of James Cameron’s *Titanic*, the soon-to-be lovestruck first-class passenger Rose DeWitt Bukater (Kate Winslet) sits for lunch with J. Bruce Ismay (Jonathan Hyde), the White Star Line executive responsible for naming the ill-fated steamship.¹ Ismay crows that in naming the *RMS Titanic*, he wished “to convey sheer size . . . and [that] size means stability, luxury, and—above all—strength.”² Rose, a cynical scourge to her robber-baron compatriots, asks Ismay if he’s familiar with “Dr. Freud” and notes that “His ideas about the male preoccupation with size might be of particular interest” to Ismay.³ After Rose excuses herself, Ismay asks incredulously, “Freud. Who is he? Is he a passenger?”⁴ The (chronologically inaccurate⁵ but admittedly biting) reference to Freud was—and

* J.D., 2024, University of Pittsburgh School of Law; B.A., University of Pennsylvania.

¹ *TITANIC* (Paramount Pictures Dec. 19, 1997).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Adrienne Tyler, *Titanic: Rose’s Funniest Line is a Real Life Historical Inaccuracy*, SCREENRANT (Mar. 26, 2022), <https://screenrant.com/titanic-movie-rose-ismay-freud-line-historical-mistake/>

remains—a bellwether for the place of psychoanalysis in end-of-history popular culture: a source of jokes about genitalia and the Oedipus complex. The cynicism hasn't stopped at the box office.

Within the span of a century, psychoanalysis has transfigured from cultural zeitgeist to dusty museum piece. The radical vision of the human mind as posited by Sigmund Freud and revised by generations of his warring acolytes has been almost entirely discarded from contemporary discourse—an effort achieved by academics,⁶ psychiatric medical practitioners,⁷ and (perhaps most ruthlessly) popular culture.⁸ While it's true that psychoanalysis is still practiced across the globe by thousands of psychiatric clinicians⁹—and while the now influential-as-ever progenies of critical theory have their roots in the Frankfurt School's blend of Freudian psychoanalysis and Marxist cultural criticism¹⁰—psychoanalysis has become more of a punchline than a practical tool for understanding the mind and society. Literary critic (and arch-custodian of psychoanalytic literary theory) Jean-Michel Rabaté glibly summarized the anti-psychoanalysis party line in the field of literary studies: “[W]hen it comes to literature as literature, the invocation of Freud and disciples . . . is most of the time a pretext for a good laugh before serious work begins.”¹¹ Such criticisms of psychoanalysis aren't limited to literary studies.

Psychiatry's radically materialist shift to a biological understanding of cognitive processes has led the march away from psychoanalysis.¹² Professor Lionel Bailly notes that, for many decades, psychiatrists and neuroscientists believed

(acknowledging that Freud did not discuss similar topics until *Beyond the Pleasure Principal*, published in 1920).

⁶ See, e.g., RICHARD WEBSTER, WHY FREUD WAS WRONG: SIN, SCIENCE, AND PSYCHOANALYSIS.

⁷ See, e.g., Joel Paris, *Is Psychoanalysis Still Relevant to Psychiatry?*, 62 CANADIAN J. PSYCHIATRY 308 (2017).

⁸ See, e.g., Robert Mankoff, *On the Couch*, THE NEW YORKER, Nov. 13, 2000, at 154. *The New Yorker* is the holy grail of sardonic jabs at psychoanalysis.

⁹ See *History of the IPA*, INT'L PSYCHOANALYTICAL ASS'N, https://www.ipa.world/IPA/en/IPA1/ipa_history/history_of_the_ipa.aspx (last visited Mar. 9, 2023). The IPA alone boasts 12,000 members as of 2009. *Id.*

¹⁰ See generally STUART JEFFRIES, GRAND HOTEL ABYSS: THE LIVES OF THE FRANKFURT SCHOOL (2016) (providing a crash-course in psychoanalytic contribution to critical theory).

¹¹ JEAN-MICHEL RABATÉ, THE CAMBRIDGE INTRODUCTION TO LITERATURE AND PSYCHOANALYSIS 1 (2014).

¹² See LIONEL BAILLY, LACAN: A BEGINNER'S GUIDE 207–08 (2009).

chemical and neuropathic understandings of cognitive processes to be the sole key to a comprehensive model of the mysteries of the human mind.¹³ Under the purely biological model, pharmaceuticals would bear the duty of combating the symptoms suffered by a psychiatric patient.¹⁴ This materialist biological understanding of the mind underwent a sea change with the appearance of Cognitive Behavioral Therapy (CBT).¹⁵ CBT, an empirically proven talk-based approach that considers the *meaning* of the events and emotions experienced by a patient, proves that purely psychological (as opposed to chemical) approaches to treatment can reduce symptoms and provide comfort to those suffering from psychiatric disorders.¹⁶ With CBT, a tilt has been made back to the analytic model.¹⁷ Unfortunately, Bailly notes, CBT does not account for the complexities and ambiguities of the unconscious.¹⁸ Perhaps such ambiguities simply inject complications into the therapeutic process, lengthening the treatment and increasing costs to patients and insurers.¹⁹ Ambiguities also increase the challenges of empirical verification of the effectiveness of more classically psychoanalytic treatments. Instead, CBT practitioners focus on treating the symptom bothering the psychiatric patient and expend less effort on uncovering the *cause* of the symptom.²⁰ An intensive period of focusing on reducing the severity of a symptom may be more immediately comforting to a patient and, even more importantly, may be more cost-effective. But shouldn't practitioners be willing to acknowledge that a patient isn't always going to be aware of her own feelings—that some are bound to be buried in the unconscious? One may attribute the continued worldwide practice of psychoanalysis to those patients and practitioners who find the ambiguities of the unconscious compelling and illuminating, despite logical challenges to the empirical verification of the method. A revamped psychoanalytic framework may still be the missing link to a more cohesive science of the mind.

Psychoanalysis has faced severe ideological hurdles in addition to the scientific ones. Perhaps the culturally conservative Western hegemony has shunned the

¹³ *Id.*

¹⁴ *Id.* at 208.

¹⁵ *Id.*

¹⁶ *Id.* at 209–10.

¹⁷ *Id.* at 209.

¹⁸ *Id.*

¹⁹ *Id.* at 208.

²⁰ *Id.* at 209.

prospect of foregoing the Enlightenment's construction of the rational being in favor of psychoanalysis's more existential (if even nihilistic) subject that cannot fully know itself. Such an exchange is an inversion of the once earth-shaking Cartesian *cogito*.²¹ Instead of "I think, therefore I am," psychoanalysis postulates (in Jacques Lacan's construction), "I think where I am not, therefore I am where I do not think."²² Maybe conservatives stew in discomfort over the seemingly immoral and inescapable ubiquity of sexual desire at the foundation of psychoanalysis—an unwelcome invader in a culture that often castigates references to unmoored sexuality.²³

Such conservative aversion to psychoanalysis has not passed unnoticed by practicing psychoanalytic theorists. Cultural critic and psychoanalytic superstar Slavoj Žižek begins his biographic sketch of Jacques Lacan with an all-telling anecdote about the *de facto* association of psychoanalysis with left-wing ideology: "It was only to be expected that in 2005 the infamous *Black Book of Communism*, listing all the Communist crimes, was followed by *The Black Book of Psychoanalysis* In this negative way, at least, the profound solidarity of Marxism and psychoanalysis is now displayed for all to see."²⁴ Despite the relative removal of psychoanalysis from anything resembling a cohesive political philosophy, the perceived danger of exploding the rational subject—or at least imputing it with forbidden desires—has flanked potential progress of psychoanalysis from the right.

In spite of its scientific and ideological detractors, perhaps the real reason psychoanalysis has been relegated to the dustbin of cultural history and medical practice is because it has been so ingrained in the communal understanding of both

²¹ See JACQUES LACAN, *The Subversion of the Subject and the Dialectic of Desire in the Freudian Unconscious*, in *ÉCRITS* 671, 685 (Bruce Fink trans., 2006) (1966) ("The promotion of consciousness as essential to the subject in the historical aftermath of the Cartesian cogito is indicative, to my mind, of a misleading emphasis on the transparency of the *I* in action at the expense of the opacity of the signifier that determines it.").

²² JACQUES LACAN, *The Instance of the Letter in the Unconscious*, in *ÉCRITS* 412, 429–30 (Bruce Fink trans., 2006) (1966).

²³ See, e.g., Lily Sánchez, *U.S. Policymaking on Sex and Reproduction Is Based on Damaging Conservative Assumptions*, CURRENT AFFAIRS (May 16, 2022), <https://www.currentaffairs.org/2022/05/u-s-policymaking-on-sex-and-reproduction-is-based-on-damaging-conservative-assumptions>; Sarah-Jane Stratford, *Conservative Americans Are More Terrified of Sex Than Violence*, THE GUARDIAN (Nov. 4, 2013, 1:18 PM), <https://www.theguardian.com/commentisfree/2013/nov/04/blue-is-the-warmest-colour-shocking>.

²⁴ SLAVOJ ŽIŽEK, HOW TO READ LACAN 1 (2006).

the individual and society that we regard its central tenets as “common sense.”²⁵ CBT practitioners and those hawking other approaches to psychological counseling have potentially unconsciously accounted for the unconscious. When a patient asserts that he harbors no ill will for his wife, a well-attuned CBT practitioner realizes the value of his negation as opposed to the facial transparency of his statement (*i.e.*, such an assertion suggests that virulent ill will for the patient’s wife is buried in the patient’s unconscious). The CBT practitioner operates under the assumption that the patient may not yet be conscious of his own feelings.

In a key passage in his touchstone 1997 volume on Lacan and critical legal theory, David S. Caudill outlines four concepts grounded in classical psychoanalysis that have become “implicit”²⁶ in our understanding of the way both individuals and society operate:

First, we recognize sexuality or sexual desire as a social force; when we pay attention to that which is seemingly an individual and private matter, we realize that sexuality reflects social repression, that “normal” sexuality is not biological (except in the narrowest sense), and that society organizes even our instincts. This is much more than a reduction of life to the erotic, of which Freud was accused. Second, we acknowledge that our desires, our needs, and our motivations are often hidden. Freud identified an unconscious into which painful or embarrassing desires and ideas are driven or repressed, such that reality is distorted or denied. Third, we talk about such matters. Freud promised access to the dynamics of mental life through an analytic method; other methods have gained prominence, but Freud’s promise remains a turning point in intellectual history. Fourth, we understand that the first three concepts are significant for our understanding of society. The reason that some social theorists employ psychoanalysis is that a picture emerges as to how the social world constructs the human subject and reproduces ideological patterns—society does not merely affect our otherwise individual and mental experiences, it actually forms them.²⁷

One would be hard-pressed to deny that these concepts of the mind have not become part of the collective consciousness. Should we then acknowledge that psychoanalysis has undeniably contributed to our understanding of the human

²⁵ DAVID S. CAUDILL, LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY 27 (1997).

²⁶ *Id.* at 27 & 160 n.12 (citing STEPHEN FROSH, THE POLITICS OF PSYCHOANALYSIS (1987)).

²⁷ *Id.* at 27.

subject and its society? Perhaps psychoanalysis deserves another look—even by the most jaded and theory averse of legal scholars.

II. WHY THE LAW NEEDS PSYCHOANALYSIS

Why should a legal scholar care about psychoanalysis, and how on earth could psychoanalytic principles increase her understanding of the law? The law seems distantly removed not only from the unconscious desires of the individual, but from significant individual influence entirely. Sure, appellate judges write influential decisions, congresspeople and state legislators pass ambiguous laws, and professors from the academy exert their dying gasps of influence,²⁸ but the individual seems to be written out of much jurisprudence (and most philosophies of law). So, why should legal scholars be concerned with the individual lawmaker's, say, "preoccupation with size?" Again, Caudill guides us, by pointing to Pierre Schlag's seminal book-length law review article, *The Problem of the Subject*.²⁹ Schlag's article posits that virtually all "modes of contemporary legal thought establish, depend upon, and eclipse a quintessentially liberal individual subject," which he also refers to as "the relatively autonomous self or the relatively autonomous subject."³⁰ Schlag grinds through the most prominent philosophies of law finding that, though they differ significantly in their treatment of the form and function of law, such philosophies have one thing in common: they either assume the existence of an autonomous subject, one capable of acting rationally and in its own best interest, or they entirely erase consideration of a subject at all.³¹ But how could that be? Caudill's four "common sense" psychoanalytic assumptions tell us that human beings don't act fully autonomously or fully rationally.³² Instead, humans are motivated by unconscious desires and feelings—sometimes diametrically opposed to their explicitly stated goals. Shouldn't any legal theory take such a comprehensive understanding of the subject into account?

Schlag doesn't necessarily believe that the assumption of a rational autonomous subject (or altogether erasure of a subject) negates the applicability of any of the

²⁸ See, e.g., Kathryn Rubino, *Judge Posner Has Some Harsh Words for Law Professors*, ABOVE THE LAW (June 27, 2016, 11:31 AM), <https://abovethelaw.com/2016/06/judge-posner-has-some-harsh-words-for-law-professors/>.

²⁹ CAUDILL, *supra* note 25, at 66.

³⁰ Pierre J. Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1631 (1991).

³¹ *Id.*

³² CAUDILL, *supra* note 25.

influential philosophies of law; he simply notes the conspicuous logical error in the assumption of a rational subject in each of the theoretical frameworks.³³ For example, in Langdellian formalism, the law is “discovered” as if it is akin to the law of gravity and the legal scholar (Langdell, or the appellate judge preaching the law *as is*) is the surrogate Isaac Newton.³⁴ The law of gravity exists without Newton—without his neuroses and his obsessions and personality quirks. Newton’s *explanation* of the “law” of gravity may vary based on Newton’s subjective understanding of language or pedagogy but, without Newton, the *existence* of gravity remains an empirical fact. (I’ll have mercy on my reader here—let’s assume gravity exists in its theorized form even without human subjects to perceive its manifestations. The irony does not escape me). Such is not the case with the law. Schlag uses Langdell’s discussion of remedies at equity as an example.³⁵ Langdell writes with an authority as if the law of remedies existed naturally before subjects had the chance to perceive it.³⁶ By choosing something banal, like Langdell’s discussion of the law of remedies, Schlag effectively distinguishes his discussion from any potential discussion of natural morality (though, logically, a similar analysis may apply in such a case). Schlag notes that Langdell and other legal formalists tend to write as if they are discovering the law.³⁷ Instead, though, they are actively engaged in obfuscating the subject (the “discoverer”—the author of the treatises and opinions).³⁸ The subject takes his idea of the law and objectifies it—entirely eclipsing the role of the subject in its creation.³⁹ Schlag calls this objectification of the subject’s work the “transcendental order of the object.”⁴⁰ In formalist approaches to law, the subject becomes Moses—a messenger for the law as already preordained by God (or, more commonly, by long-existing legal rules and

³³ Schlag, *supra* note 30.

³⁴ *Id.* at 1633.

³⁵ *Id.* at 1632 (citing Christopher Columbus Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55 (1887)).

³⁶ *Id.* To paraphrase Björk, “All the modern things, like [the law of remedies at equity], have always existed. They’ve just been waiting in a mountain for the right moment.” BJÖRK, *The Modern Things, on POST* (Elektra Records 1995).

³⁷ Schlag, *supra* note 30, at 1632.

³⁸ *Id.* (“Langdell’s work reads like law’s immaculate conception. When it is law that is produced, the ‘I’ is kept out of sight (and out of mind). Langdell’s law poses as the discourse without an individual subject.”).

³⁹ *Id.*

⁴⁰ *Id.* at 1634.

principles). Law forms and comes alive by mere deduction and without the potentially fallible input of a subject. Thank God! Such philosophies of law tend to fear the meddlesome individual subject who breaks free of the chains of deductive reasoning—especially the activist judge.⁴¹ Injection of subjectivity into the transcendental order of the object collapses the effacement of the subject.⁴² Law loses the comforting illusion of objectivity.

Schlag goes on to discuss the problem of the subject in rule-of-law,⁴³ neopragmatist,⁴⁴ and culturally conservative⁴⁵ philosophies of law, but one of his most compelling analyses is attached to his discussion of the problem of the subject in the field referred to as “critical legal studies.”⁴⁶ Critical legal studies, according to Schlag, focuses on the law as an object that, despite its objectivity, oppresses the subject.⁴⁷ In a critical legal studies framework, the law is diseased by incalculable prejudices, power imbalances, and biases—often including overt racism and classism.⁴⁸ The law as object holds captive the subject subjected to the law.⁴⁹ If only the (assumed) rational and autonomous subject could be free from the prison of the oppressive legal regime, then justice could be done. But when the subject theoretically becomes liberated from the existing oppressive order, why should we assume that the subject will then act rationally—that it will not have been poisoned by the oppressive object? The critical legal studies section most conspicuously shows the article’s age (Schlag published in 1991). Increasing efforts have been made by critical theorists to account for the subject in critical legal studies. Whether these are

⁴¹ *Id.* at 1636.

⁴² *Id.*

⁴³ *Id.* at 1662.

⁴⁴ *Id.* at 1705.

⁴⁵ *Id.* at 1721.

⁴⁶ *Id.* at 1679.

⁴⁷ *Id.* at 1685–86 (“The recurrent picture informing critical legal thought is that legal thinkers are already politically and morally competent subjects who are systematically mystified and constrained by an oppressive object-order of legal structures and thingified social roles. The critical image here is of the competent subject encased like a prisoner within the cage of objectivity—a cage that is ironically of his own making.”).

⁴⁸ See RAYMOND WACKS, PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION 92–107 (2006) (offering a crash-course in critical legal studies—including some reference to psychoanalysis’s applicability in theories of law).

⁴⁹ Schlag, *supra* note 30, at 1685–86.

analyses of unconscious bias⁵⁰ or the inherent racism (or race-coding) couched in our language,⁵¹ the critical theorists have begun to answer their problem of the subject. Such an answer still needs unification—a theory that speaks to the potentially irrational subject.

So how can we account for an *irrational* subject of law? Where could we possibly find such a unified theory? This, for Caudill, is where psychoanalysis comes in—particularly Jacques Lacan’s theoretical framework.⁵² Lacan (now long overdue for a proper introduction) was a French psychoanalyst who reached the height of his powers in the 1960s and 1970s and who presented his decades of seminars, lectures, *écrits*, and other communications as a “return to Freud.”⁵³ Freud created the groundwork for the “common sense” assumptions of classical psychoanalysis.⁵⁴ It was Lacan who refined and revised them—couching psychoanalysis in the language of postmodern theory.⁵⁵ In his body of work, Lacan considered the importance of language, law, and desire in creating and structuring the human subject.⁵⁶ For Lacan, when the subject is on the couch, so is language and the law—all of which are encoded in the ever-present Other.⁵⁷ Lacan’s theoretical framework accounts for the irrational behavior of the subject—whether it’s “discovering” law as a formalist or breaking out of the oppressive relationship with the law in critical legal studies. This is why the law needs psychoanalysis.

Caudill published his book on Lacan and the law in 1997. His ideas are due for revival. As American jurisprudence at the highest level slips towards formalism and

⁵⁰ See, e.g., Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 705 (2012).

⁵¹ See, e.g., Alex Shashkevich, *Stanford Experts Highlight Link Between Language and Race in New Book*, STANFORD NEWS (Dec. 27, 2016), <https://news.stanford.edu/2016/12/27/link-language-race-new-book/>.

⁵² CAUDILL, *supra* note 25, at 66–67.

⁵³ JACQUES LACAN, *The Freudian Thing: Or the Meaning of the Return to Freud in Psychoanalysis*, in *ÉCRITS* 334, 334 (Bruce Fink trans., 2006) (1966).

⁵⁴ CAUDILL, *supra* note 25.

⁵⁵ See BAILLY, *supra* note 12, at 41–64 (providing an introduction to Lacan and structuralism).

⁵⁶ See *id.* at 66, 132–36.

⁵⁷ *Id.* at 66 (“The psychoanalyst, listening to the speech of the Subject upon the couch, hears this Other discourse.”).

originalism⁵⁸ and while public sentiment against critical legal studies (especially critical race theory) flares,⁵⁹ the problem of the subject of law has returned. While other approaches to human behavior have gained enormous traction in legal studies,⁶⁰ only psychoanalysis takes proper account for the particularly elusive quirks of a subject, its ability to repress its fears, as well as its tendency for self-deception and self-destruction. Lacan's *sui generis* approach to psychoanalysis is most apt for exploitation.

I am thus sorry to announce that the following pages do not argue that Oliver Wendell Holmes suffered a severe Oedipus complex or that your local congressman is compensating for weaknesses in the bedroom. Lacan may be a little drier than the provocative popular understanding of classical psychoanalysis, but his work still manages to keep his student up at night. When one finally knocks at the door of the subject, he mustn't be surprised who answers.

III. LACAN'S SUBJECT AND THE LAW: A PRIMER

I must begin my brief, reductionist discussion of Lacan in the same way virtually every book attempting to "summarize" Lacan's thousands of pages of writings and lectures begins: by stating that Lacan is an enigma.⁶¹ Lacan's style of speaking (which constitutes most of his *écrits*—primarily constituted of repurposed lectures)⁶² is labyrinthine. Lacan has a large body of knowledge—much of which falls outside of strict delineations of the fields of psychoanalysis, medicine, or even philosophy.⁶³ He doesn't hesitate to employ it. Though much of Lacanian theory is

⁵⁸ See Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 345 (2014).

⁵⁹ See Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html>.

⁶⁰ See, e.g., BENJAMIN VAN ROOIJ & ADAM FINE, *THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE* (2021) (representing the tip of the iceberg in the industry of behaviorism and the law).

⁶¹ See, e.g., BAILLY, *supra* note 12, at 2; CAUDILL, *supra* note 25, at 5; PETER BARRY, *BEGINNING THEORY: AN INTRODUCTION TO LITERARY AND CULTURAL THEORY* 112 (Peter Barry & John McLeod eds., 4th ed. 2017).

⁶² BAILLY, *supra* note 12, at 2.

⁶³ Adrian Johnston, *Jacques Lacan*, STANFORD ENCYC. OF PHIL., <https://plato.stanford.edu/entries/lacan/> (Dec. 24, 2022) (noting that Lacan drew upon a variety of subjects including game theory, topology, logic, and knot theory, among others).

based in a “return to Freud”⁶⁴ (as well as structuralist linguistics as originally proffered by Ferdinand de Saussure),⁶⁵ Lacan bounces from literary history to the pre-Socratics to *Antigone* and back. Such a style has been compared (sometimes pejoratively) to that of James Joyce’s *Finnegans Wake*.⁶⁶ Some claim that Lacan’s impenetrable style mirrors the ambiguities and contradictions of the unconscious, but such an understanding is likely an exaggeration.⁶⁷ Lacan was a showman, but he wasn’t performing theater of the absurd.

It has been the job of individual readers of Lacan to construct an understanding of the individual works. Many scholars deny a unifying theory of Lacan—he simply discussed too much (and developed his theories over such an extended period).⁶⁸ A unifying theory would betray Lacan’s richness and purposeful self-contradiction. Lacan is as much Plato’s Socrates (endlessly begging the answer to the unanswerable question) as he is court jester of academia. For new students of Lacanian theory, the commentaries of Lacanian acolytes are one of the simplest on-ramps to a working understanding of Lacanian theory (though there’s no substitute for the density of the real thing). In the following pages, both Lacan and commentators’ constructions of his theory are cited. Very often, a single passage of Lacan fails to support a proposition. Sometimes, Lacan leaves his thesis unspoken, allowing his audience/reader to fill in the gaps.⁶⁹ Bailly notes that “Lacan’s mode of communication was effective for his audience because it employed the device of ‘realisation’: just as in analysis, an individual has to arrive at a realisation by him/herself, and that realisation has a force far greater than if it was received as ‘information’ from another party.”⁷⁰ It can be mildly frustrating, especially because theory is *not* itself psychoanalytic treatment, but let’s give it a shot.

Caudill notes that “‘law’ for Lacan refers variously to the super-ego, to phallic division, to castration, to men, to formalizable psychic and linguistic structuring

⁶⁴ See LACAN, *supra* note 53.

⁶⁵ ÉLISABETH ROUDINESCO, LACAN: IN SPITE OF EVERYTHING 24 (Gregory Elliott trans., 2014) (2011).

⁶⁶ CAUDILL, *supra* note 25, at 19 (citing Henry Sussman, *Psychoanalysis Modern and Post-Modern*, in *PSYCHOANALYSIS AND . . .*, 142 (Richard Feldstein & Henry Sussman eds., 1990)).

⁶⁷ *Id.* at 5.

⁶⁸ *Id.* at 7.

⁶⁹ BAILLY, *supra* note 12, at 2.

⁷⁰ *Id.* at 16. In fact, Bailly has written one of the best available introductory guides to Lacan. Even Roudinesco and Žižek assume some familiarity with the theory in their introductions.

processes . . . , to that which ‘demarcates’ the unattainable for desire, and of course to ‘the laws of the social realm’ (which include legal processes and institutions).”⁷¹ Most articles and treatises on Lacan and the law focus on these Lacanian legal conceptions.⁷² Instead, I would like to limit this discussion to the jurisprudential implications of Lacan’s linguistics of the unconscious, especially how such a theory may chip away at Schlag’s problem of the subject. As an arch example, I’ve used the rest of this Note to explain how Lacan’s linguistics may serve as the nascence of a remedy to the problem of the subject in Langdellian formalism. It’s a self-imposed limitation that at least manages to suggest the potentially far-reaching applicability of Lacan’s construction of the subject in understanding the way law is made and interpreted in the Anglo-American legal system.

IV. THE JUDICIAL PARADIGM

Here, like in many far more esteemed works of jurisprudential theory, I would like to introduce a protagonist: Justice Daedalus.⁷³ Justice Daedalus is old-school. She’s an avowed legal formalist and originalist. An acolyte of the late Justice Antonin Scalia, Justice Daedalus sees the rule of law as a law of rules.⁷⁴ To reach conclusions of law, she purports to engage with the rules and principles clearly demarcated in statutes and precedents. She collects these rules and principles and deductively applies them to uncover the inevitably correct legal conclusion. Like Langdell, she professes to discover the law as it already exists.⁷⁵ For our Justice, individual subjectivity is not to play a role in legal reasoning. If a judge injects his subjective beliefs about policy and morality into his decision, the ruling loses its authority; instead of being a strict application of what’s come before, the law is reduced to the judge’s opinion. The will of one man diminishes the glory of the supremacy of law to a misery of rote tyranny. But Justice Daedalus is no fool. While she strives to a formalist principle worthy of Scalia and Langdell, she knows it is she, a subject with individual desires and biases, who collects the rules and applies the

⁷¹ CAUDILL, *supra* note 25, at 59.

⁷² See, e.g., *id.* (including a schematic of the applicability of Lacan’s “Four Discourses” to the law); MARIA ARISTODEMOU, LAW, PSYCHOANALYSIS, SOCIETY: TAKING THE UNCONSCIOUS SERIOUSLY (2014) (creating a theoretical framework for Lacanian desire and the law).

⁷³ See, e.g., Derrick Bell, *Foreword: The Civil Rights Chronicles, in The Supreme Court 1984 Term*, 99 HARV. L. REV. 4 (1985) (featuring the sage Geneva Crenshaw); RONALD DWORKIN, LAW’S EMPIRE 238–413 (1986) (featuring the superhuman Judge Hercules).

⁷⁴ See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 UNIV. CHI. L. REV. 1175 (1989).

⁷⁵ Schlag, *supra* note 30, at 1632.

deductive logic. How can she square her theory of law—one so thoroughly void of a subject—with her own subjectivity? Could it be that the mere existence of her subjectivity reduces her rulings to just her opinion, making true her worst fears about judicial decision-making? Or is there hope for squaring a cognizable theory of the subject with something resembling a formalist outlook—one that prizes the process of applying existing rules and principles in the service of legal conclusions?

Professor Jessie Allen explores a potential reconciliation between subjectivity and formalism in her piece *Doctrinal Reasoning as a Disruptive Practice*.⁷⁶ Professor Allen endows value to purportedly formalist reasoning, claiming the performance of engaging with legal texts may itself be a means of accounting for judicial subjectivity:

[R]easoning doctrinally might have psychological effects that without substantive direction could distance the reasoner from her ordinary subjective outlook. If so, doctrine could contribute to legality—not by prescribing objectively correct substantive results but as a practice that disrupts judges’ ordinary point[s] of view. This would seem to satisfy, albeit in an unorthodox way, the criterion that legal decision-making entails something different from the exercise of decision makers’ own best judgment.⁷⁷

For Professor Allen, engaging in the process of reading legal texts, attempting to pull applicable rules from those texts, and applying those rules with the goal of deducing (or even “finding”) the correct legal answer serves as cognitive disruption of subjectivity’s free rein.⁷⁸ Allegedly formalist doctrinal reasoning can thus remain an act that accounts for the subject while also lending supremacy to the role of existing legal texts and doctrine.

Much of Professor Allen’s approach is couched in the language of contemporary cognitive science: something happens neurologically (*i.e.*, in a material sense) when a judge engages with doctrinal texts that he didn’t himself compose—a neurological effect which disrupts subjectivity.⁷⁹ But, as explained above, there is value in striving beyond a materialist understanding of the human

⁷⁶ See Jessie Allen, *Doctrinal Reasoning as a Disruptive Practice*, 6 J.L. & CTS. 215, 215 (2018).

⁷⁷ *Id.* at 224.

⁷⁸ *Id.*

⁷⁹ See *id.* at 228–29 (listing studies that “have observed variable psychological effects correlated with different forms of text.”).

mind.⁸⁰ So what happens to Justice Daedalus’s ghost in the shell when she engages in doctrinal reasoning? Sure, cognitive science could verify that something is empirically happening (*e.g.*, synapses are firing, the prefrontal cortex is engaged in a certain way), but we need a tool to determine exactly how the process of doctrinal reasoning affects the individual unique subject. For example, it’s common sense that each person has a different response to a text she reads. An academic’s reading of *Hamlet* may evoke parallels between the title character’s battle with inaction and the reader’s familiarity with the 20th century existentialist revolution.⁸¹ A lay reader may engage with the exact same text and find it evoking entirely different sentiments: Hamlet’s struggle parallels her own frustration with her mother and stepfather. But a brain scan isn’t (yet) going to show such richness of psychological response to either *Hamlet* or a statute or a piece of judicial precedent. Lacanian psychoanalysis, with its focus on the linguistics of the unconscious, provides us with a tool to start answering what exactly happens in the brain (conscious and unconscious) of Justice Daedalus when she engages in the disruptive process of doctrinal formalist reasoning. Lacan’s theory of the linguistics of the unconscious helps us further answer the problem of the subject.

V. LACAN’S LINGUISTICS OF THE UNCONSCIOUS

Lacan’s theory of language and the unconscious permeates his work.⁸² Perhaps Lacan’s most famous aphorism, one that has spread beyond the field of psychoanalysis into reductive explanations of Lacan (even more reductive than this one), is that “the unconscious is structured like a language.”⁸³ Lacan developed his theory of the linguistically structured unconscious from the structuralist theories of Claude Lévi-Strauss and the antecedent linguistics work of Ferdinand de Saussure—

⁸⁰ See *supra* text accompanying notes 12–20.

⁸¹ See Scott Hogan, *Hamlet: An Identity in Crisis*, NYU GALLATIN: CONFLUENCE (Apr. 16, 2021), <https://confluence.gallatin.nyu.edu/context/interdisciplinary-seminar/hamlet-an-identity-in-crisis> (“Shakespeare’s *Hamlet*, written hundreds of years before Sartre or Camus were born, gives us a surprisingly detailed look into the ways in which existential dread may drive one to insanity from the lack of answers to our most pressing questions.”).

⁸² BAILLY, *supra* note 12, at 41.

⁸³ LACAN, *supra* note 22, at 413 (“[I]t is the whole structure of language that psychoanalytic experience discovers in the unconscious”); see JACQUES LACAN, *The Function and Field of Speech and Language in Psychoanalysis*, in *ÉCRITS* 197, 229 (Bruce Fink trans., 2006) (1966) (“Man thus speaks, but it is because the symbol has made him man.”).

particularly his process of linguistic symbolization.⁸⁴ Bailly gifts us with a crib-sheet outline of Saussurian linguistics:

For Saussure, the fundamental building block of language is the Sign—which was commonly thought of as comprising a word plus its meaning; linguistic expression is achieved by the selection and combination of Signs. Saussure’s innovation was to say that the linguistic Sign unites not a name and thing, but a sound-image and a concept: he spoke not, therefore, of words and meanings, but of *signifiers and signifieds* [respectively] (emphasis added).⁸⁵

An example is probably in order. Think of the sound one makes when he speaks the word “justice.” Maybe say it aloud to yourself. Don’t consider the definition or how you might use it in a sentence; simply consider the sound of the word as detached from the meaning (perhaps as if you’re a listener who doesn’t speak a word of English). Say it to yourself a couple times. You might find that it uncannily begins to sound like a meaningless mishmash of syllables. You can’t believe you ever thought this mix of aspirations was a word that could be used in everyday language. You’ve just come to terms with the pure *signifier*: the sound-image that is arbitrarily attached to a *signified* to create a *sign* in the Saussurian model.⁸⁶ That which is *signified* by the *signifier* is the *concept* of “justice.” This goes beyond the *Webster’s* definition, but also includes related associations like the concepts of courts, civil rights, and equitable remedies. Together, the sound-image “justice” no longer feels like meaningless syllables but becomes an auditory (or visual, when written on the page) representation of the loose concepts it’s signifying. For the structuralists (like Claude Lévi-Strauss and Roland Barthes, who took Saussure’s theory of linguistics and applied it to a slew of cultural institutions and their unique webs of signifiers),⁸⁷

⁸⁴ ROUDINESCO, *supra* note 65 (“Not only did [Lacan] draw on the work of . . . Claude Lévi-Strauss, but he took on board the principles of Ferdinand de Saussure’s linguistics, thus passing from an existential representation of the subject based on phenomenology to a structural conception of subjectivity, wherein the subject is above all immersed in language—that is, in a symbolic function that determines it unawares.”).

⁸⁵ BAILLY, *supra* note 12, at 42–43; Ferdinand de Saussure, *Course in General Linguistics*, in THE NORTON ANTHOLOGY OF THEORY AND CRITICISM 850, 852–56 (Vincent B. Leitch et al. eds., Wade Baskin trans., 2d ed. 2010) (1916).

⁸⁶ See BAILLY, *supra* note 12, at 43.

⁸⁷ BARRY, *supra* note 61, at 46–49.

a signifier only becomes functional when placed in contrast with *other* signifiers.⁸⁸ “Justice” only operates as a meaningful signifier when put in dialectical opposition with “injustice.”⁸⁹ The popular protest chant “no justice, no peace” can serve as an example of the relation of signifiers to each other as determinative for symbolization. When one hears “justice” not in conjunction with “peace,” he may logically include the concept normally signified by the popular usage of the sound-image “peace” (and vice-versa). But to avoid redundancy when used in the protest chant in conjunction with the signifier “peace,” the concept signified by the word “justice” narrows to omit at least some of the concepts normally signified by “peace.”

Those familiar with judicial application of the linguistic canons of statutory interpretation will recognize such a structural understanding of language. Consider *Dolan v. United States Postal Service*,⁹⁰ in which the Supreme Court employed the structuralist *noscitur a sociis* canon to interpret a statute that bars claims against the U.S. Postal Service arising from “loss, miscarriage, or negligent transmission of letters or postal matter.” At question was whether a postal worker’s act of negligently leaving a package on the plaintiff’s front porch (which later caused the plaintiff to trip) was an act within the ambit of the statute and immune from a cause of action.⁹¹ The Supreme Court determined that the string of signifiers “negligent transmission of letters or postal matter” was limited in conceptual relationship to the signifiers “loss” and “miscarriage,” both signifying “failings in the postal obligation to deliver mail in a timely manner to the right address” and not including “injuries that happen to be caused by postal employees but involve neither failure to transmit mail nor damage to its contents.”⁹² Thus, the signifier “negligence” represents different concepts depending on the signifiers around it, or as the Court put it, “a word is known by the company it keeps.”⁹³ The Court could have reached the opposite result under the directly opposing and equally structuralist canon of the “Rule Against Surplusage”⁹⁴ (which would more so resemble our “no justice, no peace” example),

⁸⁸ See *id.* at 42–45.

⁸⁹ See *id.*

⁹⁰ 546 U.S. 481, 495–96 (2006); 28 U.S.C. § 2680(b).

⁹¹ *Dolan*, 546 U.S. at 485.

⁹² *Id.* at 487.

⁹³ *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

⁹⁴ *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”).

but decisions of *which* structuralist canon to apply might have more to do with other judicial considerations (such as making sure not “to render the entire provision a nullity”).⁹⁵ No matter how theory averse, judges and lawyers are still confronted by structuralist methods of interpretation.

Lacan absorbed the *oeuvre* of the structuralists and expanded it to the unconscious,⁹⁶ making sure to infuse the newfound psychological conception with his own idiosyncratic twists. For example, in Saussurian linguistics, the signified (the concept) takes theoretical precedence.⁹⁷ Lacan took this construction and flipped it. For Lacan, it is the *signifier* that entirely organizes our life and psyche.⁹⁸ Our unconscious is a web of signifiers.⁹⁹ The signifiers slip from signified concept to signified concept, betraying latent unconscious content in its supremacy.¹⁰⁰

What Lacan means by “the unconscious is structured like a language” is that, (as Bailly summarizes), “in the unconscious, signifiers develop the same type of relationship between themselves as they do in the conscious psyche.”¹⁰¹ Signifiers (the sound-images) are routinely repressed by the subject when the concepts they signify are too unbearable for the subject.¹⁰² The unconscious creates a labyrinth of these signifiers and “constantly throw[s] out signifiers that the Subject has repressed The elements in the unconscious are the signifiers that represent wishes, desires, fears, and images.”¹⁰³ When the signifiers are buried in the unconscious, the signified concepts (now without a word to describe them) attach to other signifiers with seemingly little relation to the concepts they’re signifying.¹⁰⁴ It is the purpose of Lacanian psychoanalysis to uncover the repressed signifiers.¹⁰⁵

⁹⁵ United States v. Atl. Rsch. Corp., 551 U.S. 128, 137 (2007).

⁹⁶ ROUDINESCO, *supra* note 65.

⁹⁷ BAILLY, *supra* note 12, at 45.

⁹⁸ *Id.*; see also JACQUES LACAN, *Seminar on “The Purloined Letter,”* in *ÉCRITS* 6, 30 (Bruce Fink trans., 2006) (1966) (“[A] letter always arrives at its destination.”).

⁹⁹ BAILLY, *supra* note 12, at 48.

¹⁰⁰ *Id.* at 45.

¹⁰¹ *Id.* at 49.

¹⁰² *Id.* at 48.

¹⁰³ *Id.* at 49.

¹⁰⁴ *Id.* at 48–49.

¹⁰⁵ *Id.* at 49–50 (“The re-attachment process itself is not random but controlled by a signifying chain formed in the unconscious, and this is why it is possible in analysis, to ‘source’ the re-attachment of the

The applicability of Lacanian psychoanalysis to the subject of law now becomes slightly less opaque. The subject (*e.g.*, the legislator writing a statute, the functionary following its dictates, or Justice Daedalus herself) has repressed certain signifiers to the unconscious, leaving the concepts roaming unsymbolized in the conscious realm, certain to be attached to other signifiers less likely to induce a fear instinct.¹⁰⁶ The new signifiers are only related to the repressed signifier by a “signifying chain,”¹⁰⁷ a structure of signifiers held together by the rhetorical tricks of metaphor and metonymy (a rhetorical ability most of us develop from the moments we begin to comprehend language as a child).¹⁰⁸

Another example may be useful. Assume Justice Daedalus is engaging with binding textual precedent as she tries to decide a hard case. A paragraph that could be properly described as “the holding” features a series of words—textual signifiers that (while always appearing as the same indelible words on the page) evoke unique responses in each reader’s brain. Something happens when Justice Daedalus reads the word “internal” in the precedent. The word “internal” ignites a signifying chain that reaches into her unconscious. Had she not read the word “internal” and simply decided the case based on policy or moral considerations, she would not have encountered the signifier and not activated the particular signifying chain—igniting a sort of disruptive practice similar to that described by Professor Allen.¹⁰⁹ The word “internal” and its phonetic parts echo through her conscious and unconscious. Activated are potentially long-repressed signifiers that are homonyms (*e.g.*, “eternal,” “internet,” “internment”), inversions (*e.g.*, “terminal”), or associations (*e.g.*, repressed memories of her deceased husband’s drawn-out search for “internal” medicine specialists before his death).¹¹⁰ The activation alters her process of reasoning and affects the mental gymnastics that occur before reaching a final

affect to the apparent nonsensical object, by a work of retrieving the repressed signifying chain from the unconscious.”).

¹⁰⁶ See *id.* at 48–49.

¹⁰⁷ See LACAN, *supra* note 22, at 418 (“The second property of the signifier, that of combining according to the laws of a closed order, affirms the necessity of the topological substratum, of which the term I ordinarily use, ‘signifying chain,’ gives an appropriate idea: links by which a necklace firmly hooks only a link of another necklace made of links.”).

¹⁰⁸ See *id.* at 421 (“I shall designate as metonymy the first aspect of the actual field the signifier constitutes, so that meaning may assume a place there. The other aspect is metaphor.” (emphasis removed)).

¹⁰⁹ See *supra* text accompanying notes 77–80.

¹¹⁰ See BAILLY, *supra* note 12, at 49 (noting that even “individual phonetic elements” can serve as signifiers).

decision. Engaging with the precedent shifts the locus of decision-making beyond pure subjectivity. But an understanding of Lacan's linguistics of the unconscious accounts for the unique disruption itself—different for each decision-maker. Still, it is the indelible signifiers in the precedent or legislative text which guide the decision-maker to the decision. The letter (the text of the statute or common law decision) arrives at its destination (a legally binding ruling that is more than just the judge's personal opinion—an unbroken continuation of the supremacy of law over the tyranny of one man's opinion).¹¹¹ Granted, it would be impossible to tell what was happening in every judge's brain when they composed each of their decisions. But creating a Lacanian psychoanalytic model to lend credence to the idea of doctrinal reasoning as disruptive practice lends further substance to a theory of the subject in classical formalism. It leads us beyond the limitations of cognitive science into a murky realm of fears, memories, and desires we can admit exists—that of the unconscious.

CONCLUSION

The utility of Lacanian theory to the law goes well beyond such an elementary concept and into increasingly dense theoretical territory. Lacan's construction of the subject was a life-long project—one that has wide-ranging implications for an account of the legal subject. The plurality of ideas should be exciting to the scholar of jurisprudence (even if it seems daunting).

What I hope the reader takes from this Note is a reminder that jurisprudence and the bodies of operating law problematically assume a rational subject. Psychoanalysis allows us to more effectively explain the irrational behavior of the subject of law. Lacanian psychoanalysis gives us the tools to do it (and even gives us a theoretical jump-start). Even if the irrational subject of law can't be tamed, its shadow can be glimpsed as we chase it through the labyrinth of signifying chains and judicial precedent. It's elusive, but it's there.

¹¹¹ See LACAN, *supra* note 98 (“[A] letter always arrives at its destination.”).