

Improve Yourself; Not the World

by

*Jeanne L. Schroeder & David Gray Carlson**

We question the common assumption that most legal scholarship should be oriented towards policy, or to quote the title of this session, at improving the world. Jurisprudential, critical and doctrinal scholarship should have equal prestige with policy-oriented scholarship because they more closely relate to the *practice* of law. Consequently, we start with one policy recommendation: “Lay off the policy recommendations.”

Policy oriented scholarship is what French psychoanalyst, Jacques Lacan, called a “university discourse.”¹ This terminology is ironic, referring to what academics tend to do, not what they *should* do. The university discourse, along the “master’s discourse” are the two discourses of power.²

There are, however, two other “critical” discourses applicable to law: the discourses of the “analyst” and the “hysteric”. The analyst’s discourse is that of interpretation and counseling. The hysteric’s is the discourse of challenge. This should be the predominant discourse of practice, but also of theoretical and doctrinal scholarship.

The power discourses are the discourses of the governor. This is overt in the master’s discourse which speaks in the imperative. The master commands. An example of this is H.L.A. Hart’s legal positivism: the official obeys and enforces a law not because of its moral or other substantive content, but because he identifies it as law through application of an appropriate rule of recognition.

The university’s discourse is a more subtle or veiled exercise of power. It is the claim to expertise. The expert governs indirectly by advising legislators, administrators and judges. Unlike the positivist who claims merely to recognize existing law, the expert explains and justifies what the law should be in light of a societal goal. He suggests how law can be used to incentivize, coerce or force legal subjects to act in a way that would serve these purposes.

The critical discourses are those of the governed. The governor seeks mastery over others; the governed desires mastery over self.

The four discourses have a structural relationship to each other. The hysteric’s discourse is, in the standard English translation of Lacan’s terminology, the “other side” of the university’s and,

* Professors of Law, The Benjamin N. Cardozo School of Law, Yeshiva University, New York City.

¹ See e.g. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK, XVII: THE OTHER SIDE OF PSYCHOANALYSIS (Jacques-Alain Miller ed., Russell Grigg, trans. 2007) [hereinafter, LACAN, SEMINAR XVII]. Some of these ideas are more thoroughly developed in JEANNE LORRAINE SCHROEDER, THE FOUR LACANIAN DISCOURSES OR TURNING LAW INSIDE-OUT (2008) [hereafter, SCHROEDER, FOUR DISCOURSES].

² Interestingly, Lacan delivered his seminar on the four discourses at a law school. However, this was not because he had anything to say directly about law or legal practice, per se. Rather, it was because he lost his teaching privileges at his previous venue because of his supposed influence on the Paris student uprising in the previous year of 1968. It is we who have applied his analysis to law, no doubt often in ways he would not recognize.

as such, is uniquely positioned to critique it. However, the French word *infers* also means the “lining” as of a jacket. Consequently, a more evocative translation is that the hysteric turns the university inside-out. If the university discourse sees law as a way of furthering society’s goals, the hysteric’s discourse sees law as a way of furthering her own and her client’s goals.

The university and the hysteric emphasize different aspects of rationality. Seeking to further an external goal, the university discourse concentrates on ends-means reasoning – the ability to choose an appropriate way of achieving a pre-given ends. This is completely diverse from the definition of rationality adopted by Kantian moral philosophy³ – the antecedent of the critical discourses. Kant includes in his notion of rationality the ability to choose *ends*.

Insofar as a university discourse is addressed to society’s ends, the subject subjected to law is too often treated as a means to these ends. As such, the university discourse can violate the Kantian imperative to treat others as ends in themselves, and not as the means to the ends of another.⁴

The hysteric’s discourse is the only discourse in which the subject *subjected to the law* speaks in her own voice. The master’s discourse tells the subject what to do. The university’s discourse tells her why she should do it. Even the analyst, who seeks to help the subject articulate her own desire, ruthlessly interrogates her.

The hysteric’s discourse also challenges the pretension that policy scholarship is more pragmatic than other types and, therefore, more appropriate in the changing legal academic environment. Policy scholarship is not addressed to practicing lawyers. It is addressed primarily to law makers. Hysterical scholarship seeks to analyze the structure of law, generally, and positive laws, specifically. Accordingly, it not only includes theoretical work addressed to other academics, including those working on policy. It also includes doctrinal scholarship addressed at practitioners. More importantly, it characterizes the practice of law in which attorneys help their clients find their own legal voice through representation.

As hysterics, we are harsh in our critique of the power discourses. We do not, however, advocate abolishing them. Though it were a consummation devoutly to be wished, abolition would be impossible. The four discourses have a cyclical relationship – a hysteric’s discourse always leads to a new master’s discourse which generates a new university’s discourse, etc. Consequently, the individual subject and the social order require all four discourses, and none can be understood except with respect to the others. Moreover, no one could limit herself to any one discourse. Each of us is constantly revolving through them.

To say what should be obvious, society could not function if hysteria reigned supreme (even though the technical meaning of the term is quite diverse from the colloquial one). A democratic society requires a regime of positive law which officials apply without regard to their subjective opinion as to its content – i.e. the master’s discourse. Societies need experts, bureaucrats and, we hope, professors, to identify collective goals and to propose and justify rules designed to for its members to follow to achieve its policies – i.e. the university’s discourse. Indeed, although the hysteric seeks self-actualization, she understands that this can only be achieved through relationships

³ Lacan theory is deeply influenced by the moral philosophy of Immanuel Kant, who he thought, rather than Freud, was the true father of psychoanalysis. SLAVOJ ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 229 (1991).

⁴ SCHROEDER, FOUR DISCOURSES, *supra* note 1, at 85.
Draft: Oct. 2, 2014 -2-

with others; through love. The libertarian ideal of radical autonomy is obsessive, not hysteric. The hysteric intuitively that law and freedom have a dialectical relationship – each paradoxically requires the other. Consequently, the hysteric undertakes the impossible task of trying to help the subject reconcile her subjective desires with the objective ends of society.⁵

We proceed as follows. We start with a brief description of the university and hysteric discourses. We then turn to their diverse conceptions of rationality. We will use as our foil *A Behavioral Approach to Law and Economics*⁶ by Christine Jells, Cass Sunstein & Richard Thayer (collectively “JST”) We choose it because it epitomizes one of the more troublesome examples of what is wrong with policy scholarship *despite* the fact that we agree with many of its specific recommendations.

The Matrix

Lacan often expressed his ideas through “mathemes” i.e. idiosyncratic, quasi-mathematical symbols which often seem designed more to impress and mystify than enlighten.

Each discourse is illustrated by a four-footed matrix – the “quadripode”:⁷

<u>agent</u>	→	<u>other</u>
truth		product/loss ⁸

In the upper left-hand position is the “agent” – the person (or institution) “speaking” in the discourse.⁹ The agent addresses its “other,” in the upper right-hand corner.¹⁰ This is represented by the arrow.¹¹

⁵ Freud identified three “impossible” professions governing, educating, and psychoanalyzing which Lacan identified with the master’s, university’s and analyst’s discourses, respectively. Freud identified three impossible professions, analysis, along with governing and educating. Lacan subsequently associated them with the analyst’s, master’s and university discourses, respectively. LACAN, SEMINAR XVII, *supra* note 1 at 193-94. One of us has suggested that this implies that the fourth discourse, the hysteric’s, must equate with a missing fourth “possible” discourse – the practice of law. SCHROEDER, FOUR DISCOURSES, *supra* note 1, 155-56.

⁶ 50 STAN. L. REV. 1471 (1998). This essay was later republished as the lead essay in BEHAVIORAL LAW AND ECONOMICS 13 (Cass Sunstein ed., 2000).

⁷ The language of this section is an abbreviated version of the presentation in SCHROEDER, THE FOUR DISCOURSES, at 6-29.

⁸ BRUCE FINK, THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE 131 (1995) [hereinafter, FINK, SUBJECT].

⁹ *Id.* at 130-31.

¹⁰ Mark Bracher, *On the Psychological and Social Functions of Language: Lacan’s Theory of the Four Discourses*, in LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 107, 109 (Mark Bracher et al. EDS. 1994) [hereinafter, THEORY OF DISCOURSE].

¹¹ FINK, SUBJECT, *supra* note 8, at 131.

On the lower left, beneath the agent, is its truth.¹² There is a “bar” between the agent and its truth by a “bar” indicating that the agent is separated from his own truth;¹³ a disjunction between appearance and actuality.¹⁴ With an individual as agent, it could represent his inability to recognize (or admit) his motive. It is, however, not necessarily an accusation of hypocrisy or even disingenuousness. It can be a failure to predict the unintended consequences of one's well-intended actions.

On the lower right, beneath the other, is the result of the discourse:¹⁵ something is produced by or lost in (excluded from) the discourse. In the case of the two power discourses the result is not necessarily intended. In contrast, the two critical discourses are aimed precisely at producing the result. There is no arrow in the lower register of the discourse. There is no *direct* relationship between the truth and the product, other than the indirect one of the discourse itself.

The Four Mathemes

Four concepts revolve counterclockwise through four positions of the quadri-pole: i) S_1 : the “master signifier”; ii) S_2 : “knowledge”; iii) a : the object of desire; and iv) $\$$: the subject.

These are complicated concepts that recur throughout psychoanalytic theory. Because their precise meanings vary by the contexts in which they are used, here we will only give, perhaps simplistic, explanations as to how they function in the different positions they occupy in the discourses.

Lacan starts with the master's discourse in which the master signifier is the agent. In this context, the master signifier can be thought of as positive law as understood by Hart.¹⁶ We will only touch on this discourse in this essay

$$\begin{array}{ccc} \underline{S}_1 & \rightarrow & \underline{S}_2 \\ \$ & & a \end{array}$$

By rotating this founding discourse counter-clockwise we produce the university's discourse, in which the agent is knowledge, which in this context means expertise.

$$\begin{array}{ccc} \underline{S}_2 & \rightarrow & a \\ S_1 & & \$ \end{array}$$

¹² Bracher, *supra* note 10 at 109.

¹³ See, FINK, SUBJECT, *supra* note 8, at 13, 130-36, William J. Richardson, *Lacan and the Subject of Psychoanalysis in INTERPRETING LACAN, 6 PSYCHIATRY AND THE HUMANITIES* 51, 54 (Joseph Smith & William Berrigan, EDS. 1983).

¹⁴ Bracher, *supra* note 10, at 109.

¹⁵ *Id.*

¹⁶ FINK, SUBJECT, *supra* note 8, at 130.

Next, by another counter-clockwise rotation, we obtain the analyst's discourse. The analyst interrogates her patient/client's suffering, which is why she is depicted as the object of desire. This is the discourse of interpretation and should be the discourse of counseling.

$$\frac{a}{S_2} \rightarrow \frac{\$}{S_1}$$

Finally, we come to the hysteric's discourse, in which the subject is the agent. The symbol for the subject looks, to us Americans, suspiciously like a dollar sign. This is because the S, that obviously stands for "subject", is bifurcated by a "bar" reflecting the proposition that normal, i.e. neurotic, subjectivity in modern is society constituted by an internal alienation or split.

$$\frac{\$}{a} \rightarrow \frac{S_1}{S_2}$$

This process is circular. A further rotation of the hysteric's discourse brings us back to the master's. The cycle begins anew.

We are now in a position to begin the analysis of the conflict between the university's and hysteric's discourse which we can see are the other sides of each other (i.e. S_2 and $\$$ are in the upper left and lower right positions, respectively, in the university's discourse, and the lower right and upper left positions, respectively, in the hysteric's.)

The University Discourse.

$$\frac{S_2}{S_1} \rightarrow \frac{a}{\$}$$

The agent of the university discourse is knowledge¹⁷ in the sense of claims to expertise. The university's discourse is meritocracy – rule by experts who (are supposed to) deserve their position by virtue of their superior knowledge.¹⁸ This is wonderfully illustrated by the film version of *The Wizard of Oz*. When the man who calls himself Oz, is outed as a barred subject like the rest of us, he appoints the Scarecrow as regent because of his superior brain. In contrast, Oz ruled as master with no explanation or, in the words of the song, "Because, because, because, because, because."¹⁹

The university's discourse is to be contrasted with the master's discourse of positive law which is addressed to the officials who are designated as knowledge. The master demands that he be unconditionally obeyed – he does not condescend to justify his claim. Similarly, the official with

¹⁷ Slavoj Žižek, *Four Discourses, Four Subjects* [hereinafter, Žižek, *Four Discourses*], in *SIC 2: COGITO AND THE UNCONSCIOUS* 74, 78 (Slavoj Žižek ed. 1998).

¹⁸ FINK, SUBJECT, *supra* note 8, at 132.

¹⁹ E.Y. Harburg, *We're Off to See the Wizard*. Of course, despite the lyrics in the next line of the song, the Wizard is a humbug who does not do wonderful things.

the internal position does not obey the law because it is moral, or for any other substantive justification, but just because he identifies the law as law through the application of an appropriate rule of recognition. In this context, the officials' knowledge is not so much expertise as *savoir faire* or know-how. He knows how to identify the law and get things done.

The university's discourse is spoken not only by professors in universities but by all who claim expertise necessary to set policy. It is spoken by the governor, not when she acts as an "official" recognizing positive law, but when she seeks to *justify* her rule. That is, it is the discourse spoken in legislative debate and written into legislative history. The part of a judicial opinion that *explains* why it serves a policy also falls within the realm of university's discourse.

The agent of the university's discourse addresses the object of desire.²⁰ In the context of law, the little *a* is the specific purpose, substantive or moralistic content of positive law. It is social policy. In a purely positivistic master's discourse, the morality or other reasons underlying the law is not the reason it is law. Consequently, moral discussion is expelled from the master's discourse, which is why it is the loss located in the lower right hand position in the quadripode. It is designated by the *a* of the object of desire because it is that which is missing from the discourse – one can only desire what one does not have. This is one reason why so many including Lon Fuller in his debate with Hart, reject positivism; they *want* to discuss morality from within the law.²¹ Like Fuller, legal academics speaking the university's discourse address themselves to morality, or more broadly, the substantive goals that they believe the law does or should further.

The truth, hidden in the lower left, is S_1 , the master signifier²² – in this context, power. A discourse that claims to explain and rationalize the aims of society ends up justifying a social order – either the status quo, or a proposed alternative.²³ Moreover, by using, or suggesting that law be used, to further a social policy is precisely to wield power over individuals who the law will incentivize or coerce into acting in a way that would serve this policy.

The expert is barred to some extent from his truth. As we said, this does not necessarily mean (although it can) that the expert is disingenuous, trying to disguise his secret agenda. We presume that the great majority of experts are subjectively sincere. Nevertheless, whenever one makes a legal policy suggestion one is always objectively attempting to wield power over others.

A succinct statement of the university attitude can be found in JST's assertion that there are "three functions of *any* proposed approach to law: positive, prescriptive, and normative." (emphasis added)²⁴ By positive they mean: "How will law affect human behavior?" The prescriptive task is to see how law might be used to achieve specified ends, such as deterring socially undesirable

²⁰ Bracher, *supra* note 10, at 115; Žižek, *Four Discourses*, *supra* note 17, at 78-79.

²¹ See e.g. Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Hart insisted that separating morality from law was, in fact the moral position. It allows morality to be used as an external critique of the law. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618 (1958) [hereinafter, Hart, *Positivism*]. Not separating them risked conflating the two so that people might, incorrectly, assume that existing laws were *per se* moral.

²² Žižek, *Four Discourses*, *supra* note 17, at 78; LACAN, SEMINAR XVII, *supra* note 1, at 104.

²³ Bracher, *supra* note 10, at 116-17.

²⁴ Jolls, *et al.*, *supra* note 6, at 1474.

behavior.”²⁵ They continue:

[The] normative task is to assess more broadly the ends of the legal system. In conventional economic analysis, normative analysis is no different from prescriptive analysis, since the goal of the legal system is to maximize “social welfare,” usually measured by people’s revealed preferences . . . But from the perspective of behavioral economics, the ends of the legal system are more complex. This is so because people’s revealed preferences are a less certain ground on which to build; obviously issues of paternalism become central here.²⁶

Note, what is *not* included in the three functions which are supposed to comprise *all* approaches to law: one of the primary functions of much of private law. This is the use of law by the individual subject to achieve her own goals.

The product in the lower right position is the alienated barred subject herself.²⁷ She is the subject who is subjected to the law. The university’s discourse that scientizes and explains the society’s desire, but does not address the subjects subjected to law and ask about her desire.²⁸ The expert does not address the subject directly. Rather, he uses the subject as a tool. The expert seeks to maximize the desideratum of society generally, and subjects all subjects to this goal. By making society’s object cause of desire into a subject of study, this discourse splits the individual subject from her subjective desire. Consequently, even though legal literature often speaks in the language of libertarianism and consumer sovereignty, it betrays an intention of controlling – or in Sunstein and Thayer’s euphemism “nudging” – others for their own good. This is why this is a discourse of power.²⁹ This is succinctly expressed in Sunstein and Thayer’s oxymoron “libertarian paternalism”.³⁰ At least JST, rather refreshingly, admit that they are, indeed, questioning the assumption of consumer sovereignty.³¹ Power is rather usurped from the consumers and transferred to their own selves.

Tellingly, Thayer and Sunstein begin *Nudge*, their best-selling popularization of their

²⁵ *Id.*

²⁶ *Id.* at 1474-75.

²⁷ Bracher, *supra* note 10, at 115.

²⁸ Žižek gives the following example from medical practice:

At the surface level, we are dealing with pure objective knowledge that desubjectivizes the subject-patient, reducing him to an object of research, of diagnosis and treatment; however, beneath it, one can easily discern a worried hystericized subject, obsessed with anxiety, addressing the doctor as a Master and asking for reassurance from him.

Žižek, *Four Discourses*, *supra* note 17, at 78.-79.

²⁹ LACAN, SEMINAR XVII, *supra* note 1, at 174.

³⁰ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 4-5 (2009).

³¹ Jolls, *et al.*, *supra* note 6, at 1541.

approach, with an anecdote about whether a food in a school cafeteria should be displayed in a way to influence children to make healthier choices.³² This is a loaded example. Almost everyone would agree that, as the term indicates, adults should act paternalistically – i.e. like a benevolent father – towards children. But this is precisely because we believe children are not yet capable of rational decision making. This begs the question as to if and when paternalistic treatment is appropriate for adults.

Of course, in actual universities the most obvious subject identified by Lacan as split and alienated from himself is the student.³³ Lacan developed this analysis after the Paris student uprisings of 1968, and addressed it directly at French university education – which is no doubt why he used the specific term “university”.

Lacan believes that when one speaks the university’s discourse one is indifferent to whether the speaker or the person addressed actually achieves a true understanding.³⁴ Professors (perhaps unconsciously) frequently care more about their prestige in academia and in society; students are merely a means to that end. Consequently, students become alienated from the enterprise, parroting what their teachers say rather than seeking to create their own knowledge.

Obviously, we write this not as outsiders, but participants in this system. In our classes, we personally often speak as experts. Moreover, Lacan was no less harsh in his analysis of the student radicals he addressed in 1969, accusing them of speaking in the hysteric discourse which, he believed, could never truly be radical.³⁵ We nevertheless find a positive role for this discourse perhaps because we do not presume to propose radical change in society.

Lacan thought that the university’s discourse (rule by experts) was not limited to education, however, but was dominant throughout modern Western society. The university’s discourse is both an inevitable and necessary part of education and law.³⁶

Nevertheless, necessity should not be confused with predominance. Being aimed at society’s goals, it has a problematic relationship with individual freedom. Indeed, being more subtle, it is potentially more dangerous than the master’s discourse. The master merely asserts that he must be obeyed, the expert claims that she *deserves* to be obeyed. Those who speak in the university’s discourse may sincerely believe that their hearts are in the right place and that their ultimate goal is human flourishing. However, although it critiques the content or specific laws, it is not in a position to critique the power of law *per se*. Rather, its function is to provide justifications and rationalizations for the status quo, and, by suggesting incremental improvements, to assure that the status quo is more effective in imposing its power over others.

Although this is a damning analysis, one should understand what we and Lacan *aren’t* saying.

³² THAYER & SUNSTEIN, *supra* note 30, at 1-3.

³³ LACAN, SEMINAR XVII, *supra* note 1, at 172.

³⁴ In Bracher’s words: “No provision is made for individual subjects and their desires and idiosyncracies. Individuals are to act.” Bracher, *supra* note 10, at 115. This is not to suggest that academics never struggle to achieve truth. Rather, Lacan thinks that when they do so, they leave the university’s discourse and speak in the analyst’s or hysteric’s discourse.

³⁵ LACAN, SEMINAR XVII, *supra* note 1, at 207.

³⁶ Žižek, *Four Discourses*, *supra* note 17, at 78.

Here we differ from our good friend Pierre Schlag’s critique of the normative turn in legal scholarship. Lacan is no romantic. He does not believe that but for the implicit violence of the university’s discourse the subject (or student or citizen) would be whole and unalienated, and, therefore, we should sweep aside the existing educational and legal system.³⁷ This is precisely the naive position he attributed to the 1968 student radicals. True, the university’s discourse is alienating, *but the subject does not pre-exist her alienation*. Indeed, the subject does not pre-exist *law* very broadly defined.

Following the speculative tradition of Continental theory, Lacan agreed that a human being only becomes a subject – for our purposes, a creature who is capable of bearing rights and duties – through relations with others through language, law, etc. Specifically, one only becomes a subject by being recognized as such by other subjects.³⁸ One result of this is that which we experience as most ourselves – our subjectivity – resides outside of us – in the recognition of others.³⁹ We are torn between our subjective desires, and the demands of others whose recognition we crave. To be a part of society we must adopt collective standards and goals, control our emotions and repress our passions. Consequently, alienation is the initiation rite of maturity.

The Hysteric’s Discourse.

$$\begin{array}{ccc} \underline{\$} & \rightarrow & \underline{S}_1 \\ a & & S_2 \end{array}$$

It is only in the hysteric’s discourse that the barred subject acts as an agent. She is the subject of, and not an object subjected to, the discourse. The master ordered her, the university lectured her, and even the analyst, supposedly on her side, interrogated her. Now she finally has a voice.

The hysteric’s discourse challenges and critiques the other discourses. The master declares law; telling you what to do. The university justifies law; explaining why you should obey. The analyst interprets law; asking you what you want from it.

The barred subject questions the law itself, here represented as the master signifier.⁴⁰ “The hysterical subject is the subject whose very existence involves radical doubt and questioning, her entire being is sustained by the uncertainty as to what she is for the Other.”⁴¹

In the language just quoted, the master signifier was referred to as the Other (capitalized), which is a term sometimes used for the entire symbolic order of intersubjective relations, including language and sexual identity, as well as law. The hysteric’s question for the master signifier is “What

³⁷ David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 Colum. L. Rev. 1908 (1999).

³⁸ This dynamic is explored in JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* 203 (2004).

³⁹ Lacan coined the neologism “extimacy” to express this uncanny sense. Jeanne L. Schroeder & David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653, 660 n.31 (2000). See generally Jacques-Alain Miller, *Extimité* (Francoise Massardier-Kenney trans.) in *THEORY OF DISCOURSE*, *supra* note 10, at 74.

⁴⁰ Bracher, *supra* note 10, at 109.

⁴¹ Žižek, *Four Discourses*, *supra* note 17, at 81.

do you want from me?’⁴²

The hysteric asks this question because, as already introduced, subjectivity is only created through intersubjective relations; specifically, by being recognized as a subject by other persons who she recognizes as subjects. Subjectivity is, therefore, nothing but the capacity for desire. And, in one of Lacan’s more famous slogans ‘the desire of the subject is the desire of the other,’⁴³ with the ambiguity of the English translation reflecting that of the original French. Consequently, ‘what do you want from me?’ can be restated as the imperative ‘Just tell me what I must do to make your recognize me!’

The truth of the subject is the object of desire. In this case, however, the object of desire is not necessarily the collective goals of society identified in the university’s discourse. It is the subjective desire of the barred subject. In other words, the agent speaks from the position of the pain of being barred from her own desire.

The product of this discourse is a new type of knowledge – represented by S_2 . But here knowledge is neither know-how nor expertise. Rather it is new knowledge of the subject’s relationship to the law. Mundanely, she can learn what the law does wants from her – what she needs to do or say to fit better into the symbolic. Consequently, and more critically, the hysteric can learn what is *lacking* in the symbolic – to identify its flaws and decide whether to cope or seek to change them.

By asking law ‘What do you want?’, the hysteric may learn that it is the law that is wanting. It is not complete and totalizing as the power discourses claim. Consequently, the hysteric’s question ‘What do *you* want? What do *I* lack?’ can become the accusation ‘You are wanting!’⁴⁴ ‘How must I change to accommodate you?’ is now ‘You must change to accommodate me!’ The hysteric’s discourse can be that of critique. It opens up, not revolution or the impossible search for perfection, but the possibility of imperfect reform.

At first blush, the hysteric’s discourse might seem to bear some resemblance to the university’s in that they both can involve legal reform. But, as illustrated in the quadripode, this is because the hysteric’s discourse is the other side of the university’s. The resemblance is a mirror image that reflects a reversed perspective towards freedom. The expert addresses himself towards society’s goals generally in order to justify the power of law that is his hidden truth. In order to achieve these goals the expert necessarily tries to restrain and manipulate (nudge) those who are *subjected to*, and split by, the law. Consequently, the university has a fraught relationship with freedom.

The hysteric, in contrast, challenges the law itself from the position of the subject subjected to the law whose truth is the pain and violence that law causes in the name of a greater good. She seeks the freedom that comes from the knowledge this challenge produces. Paradoxically, part of this knowledge is that freedom and law have a dialectical relationship, and that as a member of society who desires to be desired by others, she must sometimes subordinate her individual subjective wants to the objective goals of the collective.

⁴² See SLAVOJ ŽIŽEK, *THE ABYSS OF FREEDOM/AGES OF THE WORLD* 81-82 (1997).

⁴³ JACQUES LACAN, *SPEECH AND LANGUAGE IN PSYCHOANALYSIS* 31 (Anthony Wilden trans., 1981).

⁴⁴ SCHROEDER, *FOUR DISCOURSES*, *supra* note 1, at 150.

Talk Like an Hysteric.

How specifically do practitioners and scholars speak in the hysteric's discourse?

Members of the bar sometimes distinguish between lawyers and attorneys. Lawyers are those trained in the law. Attorneys are those who practice law by representing clients. In this dichotomy, the master's and university's discourses are lawyerly, while attorneys *practice* in the analyst's and hysteric's discourses. Once again, one of our points here is that, although we critique the power discourses, they are also necessary. One cannot effectively act as an attorney unless one first, is, a lawyer.

When an attorney *represents* a client, as opposed to counseling him, she does not address the client (as she does when she interrogates the client when she speaks in the analyst's discourse). She is, to use the colloquial term, his mouthpiece. As the client's alter ego she steps into the client's shoes to stand as his agent. She takes the position of the hysterical barred subject who addresses the other party who stands for the master signifier that he believes can offer a solution to the client's problem.

To give a few examples, in transactional practice the other can be the counter-party to a contract. Negotiations are precisely exchanges of the hysterical question as each side queries what the other wants, and what the other can provide for the subject to achieve her goals. The purposes of the negotiations is to create a new knowledge in the form of the contract that serves the parties respective goals. Even a failed negotiation creates a sort of knowledge in that the split subject learns that this specific potential counterparty cannot do so.

Litigation often involves the more hostile version of the question. The attorney bringing an action claims that the client has been wronged – is split, harmed, barred from the object of desire that is her truth. The defendant is in the position of the master signifier. Although not as immediately obvious, the hysteric's discourse can also characterize legal defense. Having been sued by the plaintiff or charged by the prosecutor, the defendant and her attorney find themselves in the position of the barred subject. The purpose of litigation, of course, is to produce a decision (or settlement).

The hysteric's discourse is also the discourse of critical scholarship. The speaker places herself in the position of the desiring subject who questions or challenges the law. The speculative scholarship seeks to address the internal logic of the law to see how either a real or hypothetical subject fits into the law.

Doctrinal scholarship directed largely to attorneys representing clients also falls within the hysteric discourse. The doctrinalist, like the attorney, puts herself in the position of a hypothetical legal subject with a desire – a potential problem that she thinks either might be solved or caused by the law. Unlike the university's discourse of policy scholarship, she does not address the problem in terms of some supposed external policy goal that doctrine is supposed to serve. Rather, the doctrinalist looks to the law's own internal logic to see how it can be made more coherent on its own terms so that it can be better used.

In speculative and doctrinal scholarship the result to be produced is knowledge in the sense of a greater understanding of the relationship between the law and the subject. Sometimes the understanding is intersubjective in that the doctrinal or speculative scholar might throw new light on a legal problem that enlightens not only the scholar herself but other practitioners or scholars. Sometimes this new understanding will result in an actual change in the law – as when litigation invalidates a law or leads to a new interpretation of the law. Sometimes, this understanding results in a call to change the law. If the doctrinal or speculative scholarship leads to a conclusion that the

law's effect on the subjects subjected to the law is unjust or even unintended, this suggests the law should be changed.

Rationality and Freedom.

Both the university's and hysteric's discourses see that law and individual freedom have a problematic relationship with each other. Once again, they are mirror images, resulting from their implicit different conceptions of rationality. Policy scholars address law's goals. Critical theory addresses law's power. Schematically, each is the other side – its structural inverse. Each turns the other inside-out. The university's discourse speaks from the position of knowledge, but, unintentionally, produces alienation. The hysteric's discourse speaks from the position of alienation, and tries to produce knowledge.

As such policy-oriented scholarship, on the one hand, and critical jurisprudence, on the other, implicitly differ in their attitudes towards individual freedom, personality and rationality. To repeat, the university addresses the goals of law from the position of the legislatures and judges who write the law as governors to further society's "objective" purposes. Law is a tool to achieve a desired policy. However, to do this one needs to be able to *predict* the empirical behavior of legal actors subjected to the law. Spontaneous and unpredictable behavior is a problem. Consequently, policy scholars traditionally seek to define rationality as predictable behavior and unpredictability as irrational. Specifically, rationality is associated with ends-means or pragmatic reasoning, i.e. the ability to choose appropriate means to achieve a pre-given ends. This connection is made expressly in much law-and-economics scholarship, but is implicit in much other scholarship.

In contrast, the hysteric – following speculative theory – thinks that this is a necessary but insufficient, aspect of rationality. Rationality, also includes the ability to choose an appropriate end.⁴⁵ In addition, following Kant, a moral choice must be one that is freely chosen, i.e. not caused. Therefore, the choice of ends must have a moment of pure, uncaused spontaneity.⁴⁶ Freedom, morality and *rationality*, therefore, form a holy trinity.⁴⁷ Consequently, there is an inevitable moment of unpredictability in all three.

The most obvious example of the university discourse in legal academia is first generation law-and-economics scholarship associated with Richard Posner. This movement, influenced by a reading of neo-classical price theory, argues that law either can, could or should be interpreted as furthering some form of economic efficiency, such as utility or wealth maximization, and adopts the assumption that economic actors are economically rational, or, at least, can be relied on as acting as though they were in the aggregate over the long term.⁴⁸ This first generation claimed, no doubt based on deeply felt beliefs, that it respected a libertarian view of freedom in that it had no theory of

⁴⁵ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 146 (Mary Gregor trans. & ed. 1996) [hereinafter, KANT, MORALS].

⁴⁶ IMMANUEL KANT, *CRITIQUE OF PURE REASON* 308 (J.M.D. Meiklejohn trans., 1900).

⁴⁷ SCHROEDER, *FOUR DISCOURSES*, *supra* note 1, at 69.

⁴⁸ See generally Milton Friedman, *The Methodology of Positive Economics in* MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 3 (1953).

preference creation. That is, each individual should theoretically be free to pursue his or her own utility or wealth as she saw fit. Some law – most obviously criminal and tort law – should be legislated or interpreted to incentivize people to act in a way that would have an efficient result. But other laws should be designed to minimize transaction costs that inhibit rational actors from freely negotiating efficient results. But first-best efficiency claims are not the primary object of our polemic.

Rather we turn to a later generation of law-and-economics scholarship and most specifically JST's *A Behavioral Approach to Law and Economics*⁴⁹ and Sunstein and Thayer's *Nudge*.⁵⁰ These works are two of the more egregious examples of the university discourse. Unlike first generation legal economists like Posner who at least give lip service to individual choice, JST admit that "the legal system ought always to respect informed choice, . . . government decisionmakers . . . can be relied upon to make better choices than citizens."⁵¹ That is, the experts – S₂ – should tell you not only what to do, but also what you *should* want.

This generation claims to be based on behavioral economics that argue that empirical studies show that actual legal subjects regularly and predictively deviate from the neo-classical model.⁵² In their words, subjects are only "boundedly rational."⁵³ To JST, one of the implicit revelations of behavioral economics is that irrationality is now supposedly as predictable as rationality

The lesson they draw from this is not, however, a rejection of the neo-classic conception of rationality. Rather JST suggest that, when legal actors evince behavior that does not comport with this definition of rationality, legal rules should be designed to force them to *as though* they were "rational".⁵⁴ The university's discourse thus reflects a fundamental fear of freedom. As Kant suggests, freedom is the stumbling block on which policy scholarship founders.⁵⁵

What is striking, however, is that this is diametrically opposed to the conclusions that Herbert Simon, one of the founders of behavioral economics, draws. Simon thought that the evidence falsified the neo-classic hypothesis that economic rationality is either a superior or paradigmatic

⁴⁹ *Supra* note 6.

⁵⁰ *Supra* note 30.

⁵¹ Jolls et al., *supra* note 6, at 1475 (emphasis added).

⁵² *Id.* at 1476-78.

⁵³ *Id.*

⁵⁴ As Evgeny Morozov says "The nudging state is enamoured of feedback technology, for its key founding principle is that while we behave irrationally, our irrationality can be corrected – if only the environment acts upon us, nudging us towards the right. Evgeny Morozov, *The Rise of Data and the Death of Politics*, THE GUARDIAN (July 19, 2014)

option.<http://www.theguardian.com/technology/2014/jul/20/rise-of-data-death-of-politics-evgeny-morozov-algorithmic-regulation>. Morozov argues that this approach, with its emphasis on outcomes, rather than process, is fundamentally undemocratic. His criticism is aimed specifically at an essay by Tim O'Reilly, but Morozov notes that one of the only three references in the essay was to a speech by Sunstein, who he describes as "the prominent American legal scholar who is the chief theorist of the nudging state." *Id.*

⁵⁵ IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 19 (T.K. Abbott trans. 1996).

mode of reasoning.⁵⁶ The neo-classical hypothesis is a notoriously poor predictor of actual behavior.⁵⁷ Simon suggests that models based on more empirically accurate assumptions are likely to be superior predictors.⁵⁸ Moreover, actors who consciously try to act economically rational – that is, to maximize utility, wealth or whatever desideratum they choose – are bad decision makers who tend to be unhappy in their choices.⁵⁹ Simon thought that economically rational actors are irrational in the colloquial sense of the terms. They tend to make bad choices because maximization is impossible – one can never have the type of information necessary to make the *best* choice.⁶⁰ Consequently, in order for economists to give good advice they must examine how actual successful and unsuccessful economic subjects make decisions.

In contrast, rather than giving subjects information that they themselves can evaluate to help them make decisions, JST would have experts decide how subjects should act and, if necessary, deceive the subjects so that they act “appropriately.” This is most glaringly evident in one of JST’s suggestions as to how to change the structure of tort cases in order to counter hindsight bias – that is, by withholding information from the jury as to the specifics of the case, and having them answer hypothetical questions of liability.⁶¹ This illustrates how the university’s discourse uses claims of

⁵⁶ Simon discusses the diverse notions of rationality adopted by different theorists, and compares them with the rationality postulated in his essays: *From Substantive to Procedural Rationality*, in *METHOD AND APPRAISAL IN ECONOMICS* 129 (S.J. Latsis ed., 1976), reprinted in HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: BEHAVIORAL ECONOMICS AND BUSINESS ORGANIZATION* (1982) at 424 [hereafter, SIMON, *BOUNDED RATIONALITY*]; *Rationality*, in, *A DICTIONARY OF THE SOCIAL SCIENCES* 573 (J. Gould & W.L. Kolb EDS., 1964), reprinted in SIMON, *BOUNDED RATIONALITY*, 41, at 405; *Theories of Bounded Rationality*, *DECISION AND ORGANIZATION* 161 (C.B. Radner & R. Radner eds., 1972), reprinted in SIMON, *BOUNDED RATIONALITY*, at 408.

⁵⁷ Gary Becker points out that when economists talk about the predictions made by the rationality postulate, they usually have in mind the well-documented phenomenon of downward sloping demand curves. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 157-58 (1976)]. As Becker points out, however, in fact, this phenomena is equally consistent with any number of other simpler and less controversial assumptions. *Id.* at 156-57. Jolls, *et al.* emphasize neo-classical economics’ notoriously poor predictive track records as one of the primary reasons to investigate behavioral economics as an alternative. See Jolls et al., *supra* note 6, at 1487-88.

⁵⁸ For a theory to make good predictions, Simon argues

[I]t must be a theory that describes [the operations of firms] realistically, not an “as if” theory. In both its descriptive and its normative aspects, it must describe, and prescribe for, the decision making processes of managers with close attention to the kinds of knowledge that are attainable and the kinds of computations that can actually be carried out

HERBERT A. SIMON, *AN EMPIRICALLY BASED MICROECONOMICS* 63 (1997).

⁵⁹ For example, because a real producer can never have access to the perfect information needed to maximize profits, any decision process based on an attempt to maximize is doomed to failure. See SIMON, *BOUNDED RATIONALITY*, *supra* note 57, at 369-70. Simon believes successful decision makers engage in a form of common sense that he calls “satisficing.” *Id.* at 219, 417. Mark Blaug describes satisficing “as a non-fully-rational theory of individual action under both certainty and uncertainty.” MARK BLAUG, *THE METHODOLOGY OF ECONOMICS OR HOW ECONOMISTS EXPLAIN* 233 (2d ed. 1992).

⁶⁰ SIMON, *BOUNDED RATIONALITY*, *supra* note 56, at 368-80.

⁶¹ Jolls, *et al.*, *supra* note 6 at 1527-29.

expertise to justify and veil an exercise of power over others. It is the position of the governor who wishes to control others, rather than that of the governed who seek to free herself and achieve self-control. It represents not merely a fear of freedom by the experts themselves, but a fundamental hatred of freedom in others.

Even scholars working in the university discourse of policy who claim to reject either the neo-classic or the behavioral theory of rationality share an implicit assumption – rationality is ends-means or pragmatic reasoning, the ability to choose an appropriate means to achieve a predetermined ends.⁶² Such an assumption seems necessary to support an argument that the law does, or can be reformed to, incentivize, coerce or otherwise affect the behavior of legal subjects in a way that will serve the scholars choice of ends. Policy scholarship must believe that they can *predict* the expected results of imposing a legal regime. This assumes that many if not most subjects are, or can be made to be, predictable. Spontaneity is the enemy of predictability.

Indeed, the university discourses notion of rationality might better be described as ends-means *behavior* rather than reasoning.⁶³ As Richard Posner has stated, “it would not be a solecism to speak of a rational frog”⁶⁴ or rat⁶⁵ as these poor, dumb creatures instinctively pursue their ends of eating, mating, etc.

Speculative theory, in contrast, argues that, although rationality includes this type of pragmatic reasoning, it can not be confined to it. Rather, true rationality is not the ability to identify a means to achieve ones ends, but the ability to choose appropriate ends.⁶⁶ For Kant, rationality, freedom, and spontaneity are, if not identical, so closely interrelated that one cannot conceive of one without the others. The search for one’s own proper ends conflicts with the university’s desire to promote the ends of society.

⁶² “Rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have. . . It does not assume consciousness; it certainly does not assume omniscience.” POSNER, *supra* note 49, at 17.

⁶³ SCHROEDER, *FOUR DISCOURSES*, *supra* note 1, at 66.

⁶⁴ POSNER, *supra* note 49, at 17.

⁶⁵ Richard A. Posner, *Rational Choice, Behavioral Economics and the Law*, 50 STAN. L. REV. 1551 (1998).

⁶⁶ “An end is an object of the choice (of a rational being), though the representation of which choice is determined to an action to bring this object about.” KANT, *MORALS*, *supra* note 45, at 146. Kant continues:

But if I am under obligation to make my end something that lies in concepts of practical reason, and so to have, besides the formal determining ground of choice (such as right contains), a material one as well, an end that could be set against the end arising from sensible impulses, this would be the concept of an end that is in itself a duty. . . . That is to say, determination to an end is the only determination of choice the very concept of which excludes the possibility of constraint through natural means by the choice of another.

Id. at 146. In other words, freedom is precisely the ability to use reason to choose ends, rather than having ends forced upon us by nature.