

## TAKING DUNCAN KENNEDY SERIOUSLY: IRONICAL LIBERAL LEGALISM

MOTOAKI FUNAKOSHI\*

*[I]f doubt is cast on the worth of these words [final vocabularies], their user has no noncircular argumentative recourse. Those words are as far as he can go with language; beyond them there is only helpless passivity or a resort to force.*

—Richard Rorty<sup>1</sup>

*Sometimes it makes sense to strategize, not the best result within the discourse that will leave the discourse and its implicit metanorm of moderation intact, but the politicization of the setting. Sometimes it doesn't make sense, in which case passivity by all means.*

—Duncan Kennedy<sup>2</sup>

### INTRODUCTION

Where did Critical Legal Studies come from and where will it go? In this article, I will attempt to describe a theoretical and historical meaning which Critical Legal Studies [hereinafter CLS] seems to have for legal studies in general in the eyes of an outside observer. In the first place, however, what is CLS? It has many aspects such as movement, school, theory, factoid, and so forth.<sup>3</sup> I am interested in CLS as a group of theories. But, dealing with all the materials supposedly belonging to this school of thought with the same weight

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\* Associate Professor, Kyoto University, Graduate School of Law, Kyoto, Japan. LL.B., Kyoto University, Faculty of Law 1995; LL.M., Kyoto University, Graduate School of Law 1997; LL.M., Harvard Law School 1999; LL.D., Kyoto University, Graduate School of Law 2004. I would like to thank Duncan Kennedy for his unbelievably generous support for my project of “totalizing” him. My understanding of his theory was enormously improved thanks to his comments on the earlier version of this article and to memoranda prepared for it. But still, what I deal with in this essay is my own (re-)construction of Duncan Kennedy, rather than the *real* Duncan Kennedy, and, of course, there would be a difference between the two. I also would like to thank Harvard-Yenching Institute and Harvard Law School, East Asian Legal Studies Program for sponsoring my stay at Harvard during the academic year of 2005. The author is responsible for all errors or omissions in this article.

Parts of this essay are based on my previous works written in Japanese: Motoaki Funakoshi, *Duncan Kennedy no Shibō-riron: Iraisha-shuken no Hōteki-shikō* [Duncan Kennedy’s Private Law Theory: Client-centered Legal Thinking], 153-2 HÖGAKU-RONSŌ 1 (2003), 153-3 HÖGAKU-RONSŌ 1 (2003), 153-4 HÖGAKU-RONSŌ 1 (2003), 153-5 HÖGAKU-RONSŌ 28 (2003), 153-6 HÖGAKU-RONSŌ 30 (2003); Motoaki Funakoshi, *Duncan Kennedy no Genshōgaku-teki Saitei-riron: Common Law no Dentō* [Duncan Kennedy’s Phenomenology of Judging: The Common Law Tradition], 156-5 & 6 HÖGAKU-RONSŌ 358 (2005).

1. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 73 (1989) [hereinafter RORTY, IRONY].

2. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {*fin de siècle*} 374 (1997) [hereinafter CRITIQUE].

3. *Id.* at 8-11.

seems to be a bad strategy. In this essay, therefore, I will focus on Duncan Kennedy's major works, the best part of CLS, and try to reconstruct them into a general model of legal thinking, in particular in the area of private law interpretation. It is through such a detailed reading of a particular author of the school of thought that, I believe, we can come to understand how valuable CLS is for the entire legal academy.

But, my attempt may sound ridiculous to many readers. For CLS is generally perceived as totally irrelevant and devastating to orthodox legal thinking. Such a typical misunderstanding of CLS seems to be nicely summarized by the following passage from Owen Fiss:

Critical legal studies scholars do not try to transcend the uncertainty—they revel in it. Rather than impose an intellectual structure on all the conflicting intuitions embraced within these normative concepts, critical legal studies scholars accept this openness or (to use their favorite term) “indeterminacy” as a given. Consequently, they argue, there can be no standards for constraining judges or for determining whether a decision is correct as a matter of law. . . . The purpose of this exercise is to deny the distinctive claim of law as a form of rationality. Law is not what it seems—objective and capable of yielding “right answers”—but rather simply politics in another guise. Judges speak the way they do because that is the convention of their profession and is needed to maintain their power, but their rhetoric is all a sham.

. . . Critical legal studies scholars are distinguished (if at all) from feminists and from the legal realists of an earlier generation by the purity of their negativism. When critical legal studies scholars insist that “law is politics,” they mean something quite different and more nihilistic than either realists or feminists. Critical legal studies scholars want to unmask the law, but not to make law into an effective instrument of good public policy or equality. The aim of their critique is critique. Critical legal studies scholars realize that any normative structure created to supplant law would be subject to the very same critique they used to attack the law.<sup>4</sup>

It seems that many mainstream judges, lawyers, and law professors, following this line of logic, argue that CLS theorists are, (1) by employing, for example, extra-legal (post-)structuralist linguistic theories, just indulging themselves in criticizing determinacy (and therefore objectivity and neutrality) of legal interpretation, thereby claiming the radical indeterminacy of the law<sup>5</sup>

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4. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 9-10 (1986).

5. One of the most famous examples in this regard is, needless to say, Dworkin's misunderstanding of CLS as “global internal skepticism.”

[CLS] claims, first, that the constitutional structure and main doctrinal lines of modern Western democracies can be justified only as an elaboration of a fundamentally liberal view of personality and community. . . . It argues, second, that liberalism, as a philosophical system combining metaphysical and ethical ideas, is profoundly self-contradictory and that the contradictions of liberalism therefore ensure the chaos and contradiction of any available interpretation of our law, the doom of Hercules' project.

(2) without presenting any positive reconstruction of legal practice in favor of absolute negativism,<sup>6</sup> (3) and therefore satisfied merely to expose the

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RONALD DWORKIN, *LAW'S EMPIRE* 274 (1986). See also *id.* at 78-79, 271-73. One of the most important philosophers to adopt Dworkin's misunderstanding is Jürgen Habermas. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 216-18 (William Rehg trans., MIT Press 1996) (1992). Later in this essay, I will respond to their critiques in a somewhat indirect way. See *infra* section IV.

Of course, there are a number of other mainstreamers' literatures that criticize CLS as claiming the radical indeterminacy of the law. See, e.g., Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746-47 (1982) (arguing that "deconstructionists" who say "interpretive freedom is absolute" fail to see legal interpretations constrained by the interpretive community); Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1208-10 (1985) (trying to refute the radical indeterminacy thesis by showing that there is, or we can make, at least one unquestionably easy case); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 341-45 (1986) (pointing out Joseph Singer's "misuses" of Richard Rorty, which the author regards as the paradigmatic error of CLS in general); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 491-95 (1987) (discussing that even what the author calls "weakened indeterminacy thesis" fails because, for example, there would remain easy cases in the "practically possible worlds" rather than in the "logically possible worlds"); Kenneth Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 305-07 (1989) (criticizing CLS as exaggerating the extent of indeterminacy of the law by claiming, for example, that Kennedy's "fundamental contradiction" is only "psychological tension rather than a strict contradiction," which would result only in competition between, rather than in contradiction of, legal interpretations).

A German critic also regards CLS as advocating the radical indeterminacy thesis, and tries to refute it on the basis of, among other things, the idea of the "performative contradiction." See Günter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360, 391-95 (1989). At this point, it is worthwhile to note that Frankenberg hears "the ironic tone" in CLS literatures. See *id.* at 363-66. Similarly, Gary Minda depicts one strand of "postmodern jurisprudence" as "ironist." See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 229-38 (1995). In my opinion, their attention to the concept of "ironism" is quite appropriate. But, their analysis seems to end up with overgeneralization, in that they aim to totalize CLS as a whole philosophically under the banner of ironism. See *infra* section IV.

6. No one would deny that such a reaction to CLS is typically embodied by Paul Carrington. According to Carrington, CLS is merely trying to undermine the belief that law matters in legal interpretations by claiming that the "law is a mere deception by which the powerful weaken the resistance of the powerless." Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984). As a result:

Such disbelief threatens competence. More than a few lawyers lack competence because they have lost, or never acquired, the needed confidence that law matters. Lawyers lacking confidence that legal principles actually influence the exercise of power have no professional tools with which to do their work. In due course they must abandon whatever professionalism they have, to choose between simple neglect of their work or the application of common cunning, such techniques as bribery and intimidation in all their many forms.

Moreover, there is dread in disbelief. A lawyer who succumbs to legal nihilism faces a far greater danger than mere professional incompetence. He must contemplate the dreadful reality of government by cunning and a society in which the only right is might.

*Id.* Carrington takes a further step, (in)famously writing, "the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy." *Id.*

ideological nature of the law, which is well summarized by their empty slogan “law is politics.”<sup>7</sup> In short, CLS seems to have been regarded as merely “trashing”<sup>8</sup> orthodox legal practice, that is, as *anti-liberal legalism*.<sup>9</sup>

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Of course, again, there are a number of other mainstreamers’ literatures which follow this line of logic. As to the “professional incompetence” critique, *see, e.g.*, Phillip E. Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247, 260-62, 281-84 (1984) (blaming CLS for not being able to propose any, in particular specific, alternative); Hegland, *supra* note 5, at 1216-17 (claiming that in order for CLS theorists to compare their projects to Kuhn’s, they must first build a new paradigm before destroying the old one). As to the “might is right” critique, *see, e.g.*, Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 512, 545-47 (1984) (regretting CLS’s blindness to historical experience in the 20th century in which the denial of liberal rights led to “repression and tyranny”); Frankenberg, *supra* note 5, at 391-95 (alarming us of the possibility that radical skepticism only ends up benefiting the powerful who can do without the law).

Unfortunately, some of the leading critical scholars also share such anxieties. *See, e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 314-15 (1987) (regretting that CLS’s peculiar orientation to informality, such as disruption of legal rules and rights, merely ends up disarming minorities who want formal structures as safeguards against racism); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1864-66, 1891-93 (1987) (seeming to regard, at least part of, CLS’s critique of rights as making the essentialist claim that rights arguments are indeterminate and anti-community due to its blindness to the “interpretive turn” in legal interpretations).

7. Again, there are many versions of this type of misunderstanding; among those that I have been aware of are as follows. First, the most typical one is “CLS is Marxism.” *See, e.g.*, Johnson, *supra* note 6, at 257-65 (announcing CLS’s bankruptcy for reasons of historical failure of Marxist remedy, Marxist lack of falsifiability of its theses, and so forth); Maurice J. Holland, *A Hurried Perspective on the Critical Legal Studies Movement: The Marx Brothers Assault the Citadel*, 8 HARV. J.L. & PUB. POL’Y 239, 245-46 (1985) (warning conservatives not to simply counter pose the law/politics distinction against the Marxist thesis of “law is politics,” which would allow CLS to caricature them as naïve).

But, some Marxists seem to reject accepting CLS as their comrade because CLS fails to see, or at least underestimates, the necessity between oppressive laws and capitalism, thereby being unable to provide effective strategies for social transformation. *See* Wythe Holt, *A Law Book for All Seasons: Toward a Socialist Jurisprudence*, 14 RUTGERS L.J. 915, 926-38 (1983); Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280, 285-88 (1984). As to neo-Marxist critique/misunderstanding of CLS, *see* ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* 148-54 (1993) (claiming that, for example, Kennedy’s recourse to the unsubstantiated motives of legal actors cannot provide the causal link between legal doctrine and political effect thereof).

Legal sociologists also criticize the “law is politics” thesis mainly for its methodological flaws. *See, e.g.*, David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 615, 619-22 (1984) (claiming that CLS is, by focusing on legal doctrine almost exclusively, failing to see the law’s “marginality” which empiricists have found); Susan S. Silbey, *Ideals and Practices in the Study of Law*, 9 LEGAL STUD. FORUM 7, 9-11 (1985) (categorizing CLS as a form of “idealism” in the sense that it ignores extra-legal social practice). As to a corresponding critique by a legal economist, *see, e.g.*, Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 379-87 (1984) (criticizing the thesis as overlooking not only causality between ideology and action, but also existence of the extra-ideological functions of the law and the extra-legal ideological devices).

And yet, another mainstreamer regards CLS as pre-Marxist. *See* Brian Leiter, *Is There an ‘American’ Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 367, 383-84 (1997) (categorizing CLS as revived “Left Young Hegelians,” which Marx did criticize as mere critique of consciousness, falling short of manifesto of political practice).

In an excellent book reviewing a whole range of CLS literature, however, Mark Kelman states:

I actually believe that most efforts by leftist lawyers to rework social theory have failed to engage adequately the *details* of legal argument or practice, and that what is most interesting and innovative in CLS is not the restatement of generalizations about legitimation or the relative autonomy of law but the more detailed, focused accounts of what lawyers and the law influenced do and say.<sup>10</sup>

I agree with Kelman, and believe that Duncan Kennedy's works represent the best part of CLS in this sense. For Kennedy's critical works range through a vast number of private law texts and, through internal and detailed reading of these texts, perform deconstruction in the true sense of the word, in which Kennedy makes these texts confess their own contradictions. As a consequence, it seems to me that Kennedy's theory can be said to adopt a kind of Hartian internal point of view to law,<sup>11</sup> and therefore has some potential to contribute to the development of orthodox legal practice.

However, we should be careful not to jump to the opposite extreme, another common misunderstanding of CLS, as Neil MacCormick does:

Stripped down to a claim about the political and/or ideological quality of mainstream legal dogmatics when concerned with fundamental issues of interpretation and of coherence or value in law, the CLS position is a lot less radical, or even anti-mainstream (at least as that would be judged from a British standpoint), than the grander programmatic presentations suggest. The thesis that even the best drawn laws or lines leave some penumbra of doubt, and that

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8. See Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984). Of course, I am arguing that the mainstreamers are mistakenly taking Kelman's word at face value. See *infra* text accompanying notes 10-11.

9. Pierre Schlag would call this type of argument a "rationalist" misunderstanding of CLS. See Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1198-1202 (1989). Schlag's article was very helpful to locate various strands of mainstreamers' critiques of CLS.

10. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 10 (1987).

11. While I think that Kennedy is an internalist, it is obvious that he rejects the idea of "rightness" of legal interpretation. Then, what is "internal" about his viewpoint? It may be helpful to compare Kennedy's viewpoint to MacCormick's "'cognitively internal' point of view, from which conduct is appreciated and understood in terms of the standards which are being used by the agent as guiding standards," rather than "'volitionally internal' point of view: the point of view of an agent, who in some degree and for reasons which seem good to him has a volitional commitment to observance of a given pattern of conduct as a standard for himself or for other people or for both." NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 292 (1994). See also JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 234-38 (2nd ed. 1980) (distinguishing two types of normative statements: "detached statement" and "committed statement"). For a more detailed discussion on this point, see RYUICHI NAKAYAMA, 20 SEIKI NO HO-SHISO [LEGAL THOUGHT IN 20TH CENTURY] 127-34 (2000).

this calls for an exercise of a partly political discretion to settle the doubt, is not particularly new; it is but the common currency of modern legal positivism.<sup>12</sup>

The fact that Kennedy's theory is not anti-liberal legalism does not necessarily mean that it is *ordinary liberal legalism*. In fact, as I will discuss later, Kennedy himself has responded to MacCormick's critique,<sup>13</sup> as well as to more general critiques such as the one by Fiss.<sup>14</sup> Kennedy is *neither anti-liberal legalism nor ordinary liberal legalism*, but does not offer any positive account of his stance on liberal legalism. Although it might be dangerous for an outside observer to offer such an account on behalf of Kennedy, his theory is so fascinating that I cannot resist the temptation to "find philosophy's secret, true, magical, name — a name whose use will make philosophy one's servant rather than one's master."<sup>15</sup> By appropriating Richard Rorty, I will identify Kennedy's position as *ironical liberal legalism*.

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12. Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539, 553 (1990). Another striking example of this line of misunderstanding is that of Andrew Altman. See ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 18-21 (1990) (claiming that the "moderate strand" of CLS, which rejects the radical indeterminacy of law, but rather regards the legal materials as having a core of meaning, "do[es] not entail any serious deficiency in the liberal conception of the rule of law."). Richard Posner's critique of Kennedy also may be categorized as this type of misunderstanding. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 273 (1999) (claiming that the "unsentimental legal pragmatist," unlike the judges as Kennedy is describing, admits the possibilities of policy work in the face of indeterminacy of formal materials and "rolls up his sleeves and does policy."). Some legal sociologists also regard CLS as another liberal legalism. See, e.g., Frank Munger & Carroll Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 LAW & POL'Y 257, 262-74 (1984) (claiming that CLS's almost exclusive focus on legal doctrine, the methodology at least parallel to that of conventional legal scholarship, leads to reaffirming authority/ideology of liberal legalism which the school originally purported to demystify).

13. CRITIQUE, *supra* note 2, at 172-79.

14. It is Brian Bix that Kennedy criticizes by name. Duncan Kennedy, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, in DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* 153, 165-70 (2008) [hereinafter *Hart/Kelsen*]. In the part which Kennedy cites, Bix shows his misunderstanding of CLS as claiming the radical indeterminacy of the law:

In particular, CLS theorists argued for the radical indeterminacy of law: the argument that legal materials do not determine the outcomes of particular cases. . . . The legal materials, on their own, were said to be indeterminate, because language was indeterminate, or because legal rules tended to include contradictory principles which allowed judges to justify whatever result they chose (Kelman 1987). The CLS critiques have generally been held to be overstated (Solum 1987); though there may well be cases for which the legal materials do not give a clear result, or at least not a result on which everyone could immediately agree, this negates neither the easiness of the vast majority of possible disputes nor the possibility of right answers even for the harder cases.

*Id.* at 166 (footnote omitted).

15. RORTY, IRONY, *supra* note 1, at 97.

In order to draw this conclusion, I will reread Kennedy's major works by situating them within the context of the jurisprudential debate over legal positivism conducted by the Hartians and the Dworkinians, reconstructing them as a critical successor of the Dworkinian theory of legal interpretation. One way to summarize this debate would go something like this: the Dworkinians have argued that the Hartians, by limiting legitimate materials of legal reasoning to legal rules, ignore the fact that extra-rule materials such as principles (and policies) play an important role in legal reasoning in reality, thereby recognizing judicial legislation where the law runs out.<sup>16</sup> In fact, at his academic starting point, *Legal Formality*,<sup>17</sup> Kennedy was conducting an internal critique of the positivist version of the "rule of law" ideal, demonstrating that extra-rule materials have to be deployed in order for the ideal to be sustainable (Section I).

In addition to this jurisprudential argument, Kennedy also presented the historical analysis of the constellation of the extra-rule materials—policy arguments—employed in private law interpretation. That is, in *Rise & Fall*<sup>18</sup> and *Legal Consciousness*,<sup>19</sup> Kennedy, by employing the explanatory framework of "rule/standard" and "individualism/altruism," carefully traced the historical transformation of private law arguments, thereby trying to create a detailed catalogue of two lines of contradictory policy arguments with regard to both *Form and Substance*,<sup>20</sup> which was finally formulated through the use of *Semiotics of Legal Argument*<sup>21</sup> (Section II). Furthermore, in *Critical Phenomenology*<sup>22</sup> and *Strategizing*,<sup>23</sup> Kennedy launched into a detailed description of the inner experience of legal interpreters who are always/already faced with semiotically structured legal discourses (Section III). Thus, Kennedy's postmodernist view can be regarded as a tool to analyze orthodox legal arguments, and therefore his theory will sophisticate, rather than destroy, the mainstream practice of private law interpretation. Through the entire process of reconstruction, I want to suggest the possibility to grasp Kennedy's theory in particular and CLS in general as a *complementary theory to liberal legalism*, or as

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16. See *infra* section I-C.

17. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973) [hereinafter *Legal Formality*].

18. DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* (2006). Its first draft appeared as an unpublished manuscript in 1975.

19. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (Steven Spitzer ed., 1980) [hereinafter *Legal Consciousness*].

20. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter *Form and Substance*].

21. Duncan Kennedy, *A Semiotics of Legal Argument*, in 3 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, BOOK 2, 309 (1992) [hereinafter *Semiotics of Legal Argument*].

22. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) [hereinafter *Critical Phenomenology*].

23. Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785 (1996) [hereinafter *Strategizing*].

*post-liberal legalism*, rather than as anti-liberal legalism or as ordinary liberal legalism<sup>24</sup> (Section IV).

A knowledgeable reader of Kennedy would have noticed that my reading list did not include *Blackstone's Commentaries*.<sup>25</sup> Isn't the idea of the "fundamental contradiction"<sup>26</sup> demonstrated there "the very essence"<sup>27</sup> of Kennedy's theory in particular and CLS in general? But, as I argued at the beginning of this essay, I am aiming to reconstruct Kennedy's theory as a general model of legal thinking. From this point of view, I cannot help but evaluate *Blackstone's Commentaries* as *dictum*, in contrast with Kennedy's main arguments which have been developed basically within the Hartians/Dworkinians debate.<sup>28</sup> Before starting to reconstruct Kennedy's theory as a whole, I will argue this point in the first section.

## I. PRAGMATIST TURN TO INTERNAL CRITIQUE

### A. Fundamental Contradiction Revisited

In "the most widely cited passage in Critical Legal Studies,"<sup>29</sup> Kennedy wrote:

[T]he goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others . . . are necessary if we are to become persons at all — they provide us the stuff of ourselves and protect us in crucial ways against destruction. . . .

But at the same time that it forms and protect us, the universe of others . . . threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. . . . Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society.<sup>30</sup>

This argument has an affinity to the critique of the public/private distinction of liberalism, Marxist thesis of law as a (relatively autonomous)

24. For an example of the attempt by the postmodernist himself to situate postmodernism at the extension of, rather than in substitution for, liberalism, see RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 234-39 (1999) [hereinafter RORTY, *SOCIAL HOPE*] (trying to interpret both "politics of identity" and "politics of difference" as complementary theories to the liberalism of Mill and Dewey).

25. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 209 (1979) [hereinafter *Blackstone's Commentaries*].

26. *Id.* at 211-13.

27. *Id.* at 213.

28. My treatment of *Blackstone's Commentaries* as *dictum* is motivated by my intention to criticize the mainstreamers' obsession with the "fundamental contradiction" thesis, rather than representing the "real" value thereof. I do not claim that the residual part—in fact, almost all—of *Blackstone's Commentaries* is meaningless. Rather, it contains one of the best examples of an internal critique of a legal text.

29. KELMAN, *supra* note 10, at 62.

30. *Blackstone's Commentaries*, *supra* note 25, at 211-12.

superstructure, and so forth. Therefore, it was almost inevitable that Kennedy's theory in general, as well as the "fundamental contradiction" thesis in particular, was regarded as a (maximalist) disruption of liberal legalism as a whole. However, Kennedy himself declared that he abandoned the thesis long before.<sup>31</sup> The biggest reason for his conversion seems to have lain in the fact that the "fundamental contradiction" thesis was such an extravagant "philosophizing" generalization that even conservatives could employ it to legitimize the status quo.<sup>32</sup> In other words, the thesis was too abstract to close further questioning, for example, whether or not the contradiction is really too fundamental to be resolved, and therefore it turned out to be impossible for a critic to substantiate the totality of liberal legalism on the basis of such a controversial comprehensive thesis.<sup>33</sup>

Then, has Kennedy stopped finding "contradiction" within liberal legalism? Of course, the answer is no. Now Kennedy is extracting "contradiction" differently from what was found through the use of "rule/standard" and "individualism/altruism" in *Form and Substance*. Although it was published before *Blackstone's Commentaries*, *Form and Substance* seems to have been read as an attempt to find out the "fundamental contradiction of liberalism" within the concrete private law arguments. In *Form and Substance*, Kennedy argued that on the formal level private law arguments include a requirement of certainty justifying the rule form and a counter requirement of flexibility justifying the standard form.<sup>34</sup> And, he argued that such contradiction on the formal level was connected with the contradiction on the substantive level (e.g., market/regulation), and further with the contradiction on the philosophical level (e.g., liberalism/communitarianism), or rather such deep contradiction on the level of worldview determined both the substantive and the formal contradictions of the legal arguments.<sup>35</sup> Or, at least, many readers seem to have understood *Form and Substance* in this way. In other words, Kennedy's private law theory has been regarded as a kind of a *foundationalist* theory that, by tracing back from the form through the substance to the worldview, aims to establish (the contradiction of) legal arguments on, and/or identify the origin thereof on the *extra-legal* ground.

But, it seems that Kennedy has changed his position as to the ontological status of the contradictions of legal arguments. That is, instead of the extra-legally substantiated contradiction, such as "communitarianism/liberalism," now Kennedy is focusing on the *intra-legal* contradiction over the model of private law interpretations, i.e., contradiction "between a model of maximum duty and maximum excuse, and a model of minimum duty and minimum excuse."<sup>36</sup> Furthermore, Kennedy rejects the idea that this intra-legal

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31. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-16 (1984).

32. *See id.*; *see also, e.g.*, Johnson, *supra* note 6, at 262.

33. *See* Gabel & Kennedy, *supra* note 31, at 24-25; *see also, e.g.*, Johnson, *supra* note 6, at 257.

34. *See Form and Substance*, *supra* note 20, at 1687-1701.

35. *See id.* at 1710-13.

36. CRITIQUE, *supra* note 2, at 151.

contradiction corresponds to the (extra-legal) ideology in the parallel way.<sup>37</sup> Under his revised scheme, for instance, as to the disputes over economic liberty, while liberals (rather than communitarianists) propose maximum duty of the firms to internalize the costs of workers' direct actions, conservatives (rather than liberalists) propose the minimum duty of the firms to do so.<sup>38</sup> When it comes to the disputes over civil liberty, on the other hand, while liberals propose the minimum duty of citizens to abide by social morals, conservatives propose the maximum duty of citizens to abide by paternalistic intervention in the community.<sup>39</sup> Thus, liberals and conservatives strategically choose "either rule or standard" and "either individualism or altruism" according to their policy preferences. Meta or deep structure of "liberalism/communitarianism" has lost its power to designate the phenomenal contradiction of legal arguments.<sup>40</sup>

As a consequence, it seems to me that Kennedy now addresses the question of *how* every discourse of private law interpretations contradicts each other, which focuses on the *surface* level of the discourse, rather than the question of *why* every discourse contradicts each other, which addresses the ground, the meaning, the origin, and so forth on the deepest level.<sup>41</sup> In other words, now Kennedy "chastened" his critical strategy, substituting "internal critique," in which he stays inside the legal discourses and observes them as if they were a thing,<sup>42</sup> for "external critique" in which he disrupted legal arguments through the use of extra-legally substantiated ground, such as "fundamental

37. For concrete examples of inconsistency between form and substance, see Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 45-48 (1986).

38. See CRITIQUE, *supra* note 2, at 47-48, 151-52.

39. See *id.*

40. Another interpretation of this internalist turn would go something like this. Now, it is the contradiction of *political* ideology, rather than *philosophical* contradiction of "liberalism/communitarianism" that resonates with the intra-legal contradiction. In other words, Kennedy changed the target of his critique from the philosophical liberalism to political liberalism, which is symbolized by the United States two party system. While Kennedy used to try to find out the vertical relationship of formal/substantive/philosophical discourses, now each level acquires autonomy from others, which means that meta/deep structure, which used to ground discursive contradiction, was lost (or at least the belief in such structure was lost), and each contradiction turned out to be a mere object that could be manipulated by political preferences. All of this may be regarded as the parallel movement of Rawls's retreat from universalist *Theory of Justice* to contextualist *Political Liberalism*. By retreating from the "fundamental contradiction of philosophical liberalism" to the "partisan contradiction of political liberalism," Kennedy also *de-philosophized* his theory. See also *infra* section IV.

41. One of the major causes of Kennedy's conversion is his encounter with Husserl's phenomenology. That is, now Kennedy "brackets" the fundamental *why* question while considering the superficial *how* question. See Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1153 (2001) [hereinafter *Semiotics of Critique*]. Alan Hunt also makes the same point on Kennedy's how/why conversion, but Hunt is arguing within the empiricist context rather than within the philosophical context, as I am arguing now, thereby evaluating the conversion negatively as resulting in limited explanatory power. See HUNT, *supra* note 7, at 152-53.

42. In this Durkheimian sense, Kennedy is conducting the sociology of legal arguments. See *Semiotics of Legal Argument*, *supra* note 21, at 319.

contradiction.” Because of this internalist turn, it can be said that Kennedy’s theory has become a useful analytical tool for orthodox legal practice.

### B. Legal Indeterminacy Revisited

If, as seen above, Kennedy’s theory adopts the strategy of internal critique of legal arguments, its view of legal reasoning will be different from that of CLS in general. For, as seen in the slogan “law is politics,” CLS has been regarded as adopting an external point of view to legal reasoning and aiming to disrupt determinacy, objectivity, and neutrality thereof, so as to reduce every legal discourse into extra-legal ideological discourse. For example, David Kairys states in “the textbook” of CLS:

The authors of this book reject the idealized model and the notion that a distinctly legal mode of reasoning or analysis determines legal results. The problem is not that courts deviate from legal reasoning. There is no legal methodology or process for reaching particular, correct results. This understanding of the law has been recently most closely associated with Critical Legal Studies and many of the contributors to this book, and before that with Legal Realism.

. . . If law is not determinate or neutral or a function of reason and logic rather than values and politics, government by law reduces to government by lawyers, and there is little justification for the broad-scale displacement of democracy. The extraordinary role of law in our society and culture is hard to justify once the idealized model is recognized as mythic.<sup>43</sup>

But, even if other leading CLS theorists, such as Roberto Unger, adopt such an extreme claim of radical indeterminacy of the law in particular and/or language in general, thereby reducing legal reasoning into politics, this is not true to the internalist Kennedy. Of course, Kennedy admits that where the judge cannot decide the case by merely recasting an existing rule, that is, where there are gaps, conflicts, and ambiguities within the rule and/or between the rules, he tries to “make” a new rule and apply it to the case, rather than to apply an existing rule mechanically. Kennedy continues, however, it is not always the case that this kind of judicial *interpretation* of the law should be categorized as “judicial legislation” which lacks democratic legitimacy.<sup>44</sup> As seen in the Dworkinian attack on the Hartian positivism, most American legal theorists are “concerned with whether there is a politically legitimate method of judicial law making through the interpretation of legal materials—in other words, *a middle term between law application and judicial legislation*,”<sup>45</sup> and trying to establish the ground of this “middle term.” As discussed in section I-C, Kennedy is also working within this debate, although from a unique position

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43. David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 3-6 (David Kairys ed., 3rd ed. 1998).

44. CRITIQUE, *supra* note 2, at 26-28.

45. *Id.* at 29 (emphasis added).

different from that of mainstream theorists, to focus on the middle term, and therefore is not indulging himself in just collapsing the distinction between law application and judicial legislation.

Kennedy summarizes the Ungerian CLS's view about legal reasoning as follows:

It is often asserted that "no rule can determine the scope of its own application," meaning that applying, say, "close the door at five" will require judgments about whether particulars in the order of events correspond or don't correspond to the concepts "close," "door," and "five." As a logical matter, the basis for these judgments can't be found in the concepts themselves. But there are no "objective" tests of correspondence outside the text of the rule, once one agrees that language is not the mirror of nature.<sup>46</sup>

But, Kennedy regards the collapsing strategy, or thesis of global indeterminacy of legal discourse, as off the mark<sup>47</sup> because:

It is already widely recognized in our legal culture that judges make law through legal interpretation. Moreover, it is obvious that in many or most cases the application process is *experienced* by all involved not just as unproblematic, but also as unproblematicizable, no matter how clearly nondeductive. And we have a choice in formulating norms between using terms that will be "easy" ("you can vote at age 21") and those that will be "hard" ("when you achieve good character") to apply. The *experience* of core meanings survives the loss of its metaphysical grounding.<sup>48</sup>

Unlike CLS in general which is dependent on fancy philosophical generalizations, it is obvious that Kennedy avoids global skepticism, identifying the ontological location of legal reasoning as our "experience" in which we feel certainty and constraint (as well as manipulability and freedom) of legal discourse.<sup>49</sup> For Kennedy, who adopts a kind of internal point of view of legal reasoning, the Ungerian CLS shares the wrong dichotomy of "either law application or judicial legislation" with legal positivism, which ironically enough can be regarded as a reversed version of positivism. Kennedy is trying to locate legal reasoning in "a middle term between law application and judicial legislation," meaning that he is trying to overcome such a "Cartesian Anxiety"<sup>50</sup> (*either* determinacy *or* politics) over legal reasoning. In short, it

46. *Id.* at 31. Here, Kennedy refers to Unger, Tushnet, Peller, and Boyle, as well as Kelsen. *Id.*

47. I omit Kennedy's argument on Fiss's reconstructive attempt of conventionalism and Brest's critique thereof. *See id.* at 31-32.

48. *Id.* at 32 (emphasis added) (footnote omitted).

49. For fuller discussion, see *infra* section III. Again, such a view of legal reasoning was achieved through Kennedy's exposure to Husserl's phenomenology. *See supra* note 41 and accompanying text.

50. RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 16-20 (1983). Bernstein writes:

seems to me that the most appropriate way to understand Kennedy is to regard him as a (critical) pragmatist rather than a transcendental philosopher.

### C. Orientation to the Middle Term

Kennedy's forgotten article, *Legal Formality*, is important historical evidence which shows his persistent interest in searching, along with the Hartians/Dworkinians debate, for the "middle term between law application and judicial legislation." The central question Kennedy addressed in *Legal Formality* was "the problem of justice in the liberal state," that is, whether it is legitimate for judges who are not democratically elected to exercise state force in the form of judicial decisions.<sup>51</sup> According to Kennedy, liberalism responds to this charge by developing the following model of formal justice. First, the decision process is *either* rule application, which is "*inherently certain and predictable*" because it only includes "cognitive" operation of facts and formal logic, *or* substantive rationality, which is "*inherently uncertain and unpredictable*" because it includes "discretionary" assessment of values.<sup>52</sup> Second, therefore, as long as the judges limit themselves to mechanical application of the legislatively made rules—without substantive rational consideration of the consequence thereof—they can transfer legitimacy of legislative decisions (agreements among sovereigns) to their own judicial decisions.<sup>53</sup> Needless to say, the main component of *Legal Formality* is, or is at least a form of, Hartian legal positivism which links "the postulated dichotomies of rule application vs. substantive rationality and objective fact vs. subjective value."<sup>54</sup>

Kennedy's critique of legal positivism in *Legal Formality* was quite unique in the sense that it focused on the political process. Because not everyone can correctly predict the future, there is the possibility that positivist judges are involved in the process of "cumulative divergence,"<sup>55</sup> in which they

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Descartes' search for a foundation or Archimedean point is more than a device to solve metaphysical and epistemological problems. It is the quest for some fixed point, some stable rock upon which we can secure our lives against the vicissitudes that constantly threaten us. . . . With a chilling clarity Descartes leads us with an apparent and ineluctable necessity to a grand and seductive Either/Or. *Either* there is some support for our being, a fixed foundation for our knowledge, *or* we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos.

*Id.* at 18 (footnote omitted). But, unlike Bernstein who is trying to establish a new form of, hermeneutical and/or practical, rationality beyond "*either* objectivism *or* relativism," Kennedy is not interested in such reconstructive effort. *See infra* section IV.

51. *Legal Formality*, *supra* note 17, at 351-52.

52. *Id.* at 364 (footnote omitted).

53. *Id.* at 358-59, 377. Kennedy also presents economic justification for formal justice: the judges' commitment to rule application can bring about maximization of social welfare, because supposed certainty of rule application enables each citizen to adjust her course of conduct in advance so as to achieve her own private maximization. *Id.* at 370-75.

54. *Id.* at 365 n.23. *See also id.* at 364 n.21 (discussing the Hartian distinction between "is" and "ought").

55. *Id.* at 381 n.50. In Kennedy's later works, this logic is reemployed in order to prove that in terms of the distribution of wealth/power/knowledge, "law matters" even more

mechanically apply the rule to the factual situation totally different from that of the rule makers' prediction, thereby making the world far more diverged from their original prediction.<sup>56</sup> In this case, the positivist judges would decline litigants' requests to relax the formality of the rule by arguing that it is the legislature's work to revise the rule, and/or that the existing legislature tacitly admits the status quo.<sup>57</sup> Kennedy does not accept their excuse. For the private outcome caused by the judges' rule application might feed back to the constellation of representatives in the next legislative process, thereby affecting their decision whether the rule should be retained, modified, or abolished.<sup>58</sup> That is, according to Kennedy, performing *Legal Formality* during the course of "cumulative divergence" might be regarded as anticipated legislative action, leaving the judicial usurpation problem unresolved.<sup>59</sup> As a consequence, the positivist judges would have to face "the dilemma of formality," which means that "[l]oyalty to the rule is a decision for a particular political outcome; disregard of the rule threatens the very mechanism of order [of formality]."<sup>60</sup>

I am not arguing that Kennedy's critique of Hartian positivism in *Legal Formality* establishes the basis of his later works, but I am just pointing out the possibility of interpreting them within the context of the jurisprudential debate over positivism. If you are skeptical about political critique of positivism in *Legal Formality*, then you should consider the "over-/under-inclusion" problem posed in *Form and Substance*. For example, the rule "you can vote at age 21" will enable immature people to vote, which is over inclusive for the purpose of the legislation, and of course, there will be the opposite case too.<sup>61</sup> Again, this is just another example where the positivist judges will be troubled by their own scheme, *either* law application *or* judicial legislation. CLS in general, as well as Kennedy, has pointed out that many such occasions bring about "the dilemma of formality."<sup>62</sup> However, what is distinctive to Kennedy in contrast with CLS in general is that he has been, like the Dworkinians, trying to identify "the Third Way" which "asserts that there is a judicial method distinct both from substantive rationality and from rule application . . ."<sup>63</sup> What Kennedy has been focusing on is, again like the Dworkinians, *extra-rule* materials:

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than the mainstreamers expect because we can gain huge distributive effects by accumulating subtle changes of private law rules. See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 332-35 (1991); Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 472-73 (Peter Newman ed., 1998).

56. *Legal Formality*, *supra* note 17, at 381.

57. *Id.* at 383-86.

58. *Id.* at 385.

59. *Id.*

60. *Id.* at 389.

61. *Form and Substance*, *supra* note 20, at 1689.

62. CRITIQUE, *supra* note 2, at 31; see, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 14-19 (1984) (identifying various situations in which legal interpreters are required to do something more than mechanical application of the doctrine).

63. *Legal Formality*, *supra* note 17, at 395.

A basic strategy of the theory [of formality] is to identify substantively rational decision with discretion, and then to assert that principles, policies, standards, equity and presumptions are all simply technical terms for grants of discretion by the rule maker to the rule applier . . . .

. . . .But that principles, etc., are not rules does not mean that they are necessarily merely indicators of grants of discretion—of a power to make substantively rational determinations in terms of the purposes of the decision maker. It is possible that they represent processes of decision whose psychological reality is fundamentally different from that of the maximizer or interest balancer [congressman]. And if this special decision process (or processes) accounts for most of what is important in the law, then the choice of simplifying assumptions [decision process is *either* rule application *or* substantive rationality] on which it is built may have rendered the theory of formality trivial or irrelevant from the very outset.<sup>64</sup>

Thus, it seems to me that Kennedy, throughout his academic career, has been focusing on “the Third Way” or “the middle term,” or on *policy arguments* which, according to Kennedy’s own terminology, encompass all the extra-rule materials.<sup>65</sup> This seems to enable us to situate Kennedy’s position at the extension of the Hartians/Dworkinians debate, which seems to be shown through Kennedy’s own typology of jurisprudential positions presented in *Critique*.<sup>66</sup>

*Hartian positivism*, as discussed above, formulates legal interpretation as “either law application or judicial legislation” or “either cognition or discretion,” thereby denying (the possibility of) the existence of a middle term.<sup>67</sup> But, in many cases the judge “at least reformulates the existing rule of law,”<sup>68</sup> or to put it phenomenologically, conducts strategic work on legal materials.<sup>69</sup> According to Kennedy, it is true that this reformulation, or strategic work, is not a deduction from the Hartian “core meanings.” But, this

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64. *Id.* at 356 n.11.

65. For example, Kennedy writes:

Within the liberal mode, policy (convenience, utility) was at first opposed to morality. The legal elite thought of morality in terms of a Protestant Christian ethic of total duties of altruism, sharing, and self-sacrifice. Policy was the countervailing prudential argument for limiting legal duties and legal excuses so as to promote commerce and enterprise generally, and the parallel argument for delegating family life. By the end of the nineteenth century, with the general formalization of American law, “policy” came to be used sometimes as the word for all nondeductive factors and sometimes to designate the set of instrumental, as opposed to intrinsic, reasons for a rule choice, whether it involved increasing or decreasing the level of duty. In this usage, it is sometimes opposed to “justice,” or to morality or to rights. I use it here in its broad sense, which includes all nondeductive factors.

CRITIQUE, *supra* note 2, at 108-09 (footnote omitted).

66. *Id.* at 30-38.

67. *Id.* at 31.

68. *Id.*

69. *Hart/Kelsen, supra* note 14, at 158. For fuller discussion, see *infra* section III.

does not necessarily mean that the judge is acting as a legislator and committing usurpation of the state force, being that “the institutional contexts of adjudication and legislation are so different that identical ideological motives in judges and legislators will produce very different substantive rule-making outcomes.”<sup>70</sup> Therefore, the question, which a legal theorist adopting the Kennedian internal point of view should address, is how different these two outcomes are.<sup>71</sup> Then, how different, or what is the middle term? I will discuss Kennedy’s answer to this question in the following two sections. Note that Ungerian CLS shares “Cartesian Anxiety” with positivism, and thus has to be distinguished from Kennedy’s internalist position.<sup>72</sup>

*Coherence theory* candidly accepts a middle term. According to this position, the judge obviously makes law, but “[h]e does so by treating the whole existing corpus of rules (rather than the words of a particular rule) as the product of an implicit rational plan, and asks which of the rules proposed best furthers that plan.”<sup>73</sup> Therefore, coherence theorists regard it as invalid to criticize this position by arguing that the judge’s rule-making is a *sub rosa* import of his political preference because he is just following the plan—the ideology of the legal system itself.<sup>74</sup> In particular, *Dworkinian coherence theory* is believed to give a “right answer” to all legal questions which the judge should decide. According to Dworkin’s phenomenology, positivists are wrong in that they argue that if the judge thinks his role is to try to find out “what the law is,” when the law “runs out,” he is telling a (noble) “lie” or just making a “mistake.” In contrast, the Dworkinians believe that even in hard cases the law never “runs out,” and there is a right answer although it isn’t demonstrable. Therefore, the judge is trying to find out “what the law is” “in good faith,” rather than performing judicial legislation.<sup>75</sup> Kennedy concludes his typology by saying:

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70. CRITIQUE, *supra* note 2, at 31.

71. *Id.* Kennedy also deals with a variant of Hartian positivism, which is typified by Raz. While this position also does not accept a middle term, it argues that judicial law making can be distinguished from legislation by institutional constraint (limiting rules) on adjudication. *Id.* at 32-33. However, limiting rules, which define the sphere of judicial legislation, are also open to interpretation just as the first-order rules that are supposed to govern the case at hand. Therefore, “[t]he minute the judge is doing something more than applying (searching for the meaning of) the rules that confine the scope of his legislative law making, he is engaged in judicial legislation about the scope of judicial legislation.” *Id.* at 33 (footnote omitted). In short, this position is just postponing “the dilemma of formality.” See also *Legal Formality*, *supra* note 17, at 392-94.

72. See *supra* sections I-A and I-B.

73. CRITIQUE, *supra* note 2, at 33.

74. *Id.* at 33-34.

75. See DWORKIN, *supra* note 5, at 37-43. Kennedy also deals with another variant of coherence theory, which is typified by MacCormick. This position regards the sphere of coherence as limited, arguing that “[t]he judges are obliged to decide all cases that come before them, and some of these are beyond the middle range—in other words, the law ‘runs out’ and the judge must legislate.” CRITIQUE, *supra* note 2, at 35. As to Kennedy’s critique of MacCormick, in particular in his concept of determinacy and indeterminacy cited at the beginning of this essay, see *infra* section III.

[The Dworkinian position] moves in the direction of blurring the difference between the middle term of coherence and judicial legislation, while at the same time vigorously affirming its importance. Dworkin and many other modern American legal theorists . . . affirm the possibility of “rightness” in even the “hardest” cases, while progressively abandoning any claim that this rightness is “objective,” or demonstrable in the sense that any rational practitioner of legal reasoning would have to accept it . . . They nonetheless retain a sharp distinction between judging and legislating . . .<sup>76</sup>

Based on such a review of the Hartians/Dworkinians debate, Kennedy asserts that his position is “closer to the American model of a third [middle] term between law application and judicial legislation, and to its Dworkinian variant, than to any of the others in this typology.”<sup>77</sup> However, Kennedy is not another Dworkinian. As we will see in the next section, from the perspective of *Semiotics*, Kennedy disrupts coherence of legal arguments by showing their dualist nature. Furthermore, from the perspective of *Critical Phenomenology*, Kennedy points out that in hard cases, even if the judge is neither telling a lie nor making a mistake, he is denying manipulatability of legal materials, thereby performing his role in the mode of “bad faith” rather than “good faith.” (Section III). Still, I believe it worthwhile to re-emphasize that Kennedy, at the extension of the Dworkinian position, has been trying to pursue the middle term identified as policy arguments, which means that his theory has a much greater potential to sophisticate orthodox legal practice than the mainstreamers expect.

## II. SEMIOTICS OF LEGAL ARGUMENT

My treatment of Kennedy in the previous section may have given readers the impression that he is another legal philosopher. Obviously, this is not what I intend. One of the distinguishing traits of Kennedy’s private law theory lies in his historicism, which is very unique. Along with other mainstream legal historians, Kennedy starts his historical argument with the late nineteenth century when a series of legal practices changed dramatically. But, in contrast with the mainstreamers who have focused on extra-discursive factors (e.g., economic conditions, legal profession, political configurations) as having caused this change, Kennedy devotes himself to the analysis of an enormous amount of concrete legal discourses themselves.<sup>78</sup> Furthermore, in dealing with legal (and non-legal)<sup>79</sup> arguments, Kennedy is not trying to find

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76. CRITIQUE, *supra* note 2, at 35-36.

77. *Id.* at 37.

78. *Form and Substance*, *supra* note 20, is a catalogue of these discourses.

79. In fact, Kennedy’s source is not limited to the formal discourse of the law. Rather, Kennedy registers that “just about anything is grist for [his] mill.” CRITIQUE, *supra* note 2, at 15. Such treatment of legal discourses reminds me of Foucauldian “archive.” See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 126-31 (A.M. Sheridan Smith trans., Pantheon Books 1972) (1969). In other words, the whole notion of semioticizing legal argument, appropriating Kennedy who is appropriating Derrida, lies in the idea that each legal discourse loses its qualitatively distinctive nature (“essence”) and its

out the “meaning” or “origin,” and is far from a “justification” or “critique,” of these discourses, but is attempting to describe “the mode of legal thought” or “legal consciousness,” which is supposed to lie behind these concrete discourses as a whole to *make the speaker speak in the particular way*.<sup>80</sup> In short, Kennedy adopts a Foucauldian genealogist<sup>81</sup> (or archeologist)<sup>82</sup> perspective to legal history, trying to elucidate the structure of legal argument in a very structuralist sense. To anticipate Kennedy’s conclusion, the structure of contemporary legal thinking, which is characterized by prevalence of policy analysis or balancing,<sup>83</sup> can be summarized by the structuralist formula: *legal*

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connection to something transcendent (“center”), reduced into something universal to be balanced on the same plate along with other (even non-legal) discourses. See *Semiotics of Critique*, *supra* note 41, at 1183-84. Founded on such a basic strategy, we will see each legal discourse reduced into functionally equivalent “forces” or “vectors” on the same “field.” See Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1072 (2004) [hereinafter *Max Weber’s Sociology*].

80. *Legal Consciousness*, *supra* note 19, at 4; Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 23 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter *Three Globalizations*].

81. See generally Michel Foucault, *Nietzsche, Genealogy, History*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS* 139-64 (Donald F. Bouchard ed., Donald F. Bouchard et al. trans., Cornell University Press 1977).

82. See generally FOUCAULT, *supra* note 79, at 138-40.

83. According to Kennedy, the dominant (globalized) mode of legal thinking has gone through two transformations since the late nineteenth century. Instead of discussing his argument fully, I will just sketch it briefly:

*Classical Legal Thought* was the paradigmatic mode of legal thinking in the late nineteenth century, in which the judges can and should deduce the concrete rule governing the case at hand from (the more abstract rule based on) the individualist notion of legal subjects’ realization of their will—“will theory.” *Max Weber’s Sociology*, *supra* note 79, at 1032-34; *Three Globalizations*, *supra* note 80, at 25-27. According to Weber’s ideal types, the finding of the law through the Classical system is categorized as “logically formal rationality,” one of whose important traits is “value rationality.” That is, the judges merely conduct “logical analysis of meaning” of the seemingly applicable rules without considering the rationale to choose the governing rule, which they apply to the factual situation without considering the social consequences. *Max Weber’s Sociology*, *supra* note 79, at 1040-41; see *Legal Consciousness*, *supra* note 19, at 20. Those who believed such a conceptualist/formalist nature of the Classics, to make it inadaptable to the new socio-economic conditions in the late nineteenth century of interdependence, developed what Weber called “the anti-formal tendencies of modern law,” which Kennedy summarizes as “the social”. *Max Weber’s Sociology*, *supra* note 79, at 1034-35, 1052-53; *Three Globalizations*, *supra* note 80, at 37-39.

The social is characterized by a critique of the abuse of deduction of the Classics. That is, in the face of increasing gaps between the Classical premise of individualism and the new socio-economic conditions of interdependence, according to the social jurists, the Classical jurists tended to make a non-applicable rule appear to compel their conclusions logically, with their own ideological preferences smuggled. Therefore, along with other reformation programs, the social jurists, in the mode of Weber’s “substantive rationality,” proposed the instrumentalist/teleological legal interpretation in order to achieve the results (“ought”) required by what they regarded as “the social needs” (“is”).

argument (as policy argument) constitutes a system whose basic units (“bites”) are connected with each other through the quasi-mechanical laws (“operations” and “nesting”).<sup>84</sup> In this section, mainly focusing on *Semiotics of Legal Argument*, I will elucidate what this statement means and how we should assess it.

#### A. Rule Choice

An absolutely new field of the structuralist analysis of legal argument was opened up by Kennedy’s insight that legal argument starts with “constituting the field,” which means that at the outset of the game all participants are supposed to decide “on a particular rule-exception or rule-counterrule structure as the one within which to decide the case in hand.”<sup>85</sup> In his canonical article on this field, echoing Kennedy, Jack Balkin also argues that in order to find what he calls “crystalline” structure of legal argument, “we must change radically the way we look at legal thought and doctrine,” that is, “[i]nstead of looking at doctrine as a series of *rules*, [we must] look at it as a series of *rule choices*.”<sup>86</sup> It may be no exaggeration to say that the idea of

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*Max Weber’s Sociology*, *supra* note 79, at 1035, 1049-50; *Three Globalizations*, *supra* note 80, at 38-40.

*Contemporary Legal Thought* adopts legal realists’ critique of the social. First, neo-Kantian methodological dualism invalidated the move from “is” to “ought” and methodological individualism invalidated supra-individualist concepts such as “the social needs.” *Max Weber’s Sociology*, *supra* note 79, at 1036-37, 1052-55; *Three Globalizations*, *supra* note 80, at 59-60. Second, legal realists, in particular Llewellyn, transformed these methodological critiques into a critique of the abuse of deduction of the social, arguing that the reason why the social jurists could claim exclusiveness of their particular teleological reasoning was that they were just “ignoring the pervasive phenomenon of conflict between desiderata . . . .” *Three Globalizations*, *supra* note 80, at 60; *Max Weber’s Sociology*, *supra* note 79, at 1070-71. According to Kennedy, this “social conceptualism” critique of the social irreducibly constitutes the ground on which contemporary jurists are operating. Thus, “[b]ecause [t]here [a]re [c]ontradictory [l]egislative [i]deals, [w]e [c]an [n]o [l]onger [p]resuppose’ the [c]oherence of [t]he [s]ystem.” *Max Weber’s Sociology*, *supra* note 79, at 1065. Now, each private law rule can neither be derived from the Classical ideals of autonomy, nor from the social ideal of interdependence, but rather is regarded as a compromise between conflicting ideals omnipresent in every policy field (moral, rights, social welfare, administrability, and institutional competence). *Max Weber’s Sociology*, *supra* note 79, at 1065-66, 1073-75; *Three Globalizations*, *supra* note 80, at 63-65; *CRITIQUE*, *supra* note 2, at 82-84. But, the important thing is that, although the system has lost its coherence, this does not mean that the way of legal argumentation was also disrupted. Rather, policy analysis is highly systematized into a “dualist rather than monistic logic,” which is Kennedy’s target in *Semiotics of Legal Argument*. See *CRITIQUE*, *supra* note 2, at 84; *Max Weber’s Sociology*, *supra* note 79, at 1071-73.

84. See *Semiotics of Critique*, *supra* note 41, at 1175.

85. *CRITIQUE*, *supra* note 2, at 140.

86. Balkin, *supra* note 37, at 4. Balkin’s article is very important for the legal structuralists because it covers a whole range of concrete usage of “bites.” In the following part of this essay, I will use freely Balkin’s conceptual terminology, (e.g., “rule choice” and “crystalline structure”) as well as his abbreviations of “bites” (e.g., “NLWF” and “ASB2I”), both as interchangeable with Kennedy’s counterparts. *Id.* at 4, 45 n.77.

“constituting the field” or “rule choices rather than rules” is supposed to be called a Copernican turn in the theory of legal argument.<sup>87</sup>

At this point, I want to set up the context within which the following policy analysis will operate—the case of “compulsory terms.” Compulsory terms, which Kennedy frequently uses as a typical argumentative situation, are duties which “come into existence for a legal actor as a consequence of entering some kind of relationship with another legal actor” and whose benefit “[t]he other legal actor cannot waive . . . .”<sup>88</sup> Let us suppose further that the plaintiff buyer is claiming there is a non-disclaimable warranty for the defendant seller’s defective product. Then, while the plaintiff buyer will argue for the rule to grant the compulsory term, the defendant seller will argue against the compulsory term, or argue for the rule of, for example, offer and acceptance.

### B. Bites

Once the field of competing rules is set, both parties present justificatory policy arguments for each preferred rule. According to Kennedy, the most fundamental unit thereof is the pairing of the typified “bite” and “counter-bite,” which are recurrently deployed by litigants in various cases.<sup>89</sup> For example, in our hypothetical case, while the defendant seller can employ that “the solution based on the formal rule of offer and acceptance will be easy to administer” [F]ormal Ralizability], the plaintiff buyer can rebut this by claiming that “the proposed solution lacks equitable flexibility” [E]quitable Flexibility].<sup>90</sup> Note that the usage of FR/EF in this example is in the most basic form, and that an arguer should contextualize her bite according to her own factual/doctrinal situation if she wants her bite to be convincing.<sup>91</sup> As discussed later, we cannot identify bites a priori, rather we only can gather them one by one from our ongoing legal practice. We only can say that “a competent legal arguer can, in many (most? all?) cases, generate for a given argument-bite at least one counter argument-bite that has an equal status as valid utterance within the discourse.”<sup>92</sup> Therefore, whether or not an arguer’s bite is convincing is a matter of empirical question.

According to Kennedy, bites can be used in conjunction with other bites—“supporting bites”—as well as alone. For example, the above defendant can support his bites by arguing that “only the legislature can obtain the

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87. Several important points are omitted, such as the distinction between rules and reasons for rules, and the distinction between the deductive justification and policy justification. See CRITIQUE, *supra* note 2, at 135-39. I should note that Kennedy admits existence of deductive reasoning, thereby not reducing every single legal argument into policy. See also *supra* section I.

88. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 590-91 (1982) [hereinafter *Paternalist Motives*].

89. *Semiotics of Legal Argument*, *supra* note 21, at 327; CRITIQUE, *supra* note 2, at 137-38.

90. *Semiotics of Legal Argument*, *supra* note 21, at 328; CRITIQUE, *supra* note 2, at 137; *Form and Substance*, *supra* note 20, at 1697-1701.

91. The same reservation should be applied to all the following examples in this essay.

92. *Semiotics of Legal Argument*, *supra* note 21, at 327.

information [about the market structure etc.] necessary to make this decision rationally” [Institutional Incompetence],<sup>93</sup> and that “judges should apply, not make the law . . . otherwise there will be hopeless uncertainty” [IIC+FR].<sup>94</sup> Again, we cannot determine a priori which bites can be combined. Rather, the existence of the supporting system is dependent upon the actual usage in the collective practice of legal argument. Also, the convincingness (far from validity) thereof is a matter of empirical question.<sup>95</sup>

In terms of recurrent important legal issues, as Kennedy continues, a particular horizontal pairing of bites and counter-bites, accompanying a particular vertically supporting system for each, comes to be employed repeatedly, constituting a “cluster.”<sup>96</sup> Needless to say, the case of “compulsory terms” constitutes such a cluster. What is important in the idea of the cluster is that once both parties constitute the field of a particular cluster, there already/always exists “a ready-made argument template for each side,” whose recasting will suffice for their justificatory practice.<sup>97</sup> The profound implication of this insight will be discussed in the next section. Again, whether or not we can regard a particular set of bites as a cluster, and what bites are included in the existing cluster is a matter of empirical question.<sup>98</sup>

The idea of argument-bites, in terms of which Kennedy reduces all (?) the (possible) legal discourses into a congregate mass of stereotyped units on the same plate, derives from the Saussurian linguistic theory.<sup>99</sup> Kennedy reinterpreted Llewellyn’s “Thrust and Parry” through the lens of the Saussurian theory, recasting it as the general structure of legal argument.<sup>100</sup> I will summarize what this attempt means by situating the Saussurian insight<sup>101</sup> within the context of the rule choice between strict liability and negligence. In this field, the defendant can employ a bite, for example, “no liability without fault” [NLWF].<sup>102</sup> What is important here is that NLWF does not have any necessary connection with reality<sup>103</sup> because you can describe, through the use

93. The plaintiff’s counter-bite against the defendant’s IIC would be that “the judges make decisions every day with no more information than they have here” [Institutional Competence]. *Id.* at 328.

94. *Id.* at 338; CRITIQUE, *supra* note 2, at 138.

95. *Semiotics of Legal Argument*, *supra* note 21, at 339.

96. *Id.*; CRITIQUE, *supra* note 2, at 138.

97. CRITIQUE, *supra* note 2, at 138; *Semiotics of Legal Argument*, *supra* note 21, at 339.

98. *Semiotics of Legal Argument*, *supra* note 21, at 341.

99. See generally FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., Philosophical Library 1959) (1916).

100. See *Semiotics of Legal Argument*, *supra* note 21, at 352-53.

101. For the discussion of the Saussurian linguistics in this paragraph, I cite freely to one of the most striking books on postmodernism written in Japanese, AKIRA ASADA, KŌZŌ TO CHIKARA: KIGŌ-RON WO KOETE [STRUCTURE AND POWER: BEYOND SEMIOTICS] 37-43 (1983).

102. *Semiotics of Legal Argument*, *supra* note 21, at 327.

103. Here, I am presenting postmodernist interpretation of Saussure, thereby postmodernizing Kennedy’s *Semiotics*. In fact, this is what Kennedy is trying to avoid because according to his interpretation of Saussure, “the meaning of words depends, in Saussure’s theory, both on other words and on the way reality presents itself for conceptual organization.” *Semiotics of Critique*, *supra* note 41, at 1152. Indeed, I also believe that as far as we are loyal to Saussure himself, Kennedy is right. See, e.g., the following paragraph.

of any other legal discourse, the same factual situation which is now called NLWF. Thus, the meaning of each bite is determined *arbitrarily* in the sense that it does not have the essential meaning thereof. If this is the case, NLWF can keep its current status only as long as there remains *difference* from, for example, “as between two innocents he who caused the damage should pay” [ASB2I].<sup>104</sup> That is, although NLWF is a unit of the system of legal argument, it lacks the positive entity, being just a bundle of differences from any other unit (it is not ASB2I, nor EF, nor...). Therefore, in order for NLWF to be a unit as it is now, all legal discourses should be *simultaneously* articulated as units of the system. For if we erased NLWF from the dictionary of legal discourses, the open space made by this hypothetical operation would be filled with another bite, for example, ASB2I, thus, ending up with a totally new structure of legal discourses as a whole.<sup>105</sup>

As a consequence, “words ‘get their meanings’ not from the things or ideas they signify but from their relationships with other words . . . .”<sup>106</sup> Still, Kennedy does not regard this thesis as valid *a priori* within legal practice, but rather tries to contextualize it so as to fit it into our experiences of legal interpretation. Let us go back to the hypothetical elimination of NLWF from the dictionary of legal discourses. If we deleted it, for example, ASB2I “would *ipso facto* become a different, and likely a more powerful or valuable argument than it is when it is counterable by” NLWF.<sup>107</sup> Of course, in this case, a legal arguer may be able to produce something like NLWF by herself. But, this brand new bite would be experienced by the audience as a (probably) less convincing word than the original NLWF.<sup>108</sup> Thus, each (possible) generation or elimination of a bite changes the discursive options a legal arguer can deploy, setting off the chain reaction on the part of “value” or “convincingness” of any other bite, so as to end up with new equilibrium.<sup>109</sup> It

Language and writing are two distinct systems of signs; the second exists for the sole purpose of representing the first. The linguistic object is not both the written and the spoken forms of words; the spoken forms alone constitute the object. But the spoken word is so intimately bound to its written image that the latter manages to usurp the main role. People attach even more importance to the written image of a vocal sign than to the sign itself. A similar mistake would be in thinking that more can be learned about someone by looking at his photograph than by viewing him directly.

SAUSSURE, *supra* note 99, at 23-24. But, I believe that postmodernization of the theory of bites would make it somewhat more coherent with its consequence, “death of the subject.” See *infra* section II-E.

104. *Semiotics of Legal Argument*, *supra* note 21, at 327 (emphasis added).

105. Note that each unit is established only by its difference from the others. If NLWF were a positive entity, the structure of entire legal discourses would remain the same except for the open space made by the hypothetical operation in the text.

106. *Semiotics of Legal Argument*, *supra* note 21, at 342.

107. *Id.*

108. *Id.*

109. *Id.* at 343-44. Note Kennedy’s interesting example. The traditional morality bites, such as NLWF and ASB2I, have lost their relative convincingness since the Law & Economics produced economic bites, such as “defendant should be liable because she is the

is in such an empiricist sense that each bite gets its meaning from its relation with (or difference from) the other bites.

### C. Operations

Kennedy argues that (possible) bites are connected with each other through the quasi-mechanical laws of “operations,” among which the most typical one is Hohfeldian “opposition” of counter-rights to the other party’s rights.<sup>110</sup> For example, in our hypothetical case, while the defendant seller will argue that “a contractual party has a right to enjoy the result as she intended (even if it leads to a silly result on the part of the other party)” [Rights as Freedom of Action], the plaintiff buyer will argue that “a contractual party has a right to be released from the silly result opposing her ‘true’ intention” [Rights as Security].<sup>111</sup> Kennedy finds many kinds of operations other than opposition.<sup>112</sup>

Kennedy derives the idea of the operation from the Piagetian “schema,” in particular, “reversibility” of the schema, rather than the “equilibration” process thereof.<sup>113</sup> It seems to me that one purpose of Kennedy’s Socratic method in his torts class<sup>114</sup> is to develop the students’ ability of legal argument around the notion of reversibility. First, the students are required to attack their opponent’s bite, for example, RS, responding by RFA. In this operation, the students learn how to conduct the operation of opposition *exclusively* attached to RFA [RFA<sup>opposition</sup>RS]. Second, the students who are required to attack, this time RFA, learn how to oppose it by RS. Through this practice, the students are supposed to learn that opposition is a *universal* operation compatible with any bite [RFA<sup>opposition</sup>RS]. Finally, the students are

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least cost avoider.” Furthermore, these traditional morality bites are currently supported by economic bites, for example, “there is no social interest in shifting the costs of blameless activity” [over-deterrence] (supporting NLWF) and “activities should be made to internalize their true social costs” [externality] (supporting ASB2I). *Id.* at 343.

110. *Id.* at 331; CRITIQUE, *supra* note 2, at 142.

111. Interview with Duncan Kennedy, Carter Professor of General Jurisprudence, Harvard Law School, in Cambridge, Mass. (May 25, 2006).

112. *Semiotics of Legal Argument*, *supra* note 21, at 330-36; *see* CRITIQUE, *supra* note 2, at 141-42.

113. *Semiotics of Legal Argument*, *supra* note 21, at 354-55. The way to apply the latter insight to the legal studies would be summarized as follows: every legal arguer should deal with new information (e.g., cases which pre-existing materials are not supposed to govern) through the use of her discursive framework at hand. When she does this, this new information is transformed so as to be absorbed by the extant framework, that is, she “assimilates” information positively. At the same time, however, this absorbing process also brings about some kind of transformation on the part of her framework, that is, she should “accommodate” herself to this information. Thus, a lawyer’s discursive framework can be regarded as the equilibrating system that “learns.” *See generally* JEAN PIAGET, SIX PSYCHOLOGICAL STUDIES 3-17 (David Elkind ed., Anita Tenzer trans., Random House, Inc. 1967) (1964); JEAN PIAGET, THE CHILD AND REALITY: PROBLEMS OF GENETIC PSYCHOLOGY 63-71 (Arnold Rosin trans., Grossman Publishers 1973) (1972); *see also Semiotics of Critique*, *supra* note 41, at 1155. Many examples of studies based on this type of logic are found in the area of historical analysis of the development of legal consciousness. *See Semiotics of Legal Argument*, *supra* note 21, at 354-55 n.25.

114. Fortunately, I had the opportunity to attend Kennedy’s class during the spring semester of the academic year 1998.

supposed to perceive RFA (or RS) as an interchangeable unit with its counter-bite, rather than as a consummatory unit. In other words, they are required to acquire the perspective interchangeable between two parties so as to become the instrumentalist/strategist subject of legal reasoning [~~RFA~~, ~~RS~~].<sup>115</sup>

Again, there is an important caution. Kennedy is just *analogizing* legal argument with the Piagetian “praxis,” that is, pretending to regard an operation of a bite as a “response” to a “stimulus” of the opponent’s counter-bite.<sup>116</sup> Just as discussed in terms of the argument-bites, in Kennedy’s *Semiotics of Legal Argument*, the Piagetian psychological theory is *appropriated* as an interpretive framework, or as a metaphor, with which to formulate the relationships among legal discourses. Therefore, Kennedy is not arguing that operations (or schemas) are “innate,” or that they “determine” the outcome.<sup>117</sup> Furthermore, we cannot always conduct an operation on every bite, and even if we can, that does not warrant effectiveness (far from validity) of the operation. In short, we cannot identify the catalogue of operations a priori. Instead, we cannot help gathering them one by one from our experience. Also, whether or not an operation identified in this pragmatic fashion is convincing (let alone valid) in a particular utterance is a matter of empirical question.<sup>118</sup>

#### D. Nesting

Faced with a rule choice, the plaintiff and the defendant try to justify each preferred rule by operating bites, and the judge chooses one of these two rules with accompanying justificatory arguments. According to Kennedy, however, that does not necessarily mean the end of the story. Rather, within the framework of the main rule just chosen, there may be the choice of a sub-rule, and then a whole set of bites and operations will be employed to resolve it.<sup>119</sup> Let us suppose that the judge chose the imposition of compulsory terms in our hypothetical case. Then, both parties may be confronted with the sub-rule choice: which liability scheme is appropriate in assessing the fulfillment of the duty of due care on the part of the defendant: strict liability or negligence.<sup>120</sup> Of course, the defendant would take negligence and the plaintiff would take strict liability, reproducing the same set of justificatory arguments as those produced in the main-rule choice.<sup>121</sup> Thus, according to the structuralist

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115. *Semiotics of Legal Argument*, *supra* note 21, at 355-56.

116. *Id.* at 355.

117. *Id.* at 356.

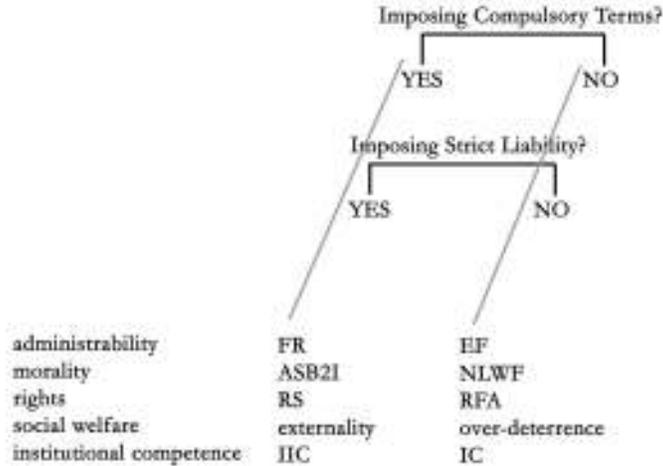
118. *Id.* at 336-37; CRITIQUE, *supra* note 2, at 142.

119. *Semiotics of Legal Argument*, *supra* note 21, at 344-49; CRITIQUE, *supra* note 2, at 175.

120. See *Paternalist Motives*, *supra* note 88, at 593.

121. See, e.g., Duncan Kennedy, *Torts Syllabus 2*, 17-21 (1991) (on file with author). Again, this is not necessarily the end of the argument. Suppose that the judge chose negligence; then, the sub-sub-rule choice of an objective or subjective standard of negligence might take place.

analysis, legal argument is constituted of a chain of “rule choices” and an accompanying operation of bites, thereby forming “crystalline structure.”<sup>122</sup>



Kennedy derives the idea of nesting from Lévi-Strauss’s analysis of a “bricolage.”<sup>123</sup> Let us take a look at one example Kennedy himself refers to. According to Lévi-Strauss, in North America, there is a general tendency in which people regard Chrysothamnus as connoting masculine (because of its use in the treatment of the disorders of the urinary tract etc.), in contrast to Artemisia as connoting feminine (because of its use in the treatment of difficult child birth, etc.).<sup>124</sup> While the Navaho (according to Lévi-Strauss) adopt this general usage, they regard Chrysothamnus as connoting female because of its use in the childbirth assistance.<sup>125</sup> But, if we see this as illogicality or so-called primitive, that is nothing but modernistic arrogance. Rather, we should see this as an example of “concrete logic.”<sup>126</sup> As we have seen in our hypothetical legal argument, it is in the sub-opposition that Chrysothamnus, in contrast with Penstemon, is categorized as female, and therefore, the former can still be categorized as male in the main opposition.

Thus, as Lévi-Strauss points out, materials of a bricolage bear no relation to any particular project, and therefore a bricolage, even if it is a new product, is only a rearrangement of materials used in the previous works.<sup>127</sup> In other words, in order to express her thought, the author of a bricolage should rely only on the *difference* between any two units of “whatever is at hand.”<sup>128</sup> Therefore, as Kennedy concludes, “[l]egal argument, understood as the

122. Balkin, *supra* note 37, at 4.

123. See generally CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND (George Weidenfeld & Nicolson Ltd. trans., The University of Chicago Press 1966) (1962).

124. *Id.* at 46-48.

125. *Id.*; see also *Semiotics of Legal Argument*, *supra* note 21, at 357.

126. LÉVI-STRAUSS, *supra* note 123, at 35-39.

127. *Id.* at 16-22.

128. *Id.*

deployment of stereotyped pro and con argument fragments, seems a particularly good example of *bricolage* masquerading as hyper-rationality.”<sup>129</sup>

*E. The Common Law Tradition (1)*

How should we evaluate Kennedy’s *Semiotics of Legal Argument*? First, we can situate it within the context of the jurisprudential debate discussed in the last section. The Dworkinians were right in that they criticized the Hartian, and, paradoxically enough, the Ungerian Either/Or formulation, or “Cartesian Anxiety” in favor of a legal interpreter’s actual experience in which he frequently employs extra-rule materials.<sup>130</sup> However, *Semiotics* is pointing out that the Dworkinians were wrong in that they wanted to reduce all the (possible) legal arguments into a coherent system so eagerly that they could not see the dualist logic thereof. Thus, *Semiotics* is trying to elucidate the *working* logic of “the middle term” of policy argument; that is, it provides a whole range of concrete *practical* techniques of policy arguments which the Dworkinians overlooked irrespective of their emphasis on orientation to the middle term. Because anyone can learn the way to do policy argumentation from *Semiotics* to reproduce her own argument in her case, which is at least observed even if it has not been validated thus far in the ongoing United States legal practice, I cannot believe that mainstreamers like Owen Fiss do not see anything positive in the work, but merely “trash” (or ignore) it.<sup>131</sup> Indeed, at least because of its practical use, *Semiotics* has much more potential than coherence theories to sophisticate liberal legalist practice.

What about Kennedy’s reliance on the structuralist theories? The mainstreamers might think it shows that *Semiotics of Legal Argument* is irrelevant to or against liberal legalist practice, and/or even that my own interpretation of Kennedy as an internalist is self-contradictory. But, in *Semiotics*, as well as some of Kennedy’s other theories, he is just trying to *appropriate* structuralism. That is, Kennedy does not reify the structuralist or any other theories, but rather intentionally accommodates them to the actual phenomenon of legal argument. As I have already pointed out repeatedly, bites, operations, and patterns of nesting are gathered a posteriori from the actual practice rather than derived a priori from the structuralist theories. Their status is based on the legal convention, and their effectiveness, again, rather than validity, is a matter of empirical question. Thus, in *Semiotics*, structuralism is, so to speak, *empiricalized* as an instrument for elucidating the nature of legal argument.

If the mainstreamers want to get relief from *Semiotics*’ connection with the traditional legal thought, all I discussed in this section would definitely enable them to categorize it as one version of *descriptive rhetoric theory* such as that of Chaim Perelman,<sup>132</sup> which, in fact, Kennedy himself partially admits.<sup>133</sup> Just as

129. *Semiotics of Legal Argument*, *supra* note 21, at 352.

130. See *supra* sections I-B and I-C.

131. See *supra* text accompanying notes 4-9.

132. I owe my discussion on Perelman’s theory in this paragraph to the Japanese translation of Ulfrid Neuman’s following excellent book, which I cited freely. ULFRID NEUMAN,

Perelman distinguishes demonstration with universal necessity from argument without it, the conclusiveness of Kennedy's legal argument mainly depends on convincingness, that is, a phenomenological sense of closure or necessity.<sup>134</sup> Therefore, just as Perelman's argument is relative to the audience, as mentioned above repeatedly, Kennedy's convincingness of legal argument as persuasion<sup>135</sup> is dependent on an indefinite number of empirical factors.<sup>136</sup> Kennedy omits Perelman's normative concepts, such as practical reason, universal audience and so forth, to limit his theory to "sociology of legal knowledge."<sup>137</sup> Consequently, I do not deny the possibility that the mainstreamers might equate Kennedy with the descriptive part of Perelman, in the way Neil MacCormick equated Kennedy with Hart, thereby neutralizing the former in accordance with their preferred ideology within liberal legalism.<sup>138</sup>

Furthermore, it seems to me that Kennedy's description/interpretation of legal argument in *Semiotics of Legal Argument* appropriately grasps distinctively United Statesian characteristics thereof. *Semiotics* well preserves the dualist logic in legal discourse, which seems to lead to the impossibility of securing neutrality thereof, in the sense that it cannot transcend the (at least tacit) interests of the arguers. For, no matter how sincerely you are trying to produce the outcome which you believe is disconnected with any particular interests, it will turn out that the decision was made only *in favor of one party*, against which a (possible) opponent can deploy a whole range of the techniques of counter-argumentation. *Semiotics* reveals the irreducibly *partisan* nature of legal discourse.

It seems most plausible that the subject of legal thinking in *Semiotics of Legal Argument* is interpreted as a partisan lawyer, who as a "seller of legal service,"<sup>139</sup> is motivated to perform "zealous advocacy." In this mode, the value of a particular legal argument lies in its relatively superior convincingness in relation to the opponent's argument for technical or whatever reasons, rather than in absolute superiority based on some kind of transcendental principle. Furthermore, in Kennedy's mode, an arguer cannot reflect on the inherent value of her argument from the *meta*-perspective. Suppose that you support

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HÖTEKI-GIRON NO RIRON [THEORIES OF LEGAL ARGUMENTATION] 70-74 (Hiroshi Kamemoto et al., trans., Hōritsu-bunka-sha 1997) (1986).

133. *Semiotics of Legal Argument*, *supra* note 21, at 319.

134. For more detail, see *infra* section III.

135. Probably, I am oversimplifying Kennedy's position, because he presents more detailed explanations about the status of legal argument: e.g., its position in-between dialogue and negotiation, accompanying a whole range of related socio-psycho considerations. See generally CRITIQUE, *supra* note 2, at 43-44.

136. For more detail, see *infra* section III.

137. *Semiotics of Legal Argument*, *supra* note 21, at 319; see also *supra* note 42 and accompanying text.

138. See *supra* text accompanying note 12.

139. TAKAO TANASE, GENDAI-SHAKAI TO BENGOSHI [MODERN SOCIETY AND LAWYER] 254-59 (Nihon-hyōron-sya 1987). Or, we can call such a lawyer an entrepreneur. See Mark Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009 (1990) (reviewing LAWYERS IN SOCIETY (Richard L. Abel & Philip S.C. Lewis eds., 1988)).

RFA. Then, for example, through opposition to it, you should move, or at least should hypothetically consider moving, to RS, and then through negation you should return to no-RS. As long as you presuppose the structuralist analysis of legal argument, if you commit yourself to a particular bite and a rule supported by it, that means there is an arbitrary interruption of thinking because every bite is related to any other bite.

In the eyes of a Continental legal theorist, *Semiotics of Legal Argument* seems to present a highly plausible, at least more plausible than Dworkin's, interpretation of the legal practice within the United States context. *If you want to be a competent lawyer under the current United States socio-institutional conditions, you should seek gaps, conflicts, and ambiguities in the opponent's rule construction, take advantage of them to produce counter arguments, and win for the client (and/or yourself).*<sup>140</sup> Needless to say, it is a whole range of techniques of argumentation for this purpose that *Semiotics* will provide you with.<sup>141</sup>

But, what I have just commented on, *Semiotics of Legal Argument*, does not make Kennedy just another (distinctively United States) liberal legalist. Indeed, what is important in *Semiotics* is, I believe, a critical or "irrationalist" sting against, rather than affinity to, liberal legalism. You cannot buy the ability to perform structuralist/partisan legal argument for free. Rather, you must face the ethical crisis. Here comes a punch line in *Semiotics*:

It is hard to imagine that argument so firmly channeled into bites could reflect the full complexity either of the fact situation or of the decision-maker's ethical stance toward it. It is hard to imagine doing this kind of argument in utter good faith, that is, to imagine doing it without some cynical strategy in fitting foot to shoe.<sup>142</sup>

As a consequence, "[y]ou can never say what you mean," because you cannot help employing ready-made bites which have been always/already articulated as they are,<sup>143</sup> otherwise (if you try to invent new bites) you run the risk of being unheard. And, because bites are connected with each other by quasi-mechanical laws of operations and nesting, legal discourses constitute *a system*, which, so to speak, operates automatically, or in other words, the subject of a

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140. For excellent sociological analysis of the distinctively United States "adversarial" legal culture, see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3-14 (2001).

141. Indeed, there is a textbook of legal thinking seemingly based on Kennedy's theoretical framework. See KENNETH J. VANDELDE, *THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING* (1996).

142. *Semiotics of Legal Argument*, *supra* note 21, at 350; see also *Form and Substance*, *supra* note 20, at 1723-24.

143. *Semiotics of Critique*, *supra* note 41, at 1179. This is followed by another critical/irrationalist consequence: "You can never mean what you say because once you've produced the representation it floats out into the world as an utterance whose interpretation by those who register it as speech you can't control." *Id.*

legal argument is alienated from its utterance.<sup>144</sup> Furthermore, if we take this idea of legal discourse as a system seriously, “[l]anguage seems to be ‘speaking the subject’, rather than the reverse,”<sup>145</sup> or alternatively, we cannot think about anything outside legal discourse, including the subject of a legal argument itself—“death of the subject.”<sup>146</sup> I will have to assess these critical/irrationalist moments in terms of liberal legalism.

But, before that there is one more item of business I have to finish. As Kennedy himself carefully admits, critical/irrationalist conclusions of *Semiotics of Legal Argument* are “only suggested,”<sup>147</sup> as long as they are reached from the *external* observation of legal discourses. Now, we should situate these findings within the *internal* experience of legal reasoning, which is traced by another one of Kennedy’s ground-breaking works, *Critical Phenomenology*.

### III. CRITICAL PHENOMENOLOGY OF LEGAL REASONING

As I have discussed thus far, Kennedy’s historicist and/or semioticist commitment to concrete legal arguments has enabled him to acquire a less reified, at least than the Hartian’s and the Dworkinian’s, view to the practical operation thereof within the distinctively United Statesian institutional contexts. Although this semiotic view definitely provides us with a plausible description of the field on which our contemporary legal thinking is operating, it still remains an *external* observation of the legal materials, in particular of their linguistic structure, thereby failing to reach a comprehensive model of legal thinking. If we seriously attempt to construct such a model, in addition to an external observation of the legal field, we must, from the very *internal point of view*, focus on a particular legal interpreter’s inner experience, thereby describing how he operates legal discourses in a particular case. Kennedy has tried to accomplish this mission in a series of phenomenological analyses of legal reasoning, which launched with *Critical Phenomenology* and advanced in *Strategizing* and *Critique*. In this section, first, I will reconstruct Kennedy’s phenomenological insights along a series of basic concepts of Sartre’s existentialism: existence, anguish (freedom), decision (responsibility), and bad faith. Then, I will assess its positive, rather than critical, implications for liberal legalism.

#### A. Existence

Kennedy’s *Critical Phenomenology* is an attempt to describe the process of legal reasoning conducted by a *particular* subject, the judge, facing a *particular* case. Although this may sound perfectly ordinary, the true implication thereof

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144. See *Semiotics of Critique*, *supra* note 41, at 1179. For a consideration of the alienation problem in the area of the legal ethics studies, see, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* chs. 5-6 (1998). For Kennedy’s phenomenological elucidation of the problem, see *infra* section III.

145. *Semiotics of Legal Argument*, *supra* note 21, at 350.

146. See *Semiotics of Critique*, *supra* note 41, at 1178, 1182, 1185.

147. *Semiotics of Legal Argument*, *supra* note 21, at 350.

is enormous. What Kennedy is trying to do with his phenomenology is, paraphrasing recklessly Sartre's famous phrase, "*existence comes before essence*,"<sup>148</sup> to recast legal reasoning as *voluntarist project* without predetermined essence. If there were such an essence of legal reasoning, then legal theorists could methodize it so as to predict the result of the application thereof to the concrete case. Kennedy seems to reject such an essentialist view of legal reasoning, situating it within a particular *work experience* of a particular judge, who, again in the Sartrean mode, must carry his own version of reasoning forward without believing that rational plans can determine the outcome.<sup>149</sup> Therefore, a critical phenomenologist must "reconstruct the situation of the judge *from the inside*, so to speak, asking how the judge experiences and responds to the body of legal materials" within the context of a "particular rule choice."<sup>150</sup>

Let us suppose that our judge is now facing the hypothetical case of compulsory terms,<sup>151</sup> having the first impression that "the rule" which should govern this case is freedom of contract (i.e., the defendant must win). According to Kennedy, however, the judges are not in the situation in which they think they are required to apply the "objective" rule, which exists independently of their work. Rather, their understanding of the situation is heavily influenced by their "strategic" interest in how to deploy available intellectual resources in order to achieve their preferred result, which they believe to be justice (How-I-Want-To-Come-Out).<sup>152</sup> Thus, the judges are thrown into the fundamentally ambivalent situation in which, while they are constrained by legal materials,<sup>153</sup> they are free to operate these materials in their preferred way.<sup>154</sup>

Therefore, as Kennedy argues, if our judge is a liberal "activist,"<sup>155</sup> who prefers compulsory terms to freedom of contract, he may conduct strategic work to undermine the rule perceived as obvious at his first impression. For

148. Jean-Paul Sartre, *Existentialism and Humanism*, in JEAN-PAUL SARTRE: BASIC WRITINGS 25, 27 (Stephen Priest ed., Philip Mairet trans., 2001) (1948).

149. Compare this with another one of Sartre's famous sentence, "Man is nothing else but that which he makes of himself." *Id.* at 29.

150. CRITIQUE, *supra* note 2, at 157 (emphasis added); see also *Critical Phenomenology*, *supra* note 22, at 518-19.

151. See *supra* section II-A.

152. Therefore, the judges' attitude toward the law is similar to that of partisan lawyers discussed in the last section, in that the judges are aware of malleability of the law. See *Critical Phenomenology*, *supra* note 22, at 522. On the other hand, the judges' attitude toward the law is distinctive in that they orient to justice. In this essay, however, for my purpose to reconstruct Kennedy as a general model of legal thinking, the latter point is intentionally obscured, which also means that I am putting more emphasis on *Critical Phenomenology* than on *Strategizing* and *Critique's* phenomenology. See also *infra* section III-D. Of course, this is my "misreading" of him. Interview with Duncan Kennedy, Carter Professor of General Jurisprudence, Harvard Law School, in Cambridge, Mass. (January 17, 2006).

153. See *infra* section III-B.

154. *Critical Phenomenology*, *supra* note 22, at 522-23; CRITIQUE, *supra* note 2, at 162-64.

155. In addition to the (constrained) activist judge, Kennedy presents "the difference splitting judge" and "the bipolar judge" as the ideal types of strategic judges. *Strategizing*, *supra* note 23, at 795-97.

instance, he may constitute “the counter-rule” or “exception of the rule” by, for example, narrowing or widening the holding in the authoritative precedent so as to reconfigure the field. He also may restate the factual situation in the present case and/or in the authoritative precedent so as to make the rule irrelevant to the present case. These are examples of strategic “deductive work,” and these illustrations of course are not exhaustive.<sup>156</sup> Also, he may employ totally different (inelegant?) kinds of strategies, such as just waiting for the defendant’s lawyer to make a mistake.<sup>157</sup> We cannot determine what of the available options are a priori.

Moreover, as Kennedy is stressing, from the internal point of view we cannot predict whether or not a certain strategic work will succeed. For example, our activist may fail due to the fact that his ability of reasoning turns out to be less excellent than he expected, or that he runs into obstructive materials unforeseeable at the beginning of reasoning. Thus, judges experience the course of their work as radically contingent.<sup>158</sup> Kennedy states:

I can imagine having a technique, like the technique of a surveyor, say, that would tell me with great confidence that if. [sic] I extend a bridge’s span at a particular angle in a particular direction it will eventually hit the other side of the ravine at a predetermined spot. But that’s just not the way it is in legal argument, at least for me.<sup>159</sup>

As discussed later in more detail, it seems to me that Kennedy refuses to equate legal reasoning with the Platonist “measurement,” which is supposed to warrant universalistic truth.<sup>160</sup> Instead, Kennedy says, “I just have to try and see,”<sup>161</sup> stressing the practical/pragmatic aspect of legal reasoning.

It must be noted, in Kennedy’s *Critical Phenomenology*, based on *appropriation* of Gestalt psychology, legal materials are conceptualized as constituting a “force field.”<sup>162</sup> When our activist judge faced the present case for the first time, he perceived the field as “impacted:” the rule of freedom of contract was repeatedly applied to the past cases similar to the present one, constituting the

156. CRITIQUE, *supra* note 2, at 164-65; see also *Critical Phenomenology*, *supra* note 22, at 521-23.

157. *Critical Phenomenology*, *supra* note 22, at 523.

158. *Id.* at 544-47.

159. *Id.* at 547.

160. Compare the passage cited above with famous passage of *Protagoras*:

[W]ouldn’t appearances mislead us and have us rushing madly back and forth, constantly choosing and then rejecting the very same things, regretting our actions and choices — our selections of big things and little things? Measuring know-how, on the other hand, would cancel out the effect of those appearances; it would show us the truth, allow a person’s soul to remain calm, and settled, and fixed on reality — it would save our lives.

PLATO, PROTAGORAS, OR *THE SOPHISTS*, in PLATO: PROTAGORAS AND MENO 1, 72 (Adam Beresford trans., 2005) (footnote omitted).

161. *Critical Phenomenology*, *supra* note 22, at 547.

162. *Id.* at 533-37.

boundary line which clearly divides the field between the lawful and the unlawful area.<sup>163</sup> At his first impression, our activist judge found the present case placed in the unlawful area. In this field, there were also many related precedents, with some of them facing each other across the rule and the others constituting the rule (the border line). Like the rule, these precedents also can be operated by, for example, recasting the facts involved in them, deriving a different ratio decidendi from the authoritative case, and so forth.<sup>164</sup> Our activist judge, against his first impression, will try these “deductive works” in order to “move” the present case from the unlawful area to the lawful area.

The most important feature in Kennedy’s field is that policies “gravitate” every precedent in opposite (liberal/conservative) directions.<sup>165</sup> For example, suppose that the reason why our activist judge perceived the field of freedom of contract as impacted was because the defendant’s bite of FR was so strong. Then, in order for him to move the case, he must oppose the defendant’s bite by contextualizing the counter-bite, for example, by using EF in a way to strengthen its gravitational power. As discussed in terms of *Semiotics of Legal Argument*, there exist indefinite strategies of such “policy work,” available options of which, again, we cannot determine a priori.<sup>166</sup>

### B. *Anguish*

In the preceding section, we dealt with the legal field as if it were a physical object operated by the judge unilaterally. Of course, this is not persuasive from the internal point of view. In Kennedy’s phenomenology, the law is conceptualized as a message with “the normative power” which requires the judge to respond to it sincerely.<sup>167</sup> For example, the authoritative precedent may not be taken to be merely the record of the fact and the outcome, but the voice of the ancients (the senior judges) and/or himself in his own previous judicial opinion, which says “freedom of contract is the *right* rule” so solemnly that even our activist judge may not be able to resist it. Criticism of his submission to the voice as irrational is external to, and therefore irrelevant to, his inner experience.<sup>168</sup> According to Kennedy, these “ought-speakers” of the legal field include not only these past figures but also our activist judge as he

163. *Id.* at 538-39; CRITIQUE, *supra* note 2, at 168-69.

164. *Critical Phenomenology*, *supra* note 22, at 530-33; CRITIQUE, *supra* note 2, at 164-65.

165. *Critical Phenomenology*, *supra* note 22, at 533-36; CRITIQUE, *supra* note 2, at 165-66.

166. I omit Kennedy’s discussion about “economics of legal work,” in which, based on the force field model, Kennedy is trying to theorize the strategy of the judge as a maximizer of his “mana or charisma.” CRITIQUE, *supra* note 2, at 166-68; *Critical Phenomenology*, *supra* note 22, at 528-30.

167. This is Kennedy’s extension of structuralist insight of language as a “thing.” In order for an utterance to be interpreted as utterance, those who receive it must “animate” it by incorporating it into their own interpretive framework (structuralism). Kennedy takes one more step, arguing that in this process of incorporation, receivers’ “real or imagined connection to the other who spoke it” can affect them, and then the utterance is no more merely a thing, but a “force of nature.” *Semiotics of Critique*, *supra* note 41, at 1179-80.

168. *Critical Phenomenology*, *supra* note 22, at 548-51.

is.<sup>169</sup> For in the course of his work to move the case by operating the field, he has to participate in these ancient voices, which may lead him to identify himself with the ancients. The more competent the judge is in manipulating the field, the more often he will have to face such self resistance.<sup>170</sup> As a result, the judge may accommodate his preferred outcome to the normative voices. Or, he may even “convert,” coming to see the situation as involving no contradiction between the rule and his preference retrospectively.<sup>171</sup>

On the contrary, the field may not exercise the normative power. In order to listen to the voice of the ancients (and/or a part of the judge’s self) correctly, the field must be more or less impacted. According to Kennedy, however, judges face various configurations of the field. For example, if the judge faces “the contradictory field,” where the plaintiffs have won cases that seriously impair the defendant’s RFA and the defendants have won cases that seriously impair the plaintiff’s RS, the judge cannot unify dissonant voices of the ancients. Even when the judge can clearly understand what the law requires him to do, the law’s voice is still an object to be interpreted, and therefore is an alienated message for him.<sup>172</sup> It seems to me that Kennedy is trying to remind his readers of the Kierkegaard’s “anguish of Abraham”<sup>173</sup> writing, “[t]here will always be an element of mystery as to whose message it is, whether I have properly understood it, whether it is ‘applicable’ here at all.”<sup>174</sup>

Therefore, nothing other than the judge himself requires conversion. “If a voice speaks to me, it is still I myself who must decide whether the voice is or is not that of an angel.”<sup>175</sup> And, there is nothing which guarantees correctness of his conversion, which might *ex post facto* turn out to be induced by the false argument on the part of the law. In any case, nothing can make the converted judge immune from his own sense of guilty and/or the audience’s blame.<sup>176</sup>

169. *Id.* at 550-51.

170. *Id.*

171. *Id.* at 551. As seen in the discussion in this paragraph, Kennedy theoretically admits that in his course of legal work, the judge may be constrained by “the duty of interpretive fidelity.” CRITIQUE, *supra* note 2, at 3-5. That is, the judge may submit to the voice of the law, thereby experiencing “unselfconscious rule-following” or “constraint by the text.” *Id.* at 160. The judge may submit to the voice of the audience, or “interpretive community.” *Id.* at 161. Thus, the judge is “both free and bound.” *Critical Phenomenology*, *supra* note 22, at 522. See also *supra* section I-B and *infra* section III-E.

172. *Critical Phenomenology*, *supra* note 22, at 551-52, 540-41. In addition to “impacted” and “contradictory” configurations, Kennedy presents “unrationalized,” “collapsed,” and “loopified” fields as ideal types. *Id.* at 538-42; CRITIQUE, *supra* note 2, at 168-69.

173. Sartre, *supra* note 148, at 30. Sartre continues:

An angel commanded Abraham to sacrifice his son: and obedience was obligatory, if it really was an angel who had appeared and said, “Thou, Abraham, shalt sacrifice thy son.” But anyone in such a case would wonder, first, whether it was indeed an angel and secondly, whether I am really Abraham.

*Id.*

174. *Critical Phenomenology*, *supra* note 22, at 552.

175. Sartre, *supra* note 148, at 31.

176. *Critical Phenomenology*, *supra* note 22, at 554-55.

This situation of “the complete absence of justification”<sup>177</sup> will throw the judge into a state of constant anguish. Kennedy confesses:

The gestalt process of interpretation and the work of argument go on under the influence of my fear that, if I disagree with the law, I will be forced into an untenable corner of civil disobedience or craven surrender, or undergo false conversion.<sup>178</sup>

### C. Decision

Let us go back to our judicial activist’s struggle over conversion. How does he settle the conflict between the rule and his preference? Needless to say, within Kennedy’s phenomenology, we cannot answer this question by simply saying “the law determines the outcome.” At first glance, it seems possible to say so, as long as we accept the internal perspective of the judge who experienced unselfconscious rule following or constraint by the text. According to Kennedy, however, even if the judge himself so describes the entire process of his legal work, that does not necessarily mean that the legal problem of which he disposed always has a determinate answer. For, as discussed above, legal reasoning is a *volitional act* whose outcome is the function of many factors such as “time, knowledge, bias, skill, strategy, or the ‘inherent properties’ of the legal field.”<sup>179</sup> Kennedy states:

This question of law had a determinate answer for this judge under these constraints. But it might have had no determinate answer, or a different answer, for another judge, differently endowed and pursuing a different strategy.<sup>180</sup>

Thus, we cannot say that the law, which is just the result of previous works and the starting point of the present works, determines the outcome exclusively.<sup>181</sup>

Then, what determines the outcome? According to Kennedy, the only possible answer to this question is that it is the judge himself who *decides* the outcome.<sup>182</sup> It is the judge himself who recasts the field to accommodate it to his preference, or who recasts his preference to accommodate it to the voice of the field. Kennedy writes:

[I]t is my experience that HIWTCO is undetermined right up to the moment when something has happened that moots the question. I can always change

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177. Sartre, *supra* note 148, at 46.

178. *Critical Phenomenology*, *supra* note 22, at 554.

179. CRITIQUE, *supra* note 2, at 169.

180. *Id.*

181. *Id.* at 169-71; *Critical Phenomenology*, *supra* note 22, at 557-58.

182. *Critical Phenomenology*, *supra* note 22, at 557.

my mind about HIWTCO, and I have on occasion found myself changing my mind very late in the game.<sup>183</sup>

Once we accept Kennedy's phenomenology, which leaves legal reasoning open to strategic choices, *the judge should take full responsibility* for his choice on the strategy and therefore on the outcome.<sup>184</sup> Kennedy in the mode of "Critical Legal Sartre"<sup>185</sup> would be happy to say that the judge "is condemned to be free."<sup>186</sup>

#### D. Bad Faith

The goal of Kennedy's "pop psychology"<sup>187</sup> in *Strategizing* and *Critique* is to explain how the judge can reconcile his experience of doing *ideologically* strategic work with the requirement to observe the duty of interpretive fidelity. By appropriating Anna Freud's theory of defense mechanism, Kennedy answers this question with the psychological claim that the judge "denies" the ideological influence.<sup>188</sup> By "denial" Kennedy means, in short, that while in "some part of the psyche [the judge] registers the possibility of the unpleasant truth" of the use of ideology in his decision, he "keeps from knowing it."<sup>189</sup> Therefore, the psychological status of the judge as a "denier is half-conscious, or conscious and unconscious at the same time,"<sup>190</sup> which, according to Kennedy, is well described in Sartre's "bad faith:"

To be sure, the one who practices bad faith is hiding a displeasing truth or presenting as truth a pleasing untruth. Bad faith then has in appearance the structure of falsehood. Only what changes everything is the fact that in bad faith it is from myself that I am hiding the truth. Thus the duality of the

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183. *Id.*

184. Referring to Kierkegaard, Kennedy says,

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

*Semiotics of Critique*, *supra* note 41, at 1159.

185. Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1679 (1991).

186. Sartre, *supra* note 148, at 32.

187. See generally *Strategizing*, *supra* note 23, at 814-15.

188. CRITIQUE, *supra* note 2, at 180.

189. *Strategizing*, *supra* note 23, at 812.

190. *Id.* at 813; see also *id.* at 805-06.

deceiver and the deceived does not exist here. Bad faith on the contrary implies in essence the unity of a *single* consciousness.<sup>191</sup>

Although Kennedy's "pop psychology" is a major advancement from his original phenomenological insight in *Critical Phenomenology*, (at least for my sloppy purpose to reconstruct Kennedy as a general model of legal thinking within the context of the Hartians/Dworkinians debate) its claim that what is denied by the strategic judge is *ideology* is too specific. As Kennedy himself admits, once we leave the legal interpretation open to the strategic choices of the judge, there is no strong reason why it is ideology that determines the outcome, being that ideology itself is a text open to strategic interpretation as well.<sup>192</sup> In short, ideology is *just one* motivational factor which influences the judge's decision making. Thus, I want to reconstruct (re-Sartrize?) the theory of bad faith as phenomenological argument on the denial of the strategic nature of legal reasoning, rather than as a psychological argument on the denial of ideology in legal reasoning.

The judge who is captured in this revised sense of bad faith is one who makes a legal decision "in a guise of solemnity or with deterministic excuses"<sup>193</sup> that he is just following the law. It is true that there is the situation in which a certain outcome appears to be designated by the law. According to Kennedy, however, this legal interpretation is a Janus-faced activity in the sense that it is "a determinate result-producing technique, and . . . intrinsically an affair of justice,"<sup>194</sup> and the conflict between these two aspects has not been resolved by any (liberal legal) theories. Furthermore, as pointed out repeatedly, "[t]he manipulability of the field is much greater than the lay public realizes . . ."<sup>195</sup> Therefore, if the judge sees a certain legal interpretation as inevitable, that may merely mean that he has not found the plausible counter argument due to his lack of skill, time, and above all *the will to transform the field*. In other words, in *Critical Phenomenology*, legal reasoning is conceptualized as the *practice* of the judge to manipulate the law, in which the judge is required to exercise the *freedom* to realize his conception of justice (at least hypothetically).

The judges who are captured in bad faith are "those who seek to hide from themselves the wholly voluntary nature of their existence and its complete freedom."<sup>196</sup> Indeed, it seems plausible that from their perspective that the law is reified as a machine, as Lukács wrote on workers in the capitalist economy:

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191. JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: A PHENOMENOLOGICAL ESSAY ON ONTOLOGY 89 (Hazel E. Barnes trans., Washington Square Press 1992) (1943). Kennedy cites this passage in *Strategizing*, *supra* note 23, at 812.

192. This is, as Kennedy correctly recognizes, the problem of infinite regress. *Strategizing*, *supra* note 23, at 790-803.

193. Sartre, *supra* note 148, at 43.

194. *Critical Phenomenology*, *supra* note 22, at 556.

195. *Id.*

196. Sartre, *supra* note 148, at 43.

He finds it [mechanical system] already pre-existing and self-sufficient, it functions independently of him and he has to conform to its laws whether he likes it or not. As labour is progressively rationalised and mechanised his lack of will is reinforced by the way in which his activity becomes less and less active and more and more *contemplative*.<sup>197</sup>

His posture of *contemplation* reminds us of Sartre's famous waiter in the café who misrepresents himself "[a]s if from the very fact that I sustain this role in existence I did not transcend it on every side, as if I did not constitute myself as one *beyond* my condition."<sup>198</sup>

After all, it may be that I am just recasting (or even reducing) Kennedy's theory of bad faith as a theory of alienation. But, this seems to be one possible interpretation of his original theory. For Kennedy himself, referring to the Sartrean idea of the human being as "at once a *facticity* and a *transcendence*,"<sup>199</sup> states:

[T]he judge misrepresents himself as factoid, or mechanical, seeming to himself to comply with the role requirement that he be that through and through, in spite of his experience of constraint by the text as a sometime thing, always unpredictably subject to dissolution by legal work.<sup>200</sup>

The plausibility of such an interpretation will depend on my interpretation of *Critical Phenomenology* as a whole within the context of my overall project to reconstruct Kennedy as a general model of legal thinking, which I will discuss next.

#### *E. The Common Law Tradition (2)*

At the beginning of *Critical Phenomenology*, Kennedy refers to three legal realists, Felix Cohen, Karl Llewellyn, and Edward Levi, saying that his force field model is an extension of their arguments.<sup>201</sup> Let me summarize, quite roughly, their influence on Kennedy's phenomenology. First, Cohen criticized the formalist/conceptualist view of legal reasoning, leaving it open to policy choices.<sup>202</sup> As discussed in section II, formulation of a whole set of policy arguments as two lines of discourse was initiated by Llewellyn ("thrust and

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197. GEORG LUKÁCS, HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS 89 (Rodney Livingstone trans., The MIT Press 1985) (1968) (footnote omitted). Compare such a worker as Lukács describes with the Classical jurist who believed that "the [Savignian] system determines" the outcome. *Max Weber's Sociology*, *supra* note 79, at 1068-69; *see also supra* note 83. Both are *metaphysicians* in that they want to see something transcendent behind a number of concrete artificial decisions by the individual social actors. *See also infra* section IV.

198. SARTRE, *supra* note 191, at 103.

199. *Id.* at 98.

200. *Strategizing*, *supra* note 23, at 818.

201. *Critical Phenomenology*, *supra* note 22, at 518 n.1.

202. *See generally* Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 204-05 n.12 (1931).

parry”<sup>203</sup>) and completed by Kennedy (“bites and counter-bites”). It is obvious that the force field model succeeds to policy analysis made available by realists. And, in this legal field, the judge is required to proceed according to Levi’s “reasoning by example,”<sup>204</sup> which seems to me, if modified in the *voluntarist* way, to overlap with Kennedy’s “deductive work.” That is, the judge (1) decides which precedent *can be made* (rather than is) similar to the present case by operating facts of both cases; (2) *makes* (rather than discovers) the rule applicable to the present case from the precedent by operating, for example, the scope of the holding; and (3) applies (if we can call it so) the rule to the present case. Thus, in the eyes of a Continental legal theorist, Kennedy’s phenomenology appears a *natural* extension of common law thinking which is conceptualized as a system of voluntarist/partisan legal argument.<sup>205</sup>

But, the Dworkinians would reject acknowledging “policy work” distinctive to Kennedy’s phenomenology as the characteristic nature of common law thinking. However, in the very process of “reasoning by example,” there is the possibility that the judge can derive several rules of varying degrees of generality from identical sets of relevant facts, and it is a matter of policy rather than logic to choose the one rule from these possible alternatives.<sup>206</sup> And, as Kennedy has pointed out, the common law judges “constantly evoke, for and against a given rule choice, the whole range of effects the rule will have on people other than the parties, and evaluate those effects in terms of the general goals of the community.”<sup>207</sup> Therefore, Kennedy’s phenomenology seems to embody the orthodoxy of the common law tradition, or at least I agree with his claim that “Dworkin is a Continental.”<sup>208</sup>

What I hasten to add is that Kennedy’s embodiment of the common law tradition is accomplished in a somewhat radical way. This point must not be forgotten because, as demonstrated above, Kennedy theoretically acknowledges the possibility that the judge is constrained by the law, thereby

203. See generally KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-35 (1960); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

204. See generally EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1-2 (1949).

205. See *supra* section II-E.

206. See, e.g., Cohen, *supra* note 202, at 215-17.

207. CRITIQUE, *supra* note 2, at 126. As to the pervasiveness of “interstitial law making” of the judges, and more generally “instrumentalism” of the lawyers, within the United States legal culture, see generally Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism?: A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 23-38 (1994); KAGAN, *supra* note 140, at 55-57. See also *supra* text accompanying notes 141-43.

208. CRITIQUE, *supra* note 2, at 36. In fact, Dworkin is a Classicist as well in the sense that he presupposes that even if he faces gaps, conflicts, and ambiguities of principles, he can find out an unenacted meta-principle of the system, from which he can do teleological reasoning to resolve the case at hand. See Max Weber’s *Sociology*, *supra* note 79, at 1049-50; *Three Globalizations*, *supra* note 80, at 39 (discussing the Classicist “constructions”). But, such a meta-meta-principle of following “the logic of the system” is just another, rather than exclusive, goal of legal interpretation, and alien to the common law tradition. See Duncan Kennedy, *Thoughts on Coherence, Social Values and National Tradition in Private Law*, in DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* 175, 178-81 (2008).

avoiding the maximalist claim (“anything goes”) which is based on the extra-legal standard of correctness, such as that of natural sciences.<sup>209</sup> Such an (minimal) internalist turn<sup>210</sup> might be regarded as Kennedy’s submission to liberal legalism, as MacCormick theorizes:<sup>211</sup> Kennedy’s position can be translated as the Hartian one that requires the judge to exercise his discretion at the “penumbra of doubt” and to apply the law mechanically at the “core of certainty.”<sup>212</sup>

Obviously, this is not the case. Although Kennedy’s technical responses to MacCormick, or technical criticisms of the Hartian “core/penumbra” thesis, are quite interesting,<sup>213</sup> what Kennedy should have emphasized is that there is a fundamental difference in the notion of the law, in particular that of the rule, between the Hartians and Kennedy. It is because of *the Platonist view of the law*,<sup>214</sup> in which the meaning of the law is determined before or independently of the interpreter’s work, that the Hartians can regard the distinction between “core and penumbra” or “easy cases and hard cases” as unquestionable.<sup>215</sup> For Kennedy, on the contrary, the law (the rule) is not just the object whose essential meaning awaits discovery by the subject, but *the tool in terms of which the subject adds new meaning to it (as the object) within a certain limitation*. Kennedy writes:

[O]ne of the ways in which we experience law . . . is as a medium in which one pursues a project, rather than as something that tells us what we have to do. When we approach it this way, law constrains as a physical medium constrains. . .

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209. *Critical Phenomenology*, *supra* note 22, at 560-61.

210. Therefore, Dworkin’s treatment of CLS, if his definition thereof includes Kennedy, is very unfair. For it is obvious that Kennedy rejects what Dworkin calls global/internal skepticism (far from external skepticism). Dworkin seems to *deny* the best part of CLS. *See also supra* section I.

211. *See supra* note 12 and accompanying text.

212. *See generally* H.L.A. HART, THE CONCEPT OF LAW 120-50 (1961); CRITIQUE, *supra* note 2, at 177.

213. First, the situations in which the judge exercises discretion are not necessarily limited to “the penumbra,” because as seen in the *Lochner* case, the (United States) judge may transform “the core” into “the penumbra.” *Lochner v. New York*, 198 U.S. 45 (1905). Second, discretion which the judge exercises may be more than “partly political,” because, in Kennedy’s *Semiotics of Legal Argument*, transition from “the core” to “the penumbra” is just a special case of “nesting,” in which the structures of argumentation are identical in both situations, and therefore the ideological stakes in the latter situation are not necessarily smaller than those in the former situation. CRITIQUE, *supra* note 2, at 177-79; *Hart/Kelsen*, *supra* note 14, at 164-65.

214. I owe the idea of Platonist/non-Platonist view of the law, as a direct source, to the following Japanese article on Wittgenstein’s argument on rule-following: Hiroshi Kamemoto, *Hōteki Shikō no Konpon Mondai: Rule to Case [A Fundamental Problem of Legal Thinking: Rule and Case]*, in HŌ NO RINKAI: HŌTEKI SHIKŌ NO SAI-TEI [THE LAW AT A CRITICAL POINT: LEGAL THINKING REORIENTED] 3, 10-14 (1999). In this part of his article, Kamemoto cites freely Andreas Kemmerling, *Regel und Geltung im Lichte der Analyse Wittgensteins*, RECHTSTHEORIE Bd.6, S.104-131 (1975).

215. Kennedy calls the Hartian belief in legal reasoning based on these distinctions “cognitive” or “top down,” which I believe refers to what I call the Platonist view of the law. *See Hart/Kelsen*, *supra* note 14, at 155, 165.

On the other hand, the constraint a medium imposes is relative to your chosen project—to your choice of what you want to make. The medium doesn't tell you what to do with it . . . . How my argument will look in the end will depend in a fundamental way on the legal materials . . . but this dependence is a far cry from the inevitable determination of the outcome in advance *by the legal materials themselves*.<sup>216</sup>

Kennedy's *non-Platonist view of the law* makes the Hartian distinctions completely nonsensical, because now the judge can inflect or shift cores and penumbras "from the bottom up," that is, the judge can conduct his strategic work in the particular case to end up transforming a hard (an easy) case into an easy (a hard) case.<sup>217</sup> If the Hartian formulation of "core/penumbra" is undermined by Kennedy's non-Platonist view, then the Dworkinian notion of "seamless web"<sup>218</sup> would be even more weakened.

It seems to me that Kennedy's non-Platonist view of the law is based on another peculiar notion of the anti-ontological view of determinacy (and indeterminacy), or the very notion of *phenomenology* of legal reasoning. Kennedy as a phenomenologist "brackets" the question of whether or not determinacy is "'qualities' or 'attributes' inherent in the norm, independently of the work of the interpreter."<sup>219</sup> Instead, as discussed above, Kennedy regards determinacy just as the "effect of [the] necessity" of many factors such as "time, strategy, skill," and so on.<sup>220</sup> In other words, it seems to me that *determinacy has lost its transcendental ground, situated within the historical context, and reduced into the function of historical factors*.<sup>221</sup>

From this phenomenologist/pragmatist position, Kennedy derives another critical/irrationalist conclusion, "loss of faith" in legal reasoning. At this point, it will suffice just to read his grievous confession:

The experience of manipulability is pervasive, and it seems obvious that whatever it is that decides the outcome, it is not the correct application of legal reasoning under a duty of interpretive fidelity to the materials. This doesn't mean that legal reasoning never produces closure. It may, but when it does, that experienced fact doesn't establish, for a person who has lost faith, that closure was based on something "out there" to which the reasoning corresponded . . . .

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216. *Critical Phenomenology*, *supra* note 22, at 526.

217. *Hart/Kelsen*, *supra* note 14, at 165; *CRITIQUE*, *supra* note 2, at 166. Generally speaking, anti-essentialists suggest that "we brush aside all questions about where the thing stops and its relations begin, all questions about where its intrinsic nature starts and its external relations begin, all questions about where its essential core ends and its accidental periphery begins." RORTY, *SOCIAL HOPE*, *supra* note 24, at 57-58.

218. *See generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 115-18 (1977).

219. *Hart/Kelsen*, *supra* note 14, at 160. *See also supra* section III-C.

220. *Hart/Kelsen*, *supra* note 14, at 159-60. In other words, Kennedy seems to regard determinacy of the law as the "perlocutionary" effect of utterance rather than an existing thing. *See Semiotics of Critique*, *supra* note 41, at 1180-81.

221. *See CRITIQUE*, *supra* note 2, at 169-71; *Hart/Kelsen*, *supra* note 14, at 169-70.

Loss of faith is a loss, an absence: “Once I believed that the materials and the procedure produced the outcome, but now I experience the procedure as something *I do to* the materials to produce the outcome I want.”<sup>222</sup>

Thus, again, we hit upon Kennedy’s *ambivalence* (like Weber’s?<sup>223</sup>) toward liberal legalism. As I have (plausibly, I hope) pointed out, in contrast with the common misunderstanding of CLS as nihilism (e.g., by Fiss),<sup>224</sup> Kennedy’s *Critical Phenomenology*, as well as *Semiotics*, is genealogically and/or realistically embedded within the (distinctively United Statesian) common law tradition. On the other hand, however, we cannot simply equate Kennedy with liberal legalism (e.g., just as MacCormick does)<sup>225</sup> because there is definitely a critical sting of “loss of faith” caused by “death of the subject.”<sup>226</sup> In the next section, I will try to reveal what this critical sting is really like, and thereby identify Kennedy’s stance on liberal legalism.

#### IV. MPM, OR IRONICAL LIBERAL LEGALISM

Throughout this essay, I have been reconstructing Kennedy’s private law theory as a critical successor to the Dworkinian theory of legal interpretation. Let me summarize my argument thus far. First, I affirmed that at the starting point of his academic career, in *Legal Formality*, Kennedy attempted to criticize the Hartian legal positivism which prevents the judges from consulting any materials other than legal rules, correctly pointing out the inevitability of substantive rationality, in particular policy arguments, in legal reasoning (Section I-C). Second, gathering historically accumulated policy arguments from the perspective of the Foucauldian genealogist (archaeologist), Kennedy found the dualist logic of private law interpretation, thereby undermining the reconstructive attempt of the Dworkinian coherence theory (Section II). Consequently, the distinction between law and politics is blurred almost completely.

Third, however, we should not equate Kennedy’s position with the Ungerian reductionist critique, or caricatured CLS. Instead of reducing legal argument into politics (ideology) directly, Kennedy adopts the “internal critique” strategy, trying to situate legal arguments within “a middle term between law application and judicial legislation”<sup>227</sup> (Sections I-A and I-B). Fourth, based on this internalist turn, Kennedy elucidates the order of legal

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222. CRITIQUE, *supra* note 2, at 311-12.

223. Kennedy himself says, stressing Weber’s *decisionist* moment, “much critical legal studies work, in the skeptical vein, has been reinvention, or adaptation to new non-Weberian purposes, of Weberian wheels.” *Max Weber’s Sociology*, *supra* note 79, at 1076.

224. See *supra* text accompanying notes 4-9.

225. See *supra* text accompanying note 12.

226. What is the relationship between “loss of faith” and “death of the subject?” This is a very important question, but I am not prepared to answer it. For the time being, I am supposing that loss of faith in legal reasoning is caused, at least partly, by the semiotic/dualist structure of legal discourses. In the rest of this essay, I will use both terms interchangeably.

227. CRITIQUE, *supra* note 2, at 29.

discourses from the structuralist perspective, in which legal argument is regarded as a system of mechanical combinations of basic units (Section II). Fifth, Kennedy describes the inner experience of legal arguers, in particular the judges, from the phenomenological perspective in which legal argument is regarded as strategic work, which fully exploits the systematic nature of legal discourses (Section III).

As a result, Kennedy successfully, paradoxically enough, more successfully than the Dworkinians, constructs a general model of contemporary legal thinking penetrated by policy arguments, which can be regarded as embodying the (distinctively United Statesian) common law tradition. At this point, I believe that I have successfully achieved one of my objectives in this essay: “to suggest the possibility to grasp Kennedy’s theory in particular and CLS in general as a *complementary theory to liberal legalism*.”<sup>228</sup>

#### A. Metaphysics

However, there is the other half of the story: Kennedy is *neither anti-liberal legalism nor ordinary liberal legalism*, rather *post-liberal legalism*.<sup>229</sup> This post-ness, rather than anti-ness and same-ness, derives from his peculiar critical/irrationalist sting. As discussed above, Kennedy’s *Semiotics* reduces a particular legal interpretation into just an intersection of systematized legal discourses (“death of the subject”),<sup>230</sup> which, as his *Critical Phenomenology* points out, can be interchangeable with another position by the interpreter’s strategic work (“loss of faith”).<sup>231</sup> In short, Kennedy teaches legal interpreters to consider that there is (always? usually? sometimes?) the possibility that a *decisionist moment* is relevant to their interpretive practice. Kennedy rejects taming this, I would say, “fundamental experience of undecidedness,” under the banner of “rightness” provided by reconstructive fancy liberal theorists.<sup>232</sup>

In other words, I regard Kennedy as “a nominalist and a historicist,”<sup>233</sup> in opposition to “the metaphysician,” who is persistently obsessed with the idea of something behind or transcendent of concrete experiences, such as rightness, determinacy, coherence and so forth. As discussed in the section III, the liberal legalists, such as the Hartians and the Dworkinians, believe, just like the metaphysician (Platonist) does, that the true meaning within the law awaits discovery.<sup>234</sup> In contrast, Kennedy, by situating legal reasoning within

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228. See *supra* text accompanying note 24.

229. See *id.*

230. See *supra* text accompanying notes 142-46.

231. See *supra* text accompanying notes 222-26.

232. See CRITIQUE, *supra* note 2, at 359-61, 332-33.

233. RORTY, IRONY, *supra* note 1, at 74.

234. The metaphysician is not the kind of person who admits *apparent* contradiction, for example, of legal interpretations, but rather, who wants to see *real* reconciliation behind it:

The typical strategy of the metaphysician is to spot an apparent contradiction between two platitudes, two intuitively plausible propositions, and then propose a distinction which will resolve the contradiction. Metaphysicians then go on to embed this distinction within a network of associated distinctions—a philosophical theory—which

the interpreter's concrete work experience, "brackets" existence (or non-existence) of such a metaphysical meaning, thereby reducing the meaning of the law into a function of contingent historical factors, such as the interpreter's strategies, time and resources, legal materials and so forth. For those who share Kennedy's views, legal interpretation is "dominated by metaphors of making rather than finding."<sup>235</sup> They think "of final vocabularies as poetic [dialectic or rhetorical] achievements rather than as fruits of diligent inquiry according to antecedently formulated criteria,"<sup>236</sup> such as the theory of coherence.

### B. Ironism

As you can see already, I am reconstructing Kennedy's theory and Kennedy himself as an "ironist," as Richard Rorty discussed in his famous (infamous?) book, *Contingency, Irony, and Solidarity*. At this point, it would be a good idea to summarize the overall framework of this book before immediately trying to identify Kennedy's stance on liberal legalism through the use thereof.<sup>237</sup>

How should we grasp our (political) life? According to Rorty, throughout the history of Western (political) philosophy two types of writers have been disputing each other over this question. One type of writers, since Plato or

will take some of the strain off the initial distinction. This sort of theory construction is the same method used by judges to decide hard cases, and by theologians to interpret hard texts. That activity is the metaphysician's paradigm of rationality. He sees philosophical theories as converging—a series of discoveries about the nature of such things as truth and personhood, which get closer and closer to the way they really are, and carry the culture as a whole closer to an accurate representation of reality.

RORTY, IRONY, *supra* note 1, at 77. Compare a metaphysician's impulse to see things "top down" with Kennedy's historicism and nominalism. For example, against metaphysicians who want to believe coherence of rights, Kennedy presents *the (distinctively United Statesean) historical context within which one line of rights argument would not be regarded as plausible enough to conclude the legal debate in a particular case*, rather than the metaphysical thesis of absolute indeterminacy of language. According to Kennedy, first, there has been a huge historical accumulation of practical techniques of critique of the opponent's rights argument, including Hohfeldian flip (i.e., rights of the injured/privilege of the injurer), creation of new rights (e.g., rights to privacy), internal critique of the deductive rights argument (e.g., Fuller's critique of expectation damage), and so forth. CRITIQUE, *supra* note 2, at 318-19. Second, there have been close connections between rights arguments and politics in which conservatives and liberals have frequently changed their position on the same issues (e.g., activism/passivism), and they have conducted internal critique of rights discourse produced from within their own camps. *Id.* at 320-29. Thus, Kennedy seems to be arguing, and *only* arguing, that under such historical contexts, the other party will have a good opportunity to present a counter-rights argument, which might undermine the plausibility of her opponent's rights argument. Note how "chastened" Kennedy's "bottom up" argument is. *See also supra* section I.

235. RORTY, IRONY, *supra* note 1, at 77.

236. *Id.*

237. Their parallelism is so striking that I can hardly resist the temptation to describe it "in terms of the march of the World-Spirit toward clearer self-consciousness," although, of course, "any such description would betray the spirit of playfulness and irony which links the figures I have been describing." *Id.* at 39.

Christianity, based on the *metaphysical* or theological notion of “common human nature,” have been trying to show that achieving justice or solidarity—the public—is nothing other than achieving self-creation or self-perfection—the private.<sup>238</sup> Contemporary *liberalists* such as Habermas, who are driven by “the desire for a more just and free human community,” can be regarded as their descendants.<sup>239</sup> The other type of writers, along with Nietzsche, denying such a metaphysical notion as “common human nature,” have been trying to show that human solidarity is “a ‘mere’ artifact of human socialization” which is “antithetical to something deep within us.”<sup>240</sup> These writers (e.g., Foucault), who are driven by “the desire for self-creation, for private autonomy,” not poisoned by public restraints, will be called *ironists*.<sup>241</sup>

But, Rorty sees their opposition as merely apparent, because we are lacking the premise that “a more comprehensive philosophical outlook would let us hold self-creation and justice, private perfection and human solidarity, in a single vision.”<sup>242</sup> Therefore, in *Irony*, by showing “how things look if we drop the demand for a theory which unifies the public and private, and are content to treat the demands of self-creation and of human solidarity as equally valid, yet forever incommensurable,”<sup>243</sup> Rorty tries to pursue the alternative view of our (political) life—“a liberal utopia: one in which ironism, in the relevant sense, is universal.”<sup>244</sup> That is, the citizens in his “liberal utopia” are “liberal ironists,”<sup>245</sup> who are “as privatistic, ‘irrationalist,’ and aestheticist as they please” in their private life,<sup>246</sup> but at the same time hope “that suffering will be diminished, that the humiliation of human beings by other human beings may cease” in their public life.<sup>247</sup>

What is important is that a liberal *ironist’s* hope is “ungroundable,” being that they are “sufficiently historicist and nominalist to have abandoned the idea that those central beliefs and desires refer back to something beyond the reach of time and chance.”<sup>248</sup> Therefore, their hope of solidarity “is to be achieved [rather than discovered] not by inquiry but by imagination, the imaginative ability to see strange people as fellow sufferers.”<sup>249</sup> Thus, in the conclusion of *Irony*, Rorty pursues the possibility of solidarity within the context of “a general turn against theory and toward narrative,”<sup>250</sup> thereby trying to *redescribe, rather than found*, liberalism.

*Irony* holds a rather unique position within the United Statesean political and intellectual configurations, thereby being “attacked with equal vigour from the

238. *Id.* at xiii.

239. *Id.* at xiv.

240. *Id.* at xiii-iv.

241. RORTY, *IRONY*, *supra* note 1, at xiii.

242. *Id.* at xiv.

243. *Id.* at xv.

244. *Id.*

245. *Id.*

246. *Id.* at xiv.

247. RORTY, *IRONY*, *supra* note 1, at xv.

248. *Id.*

249. *Id.* at xvi.

250. *Id.*

political right and the political left.”<sup>251</sup> On the one hand, the political right, who believes that liberal social institutions are not only preferable, but also “Objectively Good,” or “grounded in Rational First Principles,” attacks Rorty’s “postmodernist” ideas, for example, the critique of reason, truth, and so forth, regarding him as irresponsible.<sup>252</sup> On the other hand, the political left, in particular the “postmodernist” who believes that the United States “has always been quasi-fascist,” attacks Rorty’s support for existing (distinctively United Statesean) liberal democracy and welfare state capitalism, and his disbelief in something like “total revolution,” regarding him as inconsistent.<sup>253</sup> “So,” Rorty says, “my philosophical views offend the right as much as my political preferences offend the left.”<sup>254</sup> In reconstructing Kennedy’s stance on liberal legalism, I will fully exploit Rorty’s logic, which enabled him to take such a tricky position.

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Now, let us return to the main subject. A legal interpreter who has lost her faith in legal discourses seems to satisfy three conditions set by Rorty for being an ironist. First, “[s]he has radical and continuing doubts about the final vocabulary,”<sup>255</sup> which means, in our context, legal discourses concretized as bites, because “she has been impressed by other vocabularies,”<sup>256</sup> that is, counter-bites. Second, “she realizes that argument phrased in her present vocabulary can neither underwrite nor dissolve these doubts,”<sup>257</sup> because she realizes that each bite is connected with a counter-bite, and therefore, there is at least the possibility that she can make, rather than find, a counter-bite equally plausible with her original bite. Third, “insofar as she philosophizes about her situation, she does not think that her vocabulary is closer to reality than others,”<sup>258</sup> because, again, as long as she presupposes a structuralist and phenomenologist (voluntarist) view of the law, she can neither maintain meta (the third party) perspective, nor determinacy (or indeterminacy) of the law independent of her own work. As a consequence, she will be “never quite able to take [herself] seriously because . . . [she is] always aware of the contingency and fragility of [her] final vocabularies, and thus of [herself].”<sup>259</sup>

Turning to the theorist himself, what motivates the ironist to theorize? (Why do it?) I will cite Rorty’s answer at length:

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251. RORTY, SOCIAL HOPE, *supra* note 24, at 3. *Irony*, according to Rorty himself, “got a couple of good reviews, but these were vastly outnumbered by reviews which said that the book was frivolous, confused and irresponsible.” *Id.* at 14.

252. *Id.* at 4-5. In contrast, Rorty sees them as “philosophically wrong as well as politically dangerous.” *Id.* at 18.

253. *Id.* at 17-18, 3-4. In contrast, Rorty sees them as “philosophically right though politically silly.” *Id.* at 18.

254. *Id.* at 5.

255. RORTY, IRONY, *supra* note 1, at 73.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 73-74.

The metaphysicians attempt to rise above the plurality of appearances in the hope that, seen from the heights, an unexpected unity will become evident—a unity which is a sign that something *real* has been glimpsed, something which stands behind the appearances and produces them. By contrast, the ironist canon I want to discuss is a series of attempts to look back on the attempts of the metaphysicians to rise to these heights, and to see the unity which underlies the plurality of these attempts. The ironist theorist distrusts the metaphysician's metaphor of a vertical view downward. He substitutes the historicist metaphor of looking back on the past along a horizontal axis. . . .

The goal of ironist theory is to understand the metaphysical urge, the urge to theorize, so well that one becomes entirely free of it. Ironist theory is thus a ladder which is to be thrown away as soon as one has figured out what it was that drove one's predecessors to theorize. The last thing the ironist theorist wants or needs is a theory of ironism. He is not in the business of supplying himself and his fellow ironists with a method, a platform, or a rationale. He is just doing the same thing which all ironists do – attempting autonomy. He is trying to get out from under inherited contingencies and make his own contingencies, get out from under an old final vocabulary and fashion one which will be all his own. The generic trait of ironists is that they do not hope to have their doubts about their final vocabularies settled by something larger than themselves. This means that their criterion for resolving doubts, their criterion of private perfection, is autonomy rather than affiliation to a power other than themselves . . . .<sup>260</sup>

It seems to me that the characteristics of Kennedy's critical/irrationalist sting of "loss of faith" and/or "death of the subject," which seems to be subsumed under his more general attitude of "mpm (modernism/postmodernism)"<sup>261</sup> and its relationship to liberal legalism, will be well elucidated by comparing it with ironist impulse. In the following several paragraphs, I will identify the parallelism between traits of Rorty's ironist and those of Kennedy's mpm author, thereby assessing Kennedy's peculiar stance on liberal legalism. First, mpm is an intellectual impulse to "disrupt the rational grid," including rightness, determinacy, and coherence of legal argument.<sup>262</sup> As I have repeatedly pointed out, just as the ironist theorist rejects the metaphysician's attempt to see, from the "top down" perspective, real unity behind apparent diversity, Kennedy stays within the concrete experiences of interpretive work, which operates only on the field of historically accumulated legal discourses. Thus, Kennedy, from the "bottom up" perspective, undermines the liberal legalist's attempts to find the real meaning of apparently ambiguous law by reducing the apparent contradictions of legal interpretations into real coherence. While liberal legalists believe that legal interpretation is a matter of application of the method well defined in advance, which thereby warrants necessitarian truth, Kennedy sees each legal interpretation as a matter of creative work under particular historical

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260. *Id.* at 96-97 (footnote omitted).

261. *See generally* CRITIQUE, *supra* note 2, at 5-12.

262. *Id.* at 7-8, 341-42.

conditions, which thereby includes the decisionist moment.<sup>263</sup> In short, mpm means hostility toward any attempt to see legal practice from the aspect of “rightness in all its forms.”<sup>264</sup>

This hostility should be directed to the mpm author himself as well, and therefore he cannot claim to achieve anything “authentic” from his critique. Indeed, “[a]uthenticity” is the last thing people like me meant to appeal to as the ‘behind’ that we might liberate through the critiques of adjudication and of rights.”<sup>265</sup> Furthermore, Kennedy is not claiming that his own position is right—mpm is only “hypercritical.”<sup>266</sup> In particular, again, in contrast with the common misunderstanding of CLS (e.g., by Fiss),<sup>267</sup> Kennedy is not claiming that legal interpretation is *essentially* indeterminate on the basis of “global internal critique” and/or “critical maximalism.”<sup>268</sup> Kennedy’s ironism is thoroughgoing in the sense that he avoids metaphysics of anti-metaphysics, saying “[i]t may be true ‘in theory’ that it is always possible to [disrupt the experience of closure], but to assert that as truth is to substitute a metaphysics of absence for one of presence, a substitution that does not seem like an improvement to me.”<sup>269</sup> And, of course, Kennedy does not believe in the reconstructive project, being that “the call for reconstruction” is nothing other than “reification or fetishism of theory,” in the sense that it is “an affirmation

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263. As a corollary to this point, in Kennedy’s view legal theory (logic) seems to be substituted by rhetoric:

[In the face of the prevalence of policy analysis] what seemed to be an insuperable objection to normatively compelling rational lawmaking, namely the existence of contradictory legal philosophies each claiming to operate according to an absolute (logical or social) necessity, was transformed into something like a technical problem . . . .

*Max Weber’s Sociology*, *supra* note 79, at 1074. This perspective, again, resonates with that of Rorty’s ironist who “thinks of logic as ancillary to dialectic [rhetoric].” RORTY, IRONY, *supra* note 1, at 78.

264. CRITIQUE, *supra* note 2, at 11.

265. *Id.* at 345.

266. *Id.* at 11-12. As a corollary to this point, mpm cannot be said to have any *intrinsic* political position. *Id.* at 340. Compare this with Rorty’s claim that we cannot “hold reality and justice in a single vision.” RORTY, SOCIAL HOPE, *supra* note 24, at 13, 19. In other words, although “people on the left keep hoping for a philosophical view which cannot be used by the political right, one which will lend itself only to good causes. . . . there never will be such a view; any philosophical view is a tool which can be used by many different hands.” *Id.* at 23 (footnote omitted); *see also supra* text accompanying notes 251-54.

267. *See supra* text accompanying notes 4-9.

268. *See generally* CRITIQUE, *supra* note 2, at 348-50.

269. *Id.* at 349. Therefore, Kennedy’s decisionism should not be equated with the radical indeterminacy thesis:

What makes the thinker a decisionist is not that he has a global or ontological critique of justificatory closure, but that, after coming upon a situation of choice where governing norms contradict one another or “run out,” he refuses the enterprise of either repairing the discourse or replacing it with a new discourse that will be more determinate.

*Semiotics of Critique*, *supra* note 41, at 1163. *See also supra* section III-E (discussing the non-Platonist view of the law).

of faith in theory as way to rightness.”<sup>270</sup> After all, it seems to me that Kennedy has lost his faith in theory in general, just as Rorty’s ironist.<sup>271</sup>

The vehicle of mpm critique is, therefore, an artifact rather than a theory.<sup>272</sup> Kennedy writes, “rather than putting a new theory in place, [mpm] looks to induce, through the artifactual construction of the critique, the modernist emotions associated with the death of reason—ecstasy, irony, depression, and so forth.”<sup>273</sup> Kennedy calls such an artifact “the transgressive artifact,” which attempts to innovate the form of expression, such as the particular technique of internal critique, in order to “shatter” reified expression normalizing experience, for example, a particular deductive reasoning in a particular case.<sup>274</sup> The point is that the author of an mpm artifact is trying to establish the new style, which then might “get reproduced as a theoretical routine, as a piece of critical ‘normal science,’ performed over and over again without either disruptive effect or disruptive intention.”<sup>275</sup> Thus, importantly, ironists’ view of their artifact seems to be projected onto, or derived from, intellectual history; that is, they want to see such “formal innovation,” or endless dialectic, though lacking Hegelian *telos*, interaction between authentic discourses and deviational discourses, and built in intellectual history as well. As a result, while Kennedy sees the history of the (distinctively Unitedstatesean) liberal legalism “as a protracted debate about how to deal with the ‘viral’ tendency of internal critique;”<sup>276</sup> Rorty sees the historical transformations of liberalism and liberal institutions as representing “a culture which was able to incorporate and make use of an understanding of the dissolvant character of rationality, of the self-destructive character of the Enlightenment.”<sup>277</sup> In short, they have in common the *anti-foundationalist view of liberalism* (liberal legalism), which will be addressed later.

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270. CRITIQUE, *supra* note 2, at 361.

271. *See id.*

272. As Kennedy states, as soon as modernist authors tried to theorize their artistic activities, they lost their critical force, even falling into the premodern myth of the subject that they had originally disrupted in their artifacts. *Id.* at 346-48.

273. *Id.* at 342.

274. *Id.* at 342-43.

275. *Id.* at 343. Compare Kennedy’s view of intellectual history with Rorty’s counterpart:

Old metaphors are constantly dying off into literalness, and then serving as a platform and foil for new metaphors. This analogy lets us think of “our language” — that is, of the science and culture of twentieth-century Europe — as something that took shape as a result of a great number of sheer contingencies.

RORTY, IRONY, *supra* note 1, at 16. And, Rorty continues, “[t]his account of intellectual history chimes with Nietzsche’s definition of ‘truth’ as ‘a mobile army of metaphors.’” *Id.* at 17. Compare Rorty’s view of truth with Kennedy’s non-Platonist view of the law. *See supra* section III-E.

276. CRITIQUE, *supra* note 2, at 88. *See also supra* note 83 (discussing the historical transformations of legal consciousness).

277. RORTY, IRONY, *supra* note 1, at 57.

If there is something that organizes these traits of mpm, I agree with Rorty that it will be the idea of autonomy or perfectionism. In other words, the mpm author is engaging in *critique for its own sake*, which is clearly demonstrated in “the model of alienated powers.”<sup>278</sup> If internal critique of legal discourse plausibly reveals the fact that the decisive factor of the outcome is, in reality, for example, ideology, and therefore, if the apparent determinacy thereof turns out to be just a product of false consciousness, or in the case of Kennedy’s mpm, bad faith, then Kennedy does not hesitate to suggest that “it would be in some sense ‘better’ to determine our fates without alienating our powers,”<sup>279</sup> without considering the cost and the consequence of throwing away such a “noble lie” and, again, without proposing any alternatives.<sup>280</sup> As the intellectual elitist project for uncompromisingly pursuing the de-reified or de-fetishized self and world, Kennedy’s mpm and Rorty’s ironism belong to the same genealogy deriving from Nietzsche:<sup>281</sup>

The line of thought common to Blumenberg, Nietzsche, Freud, and Davidson suggests that we try to get to the point where we no longer worship *anything*, where we treat *nothing* as a quasi divinity, where we treat *everything* – our language, our conscience, our community – as a product of time and chance. To reach this point would be, in Freud’s words, to “treat chance as worthy of determining our fate.”<sup>282</sup>

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However, Rorty is arguing that ironist discourse cannot, or even should not, become public discourse, such as justice, solidarity and, I believe he would include, the law. For “[t]he sort of autonomy which self-creating ironists like

278. See generally CRITIQUE, *supra* note 2, at 18-20.

279. *Id.* at 19.

280. This point is one of Schlag’s critiques of Kennedy—mpm critique is, or leads to, nihilism. See Pierre Schlag, *Politics and Denial*, 22 CARDOZO L. REV. 1135, 1143-44 n.15 (2001); see also Jeremy Paul, *Symposium: CLS 2001*, 22 CARDOZO L. REV. 701, 710 (2001). To this type of critique, Kennedy would respond by arguing that critique “leaves us whatever we had before critique,” because all that critique undermines is “rightness” of the target, and that it is a matter of an empirical question what will happen after critique, which cannot be predicted a priori (“loss of faith in property rights might permit previously thwarted egalitarian sentiments to flower”). CRITIQUE, *supra* note 2, at 362. Interestingly enough, Rorty seems to be responding to critique of ironism as nihilism by the parallel logic: we can regard as false the prediction that ironism will weaken liberalism, because, first, we can employ “the analogy with the decline of religious faith,” which “has not weakened liberal societies, and indeed has strengthened them.” RORTY, IRONY, *supra* note 1, at 85. Second, even if people become more and more ironical about the ground of liberalism, that does not necessarily mean that they will abandon it (“They would feel no more need to answer the questions ‘Why are you a liberal?’ . . . than the average sixteenth-century Christian felt to answer the question ‘Why are you a Christian?’ . . .”). *Id.* at 87.

281. In terms of the genealogy of mpm, Kennedy himself says, “One way to see mpm is as the bleeding together of surrealism with the structuralist critique of the scientism and humanism of both Liberalism and Marxism, under the sign of Friedrich Nietzsche, perhaps.” CRITIQUE, *supra* note 2, at 348. See also *id.* at 346-48, 353-54.

282. RORTY, IRONY, *supra* note 1, at 22.

Nietzsche, Derrida, or Foucault seek is not the sort of thing that *could* ever be embodied in social institutions.”<sup>283</sup> What is worse for Rorty, they “cannot offer the same sort of social hope as metaphysicians offer,”<sup>284</sup> because their redescription of the situation, due to their own anti-necessitarian premise, can never become a sort of policy proposal which explains how to fix the problem.<sup>285</sup> Thus, believing “as *public* philosophers they [Nietzsche, Heidegger and Derrida] are at best useless and at worst dangerous,”<sup>286</sup> Rorty suggests “[p]rivatize the Nietzschean-Sartrean-Foucauldian attempt at authenticity and purity, in order to prevent yourself from slipping into a political attitude which will lead you to think that there is some social goal more important than avoiding cruelty.”<sup>287</sup> Such an attitude is, according to Rorty, *anti-liberalism*.<sup>288</sup>

So, should we ignore, repress, or exile Kennedy, as “at best useless and at worst dangerous” for the public realm, which should be entrusted to liberal legalists? Again, this seems to be the way the mainstreamers (e.g., Fiss) have treated Kennedy’s views,<sup>289</sup> as *anti-liberal legalism*, and I believe that it is the least productive way to read Kennedy. Rather, I want to suggest that mainstreamers read Kennedy in juxtaposition with Rorty. Remember that Rorty, as a postmodernist, criticizes not only “Foucault’s attempt to be an ironist without being a liberal,”<sup>290</sup> but also “Habermas’s attempt to be a liberal without being an ironist,”<sup>291</sup> that is, an attempt to *found* liberalism on a metaphysical concept such as “communicative reason.”<sup>292</sup> Recall that, instead, Rorty is pursuing “the possibility of a liberal utopia: one in which ironism, in the relevant sense, is universal,”<sup>293</sup> where Foucault would become a liberalist and Habermas would become an ironist. In my opinion, Kennedy and Rorty are pursuing parallel, rather than identical, projects<sup>294</sup> to identify *the middle term*

283. *Id.* at 65.

284. *Id.* at 91.

285. The anti-necessitarian ironist:

cannot claim that adopting her redescription of yourself or your situation makes you better able to conquer the forces which are marshaled against you. On her account, that ability is a matter of weapons and luck, not a matter of having truth on your side, or having detected the “movement of history.”

*Id.*

286. *Id.* at 68.

287. *Id.* at 65.

288. “I borrow my definition of ‘liberal’ from Judith Shklar, who says that liberals are the people who think that cruelty is the worst thing we do.” RORTY, IRONY, *supra* note 1, at xv.

289. *See supra* text accompanying notes 4-9.

290. RORTY, IRONY, *supra* note 1, at 65.

291. *Id.*

292. *Id.* at 65-69.

293. *Id.* at xv.

294. There are at least two quite important differences between Kennedy and Rorty. First, as seen above, Rorty’s definition of “liberalism” is borrowed from Judith Shklar’s “cruelty is the worst thing we do.” *See supra* note 288. On the other hand, Kennedy is targeting “Liberalism” as political ideology, that is, “universalization projects” of “liberalism and conservatism.” CRITIQUE, *supra* note 2, at 46-48; *see also supra* note 40. Therefore, Rorty’s “liberalism” would be regarded as a specific position within Kennedy’s “liberal” projects.

between the metaphysics and the ironism, or anti-foundationalist view of liberal legalism (liberalism).<sup>295</sup> If you think that you will necessarily fall into “at best useless and at worst dangerous” anti-liberal legalism as soon as you abandon the metaphysical foundation of liberal legalism, then you merely repeat another version of “Cartesian Anxiety” (either the metaphysics or the ironism).<sup>296</sup> Although ironism has been regarded as hostile to any form of social order or human solidarity, “[h]ostility to a particular historically conditioned and possibly transient form of solidarity is not hostility to solidarity as such.”<sup>297</sup> Such a call for the middle term is also true to Kennedy’s critique of liberal legalism.

However, in what way on earth can the ironist, who has lost his faith in any metaphysical idea, such as rationality or coherence, become a liberalist or a liberal legalist? Rorty imagines his “liberal utopia” as being achieved not on the basis of static demonstration of the metaphysical truth of, for example, human nature, but through the dynamic process of creation, rather than discovery, of solidarity as *moral sensitivity*:

[S]olidarity is not thought of as recognition of a core self, the human essence, in all human beings. Rather, it is thought of as the ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared with similarities with respect to pain and humiliation – the ability to think of people wildly different from ourselves as included in the range of “us.”<sup>298</sup>

Let us see another passage:

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Second, in his own project, Kennedy’s mpm is connected with leftism, rather than liberalism. It is true that Kennedy is criticizing the metaphysics (“rightness”), but it is the leftists’ one rather than Liberalists’. CRITIQUE, *supra* note 2, at 11-12, 363-64. Therefore, I am not identifying Kennedy with Rorty, but just trying to reconstruct Kennedy by using Rorty. *See also infra* note 321.

295. For example, Rorty states:

I shall try to show that the vocabulary of Enlightenment rationalism, although it was essential to the beginnings of liberal democracy, has become an impediment to the preservation and progress of democratic societies. I shall claim that the vocabulary . . . which revolves around notions of metaphor and self-creation rather than around notions of truth, rationality and moral obligation, is better suited for this purpose.

I am not, however, saying that the Davidsonian-Wittgensteinian account of language and the Nietzschean-Freudian account of conscience and selfhood which I have sketched provide “philosophical foundations of democracy.” For the notion of a “philosophical foundation” goes when the vocabulary of Enlightenment rationalism goes. These accounts do not ground democracy, but they do permit its practices and its goals to be redescribed.

RORTY, IRONY, *supra* note 1, at 44. *See also supra* text accompanying notes 272-77.

296. *See supra* note 50 and accompanying text.

297. RORTY, IRONY, *supra* note 1, at xv.

298. *Id.* at 192.

Solidarity is not discovered by reflection but created. It is created by increasing our sensitivity to the particular details of the pain and humiliation of other, unfamiliar sorts of people. Such increased sensitivity makes it more difficult to marginalize people different from ourselves by thinking, "They do not feel it as *we* would," or "There must always be suffering, so why not let *them* suffer?"<sup>299</sup>

Thus, even the ironist who cannot commit himself to the politics of truth, according to Rorty, can still project the politics of social hope in the form of the *narrative*, rather than the theory,<sup>300</sup> of solidarity. And, what about Kennedy? It seems to me that he is also trying to produce the parallel, rather than the identical, narrative of "ad hoc paternalism," in order to *redescribe, rather than merely "trash," liberal legalism.*

### C. Hopeful Narrative

After *Critique*, how should the judge decide the case, for example, of the compulsory terms? Kennedy's critique has already reduced (all?) the available justificatory discourses into a quasi-mechanical system of dualist logic which (always?) goes either way with accompanying various forms of reasons and results, thereby requiring the judge to choose one of them without recourse to any metaphysical ground. So, is Kennedy just suggesting the judge *either* indulge in the disinterested formalist operation of legal arguments, *or* make a firm and enthusiastic decision within the vacancy of normativity? Both are wrong. It seems that "ad hoc paternalism" in *Paternalist Motives*,<sup>301</sup> which is exceptionally presented by a cautious Kennedy to justify the imposition of the compulsory terms, is an attempt to *redescribe*, from the perspective of the "liberal ironist," legal argument in particular and liberal legalism in general.

Kennedy would argue that even the ironist judge, who has lost his faith in any metaphysical concepts, such as legal determinacy, efficiency and so forth, could justify his decision to impose the compulsory terms on the basis of moral sentiment of "empathy," that is, paternalism. Rorty, in order to justify his solidarity, relies on anti-Kantian views of morality,<sup>302</sup> particularly Wilfrid Sellars's thesis of morality as "we-intentions" ("the core meaning of 'immoral action' is 'the sort of thing *we* don't do'").<sup>303</sup> Likewise, Kennedy conceptualizes paternalism in general as contingently constituted from local phenomenon of "lived intersubjectivity," rather than deductively derived from some universalistic principle (e.g., ability to judge). That is, in order to act paternalistically, the judge must intuitively feel that the addressee is "suffering from some form of false consciousness," in which she could not arrange the

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299. *Id.* at xvi.

300. "Ironist theory must be narrative in form because the ironist's nominalism and historicism will not permit him to think of his work as establishing a relation to real essence . . ." *Id.* at 101.

301. See generally *Paternalist Motives*, *supra* note 88, at 638-49.

302. RORTY, IRONY, *supra* note 1, at 57-60 (discussing Dewey, Oakeshott, and Rawls all as Enlightenment liberalists without Enlightenment rationalism, that is, ironical liberalists).

303. *Id.* at 59 (footnote omitted); see also *supra* text accompanying notes 298-300.

contractual terms which she would have wanted otherwise.<sup>304</sup> Such intersubjectivity is available only on the basis of “unity” between the judge and the addressee, in which the judge can feel that he has direct access to the addressee’s understanding of the world, thereby being “not in the position of ‘supposing’ or ‘hypothesizing’ that the [addressee] feels in a particular way.”<sup>305</sup> Again, following Rorty, you might call Kennedy’s paternalism a version of an anti-Kantian, this time, in particular, Freudian, view of morality (“‘goodness’ is something irrationally concrete, something to be captured by imagination rather than intellect”).<sup>306</sup>

Needless to say, this type of “intimate knowledge” is not demonstrable in the metaphysical sense, which is the last thing that the ironist wants, but “ad hoc” or “unprincipled” by its nature. But, of course, to ironist Kennedy, such intuitive knowledge is “more real and more reliable than knowledge of the other built up by formulating and testing hypotheses and models.”<sup>307</sup> The mainstreamers, whom Kennedy would call the metaphysicians, tend to want to conceal such an intuitive paternalist decision for compulsory terms under the guise of an objective test, such as efficiency, “unequal bargaining power,” and so forth.<sup>308</sup> Again, however, to non-Platonist Kennedy, a decision in the form of merely following the rule is just another example of “denial” of, or escape from, the decisionist moment. All the judge needs to do in making a paternalist decision is to make a “correct intuition about [the addressees’] needs and an attitude of respect for their autonomy.”<sup>309</sup> Quite importantly, the reason why Kennedy succeeds in internal critique of those objective tests is that their discourse “depends in a major way on what kind of general character we attribute to large numbers of people of whom we have little concrete knowledge.”<sup>310</sup> That is, the problem lies in the fact that the judge

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304. *Paternalist Motives*, *supra* note 88, at 638.

305. *Id.*

306. RORTY, IRONY, *supra* note 1, at 152. Citing Nabokov, Rorty further explains the Freudian view of morality as follows:

[T]he only thing which can let a human being combine altruism and joy, the only thing that makes either heroic action or splendid speech possible, is some very specific chain of associations with some highly idiosyncratic memories . . . . But it is neither a metaphysical claim about the “nature” of “goodness” nor an epistemological claim about our “knowledge” of “goodness.” Being impelled or inspired by an image is not the same as knowing a world. We do not need to postulate a world beyond time which is the home of such images in order to account for their occurrence, or for their effects on conduct.

*Id.* at 153-54 (footnote omitted).

307. *Paternalist Motives*, *supra* note 88, at 639.

308. *Id.* at 645-46.

309. *Id.* at 646. But to satisfy these requirements does not necessarily warrant successful intervention nor immunize the judge from his failure. *See infra* text accompanying notes 315-19.

310. *Paternalist Motives*, *supra* note 88, at 600 n.16.

arbitrarily hypothesizes or postulates “the generalized other”<sup>311</sup> (e.g., the buyers in general). Rather, the judge must face the addressee as “the concrete other,” as she appears in the judge’s phenomenal world, thereby describing her pain directly as if it were the judge’s own pain.<sup>312</sup>

Thus, just as Rorty’s solidarity, the ironist’s ad hoc paternalism cannot but help take the form of narrative rather than theory (demonstration),<sup>313</sup> which means that ad hoc paternalism is “not discovered by reflection but created.”<sup>314</sup> To the ironist judge in the pluralist society, this is very important. For, as Kennedy points out, there is always the possibility that the judge may make a wrong intuition about the addressee’s preference, may not understand the hidden consequential benefit of the addressee’s “mistaken” conduct, and may be criticized for his (unintended) arrogance by the addressee; all of which enormously increase the risks of the paternalist intervention.<sup>315</sup> Nevertheless, or therefore, Kennedy seems to encourage the judge to go beyond his “limits of empathy,”<sup>316</sup> thereby enlarging “we-intentions.” First, he must start to deal with “people who are not at a great distance, who are not strangers.”<sup>317</sup> Then, he must “investigate the consciousness of those he isn’t supposed to mess with” by “breaking down the barriers of segregation by knowing others, rather than just making rules for them.”<sup>318</sup> Finally, the judge must “mobilize the groups on whose part [he] may have to act paternalistically” in order that “there’s more chance they will be able to dispense with [his] services.”<sup>319</sup>

As a consequence, it seems that Kennedy is trying to redescribe not only a particular legal interpretation on compulsory terms, but also liberal legalism in

311. I owe the dichotomy of “the generalized other” and “the concrete other” (will appear just below) to Seyla Benhabib. See generally SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 148-77 (1992).

312. *Paternalist Motives*, *supra* note 88, at 639.

313. Rorty states:

[T]hose overlapping words [expressing solidarity] — words like “kindness” or “decency” or “dignity” — do not form a vocabulary which all human beings can reach by reflection on their natures. Such reflection will not produce anything except a heightened awareness of the possibility of suffering. It will not produce a *reason to care* about suffering. What matters for the liberal ironist is not finding such a reason but making sure that she *notices* suffering when it occurs. Her hope is that she will not be limited by her own final vocabulary [e.g., the law (according to the author)] when faced with the possibility of humiliating someone with a quite different final vocabulary.

For the liberal ironist, skill at imaginative identification does the work which the liberal metaphysician would like to have done by a specifically moral motivation — rationality, or the love of God, or the love of truth [, or legal justification (according to the author)].

RORTY, *IRONY*, *supra* note 1, at 93. See also *supra* text accompanying notes 302-06 (the discussion on Freudian view of morality).

314. RORTY, *IRONY*, *supra* note 1, at xvi.

315. *Paternalist Motives*, *supra* note 88, at 646-48.

316. *Id.* at 649.

317. *Id.*

318. *Id.*

319. *Id.*

general, on the basis of a narrative of empathy parallel with Rorty's narrative of solidarity, or on the basis of social hope of gradual expansion of "we-intentions." Here, I am reinterpreting Kennedy's ad hoc paternalism as a general theory of the role of the judge as well. In fact, irrespective of his mpm attitude against reconstruction, Kennedy writes *recklessly*:

[T]he decision maker setting the groundrules as a state actor in a society such as ours, riven by group divisions that are divisions of consciousness, is one of the few people of whom we can demand that he represent our collective commitment to the transcendence of pluralism in the name of truth.<sup>320</sup>

Am I going too far when reading the above passage in juxtaposition with Rorty's slogan of "liberal utopia:" "[w]e should stay on the lookout for marginalized people — people whom we still instinctively think of as 'they' rather than 'us' [and] should try to notice our similarities with them"?<sup>321</sup> As a *series of everyday micro practices* to try to transcend the divided consciousness, rather than as a metaphysically regulated static machine, should we re-imagine liberal legalism, as Kennedy seems to argue, from the position of Gramscian organic intellectuals?<sup>322</sup>

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320. *Id.* at 648.

321. RORTY, IRONY, *supra* note 1, at 196. Needless to say, I am not arguing that this slogan includes all of the reconstructive aspects of Kennedy. For example, even in *Paternalist Motives*, Kennedy presents a *distributive* strategy for legal interpretation. See generally *Paternalist Motives*, *supra* note 88, at 609-14.

322. For example, Gramsci writes:

A philosophy of praxis cannot but present itself at the outset in a polemical and critical guise, as superseding the existing mode of thinking and existing concrete thought (the existing cultural world). First of all, therefore, it must be a criticism of "common sense", basing itself initially, however, on common sense in order to demonstrate that "everyone" is a philosopher and that it is not a question of introducing from scratch a scientific form of thought into everyone's individual life, but of renovating and making "critical" an already existing activity. It must then be a criticism of the philosophy of the intellectuals out of which the history of philosophy developed . . . .

ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 330-31 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., International Publishers 1971) (footnote omitted). Although I am not sure whether it is appropriate to juxtapose Rorty with Gramsci, the following passage from Rorty might be helpful for considering this point, or the role of (legal) intellectuals in general:

He [the liberal metaphysician] thinks that the task of the intellectual is to preserve and defend liberalism by backing it up with some true propositions about large subjects, but she [the liberal ironist] thinks that this task is to increase our skill at recognizing and describing the different sorts of little things around which individuals or communities center their fantasies and their lives. The ironist takes the words which are fundamental to metaphysics, and in particular to the public rhetoric of the liberal democracies, as just another text, just another set of little human things . . . . Her liberalism does not consist in her devotion to those particular words but in her ability to grasp the function of many different sets of words.

## CONCLUSION

In the eyes of a Continental legal theorist, Duncan Kennedy's theory appears very fascinating. In this essay, I have tried to identify one of the reasons for its fascination, which I think the United States legal theorists have not realized yet, as Kennedy's *ambivalence* toward liberal legalism. Many mainstreamers, such as Owen Fiss, seem to have misunderstood Kennedy's theory, along with other works of Critical Legal Studies, which are caricatured as advocating the slogan "law is politics," as an *anti-liberal legalism*.<sup>323</sup> On the one hand, however, Kennedy, at the extension of the Dworkinian critique of the Hartian positivism, has been trying to elucidate the structure and the function of policy argument, which is prevalent within the (distinctively United States) common law tradition, in such a practical way that it has the potential to sophisticate, rather than destroy, the liberal legalist practice.<sup>324</sup>

On the other hand, however, his critical/irrationalist sting of mpm prevents some mainstreamers, such as Neil MacCormick, from equating Kennedy's theory with *ordinary liberal legalism*.<sup>325</sup> In stressing the manipulability of legal reasoning, Kennedy has lost his faith in the "final vocabulary," thereby taking the "ironist" posture against any metaphysical claims, such as determinacy and coherence. Again, however, Kennedy has not merely indulged himself in his "private" attempts to produce the transgressive artifact, but presented a "public" goal to redescribe liberal legalist practice along the line of the concrete narrative of "ad hoc paternalism."<sup>326</sup> Therefore, it seems that Kennedy has been trying to pursue *the middle term between anti-liberal legalism and ordinary, now that I can call metaphysical, liberal legalism*, that is, *ironical liberal legalism*, in which liberal legalist practice, because of its lack of metaphysical foundation, will be reimagined as the self-evolutionary process toward, Kennedy hopes with Rorty, realization of "empathy" or "solidarity."

But, isn't it too bold to say that Duncan Kennedy, the leader of Critical Legal Studies, is, even though the adjective "ironical" is put forward, a liberal legalist? Maybe this is so. But, I believe, and this is what "internal critique" means: that in order to criticize devastatingly, you have to truly know the intended target. And, as pointed out over and over again, at least in the eyes of a Continental legal theorist, Kennedy seems to (re)describe liberal legalism very plausibly, indeed more plausibly than liberal legalists themselves have done. So, what Kennedy has been trying to do is, appropriating Rorty again, a "therapeutic rather than constructive" project which is "designed to make the reader [the believer or the critic of liberal legalism (according to the author)] question his own motives for philosophizing rather than to supply him with a

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RORTY, IRONY, *supra* note 1, at 93-94.

323. *See supra* text accompanying notes 4-9.

324. *See supra* sections II-E and III-E.

325. *See supra* text accompanying note 12.

326. *See supra* section IV.

new philosophical program.”<sup>327</sup> Is there anything more critical than such an ironist attitude? And, although Kennedy himself, as a cautious critic of liberal legalism, would never claim this, I believe that it would be such a skeptical view of itself, as provided by Critical Legal Studies in general and Duncan Kennedy in particular, that liberal legalism depends on for its prosperity.<sup>328</sup>

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327. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 5-6 (1979). Frankenberg also regards CLS as a therapeutic project against constructive compulsion, though seemingly without direct reference to Rorty. Frankenberg, *supra* note 5, at 389-91.

328. In other words, Kennedy seems to have been suggesting us to get ‘matured.’ Citing Isaiah Berlin, Rorty also writes:

Berlin ended his essay by quoting Joseph Schumpeter, who said, “To realise the relative validity of one’s convictions and yet stand for them unflinchingly, is what distinguishes a civilized man from a barbarian.” Berlin comments, “To demand more than this is perhaps a deep and incurable metaphysical need; but to allow it to determine one’s practice is a symptom of an equally deep, and more dangerous, moral and political immaturity.” In the jargon I have been developing, Schumpeter’s claim that this is the mark of the civilized person translates into the claim that the liberal societies of our century have produced more and more people who are able to recognize the contingency of the vocabulary in which they state their highest hopes — the contingency of their own consciences — and yet have remained faithful to those consciences.

RORTY, *IRONY*, *supra* note 1, at 46 (footnote omitted). It seems to me that Kennedy has been trying to cure “deep metaphysical need” of liberal legalists to *found* their practice on some absolute ground such as determinacy or coherence. And, I believe that Kennedy would agree on the “pragmatized” or “de-philosophized” liberalist claim, as long as it is regarded as an descriptive or interpretive claim, that “liberal institutions would be all the better if freed from the need to defend themselves in terms of such foundations.” *Id.* at 57 (discussing Dewey, Oakeshott, and Rawls).