

I

The Rise and Fall of the Harvard School

What was structuralism? Who were the structuralists? Why did they come, and what did they want? A generation after structuralism first took Paris by storm, there remains little agreement about whether structuralism was a movement or something else, who embraced the name and who recanted, and of what use the label “structuralism” might have after the apparent victories of a *post*structuralism.¹ In any case, the intellectual history of structuralism coalesces around a common starting point, and the naming of names: Claude Lévi-Strauss, Roman Jakobson, Roland Barthes, Michel Foucault, Jacques Lacan, Jean Piaget, Louis Althusser, and Paul Ricoeur fill the typical list.² These names signal a certain methodological posture with respect to the “the human sciences,” and indeed, there is no single domain (save linguistics) in which structuralism might have been thought of as having an indigenous beginning. In its heyday, structuralism travelled far and wide, visiting the lands of anthropology, history, classics, religion, literature, philosophy, psychology, and sociology, to name a few. Nevertheless, canons are slippery. “Barthes might have once adhered to structuralism, but certainly not after *S/Z!*” “Foucault despised structuralism, he can’t be on the list!” “Ricoeur was a phenomenologist!” And so on.

Thus, while I readily concede that the list of theorists and the list of disciplines are moving targets, there is a point on which virtually all sides

¹ See Phillip Lewis, “The Post-Structuralist Condition,” in *Structuralism: Critical Concepts in Literary and Cultural Studies* (Johnathan Culler, ed.) (London: Routledge, 2006).

² François Dosse presents a helpful overview in *History of Structuralism*, Vols. I and II (Deborah Glassman, trans.) (Minneapolis: University of Minnesota Press, 1998).

agree. This is an agreement about what is not and has never been listed: Law. An effect of this chapter, I hope, is to expand those lists a bit, for as I argue below, Duncan Kennedy and Roberto Unger founded what I will call the Harvard School of legal structuralism.

The Harvard School of legal structuralism came into being between 1975 and 1984. Its principal agents were junior professors Duncan Kennedy and Roberto Unger, each hired in the early 1970s, though others like Gerald Frug and David Kennedy, and some not even based in the United States, such as Martti Koskenniemi, played important supporting roles.³ My argument is that the Harvard School was a manifestation of the structuralist impulse originating in France and which eventually made its way to the United States, most famously at the Johns Hopkins Conference of 1966.⁴ But before we arrive at the Harvard Law School of the 1970s and bear witness to the particular influence of Paris on Cambridge, I will recount just a bit of the relevant intellectual context. This bit of recounting is hardly exhaustive, and I have tailored it with the narrow purpose of introducing the Harvard School's approach to legal structuralism.

On the Road to Legal Structuralism

The French intellectual universe of the twentieth century is sometimes imagined as a series of stellar lights passing in the night sky. If it is a postwar story, the first light to illuminate the scene is the one called Jean-Paul Sartre. Sartre's existential philosophy is then eclipsed by the constellation of Claude Lévi-Strauss's structural anthropology, which in turn swallowed up in the glare of Jacque Derrida's supernova that was deconstruction.⁵ But hovering in and around all of this like so much dark matter was a reconceived idea of language,⁶ and in particular, the influence of the Swiss linguist Ferdinand de Saussure's *Course on General*

³ It is worth emphasizing once again that I am not listing those founding members of the critical legal studies movement. My focus is only on those scholars developing structuralist legal analysis.

⁴ The papers are collected in *The Structuralist Controversy: The Languages of Criticism and the Sciences of Man* (Richard Macksey and Eugenio Donato, eds.) (Baltimore: The Johns Hopkins University Press, 2007).

⁵ For a different chronology, see Peter Gordon, "Hammer without a Master: French Phenomenology and the Origins of Deconstruction (or, How Derrida Read Heidegger)," in *Histories of Postmodernism* (Mark Bevir et al., eds.) (London: Routledge, 2008).

⁶ See, e.g., *The Linguistic Turn: Essays in Philosophical Method* (Richard Rorty, ed.) (Chicago: University of Chicago Press, 1967); Terry Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 2008).

Linguistics.⁷ First put into print by Saussure's students in 1916, Saussure's *Course* offered a new platform for understanding the semiology of language systems, and it is here that structuralism is typically thought to begin.⁸ Indeed, as the historian François Dosse has suggested, "In order to understand the structuralist paradigm . . . we have to begin with the Saussurean break, since an entire generation read and considered [the *Course*] to be the founding moment."⁹

For present purposes, Saussure's two distinctions of *langue/parole* and synchronic/diachronic are the most relevant. *Langue* refers to the fundamental rules of syntax shaping the grammatical horizon of the linguistic structure. As Saussure explained, the *langue* represents "the whole set of linguistic habits which allow an individual to understand and be understood."¹⁰ Denying it a natural or necessary character, Saussure situated the *langue* as a social construction with a determinate scope. Its contents were fixed and closed, and in the background context of the system, the *langue* governed the forms in which the language was uttered.¹¹ In contrast is *parole*, the open, arbitrary, and individually created speech-act.¹² Thus, where *langue* is prereflective, preconceptual, and often out of mind, *parole* is the surface manifestation. Where *langue* is unnoticed syntax, *parole* is deliberate utterance. Where *langue* represents a field of coercion, *parole* is free.¹³

⁷ Ferdinand de Saussure, *Course in General Linguistics* (Wade Baskin, trans.) (New York: Philosophical Library, 1959), p. 77. See also, John Sturrock, *Structuralism* (Malden, UK: Wiley-Blackwell, 2003), pp. 6–10; *Critical Theory: A Reader* (Douglas Tallack, ed.) (New York: Harvester Wheatsheaf, 1995), p. 11. See also Eero Tarasti, *Existential Semiotics* (Bloomington: Indiana University Press, 2001).

⁸ Jonathan Culler, *Ferdinand de Saussure* (Ithaca, NY: Cornell University Press, 1986); John Joseph, *Saussure* (Oxford: Oxford University Press, 2012); Anthony Giddens, *Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis* (Berkeley, University of California Press, 1979), p. 10.

⁹ Dosse, *History of Structuralism*, supra note 2, at 45.

¹⁰ Saussure, *Course in General Linguistics*, supra note 7, at 77.

¹¹ Id. at 73. ("A language constitutes a system. In this one respect . . . language is not completely arbitrary but is ruled to some extent by logic; it is here also, however, that the inability of the masses to transform it becomes apparent. The system is a complex mechanism that can be grasped only through reflection; the very ones who use it daily are ignorant of it.")

¹² Id. at 76. ("Nothing could be more complex than [the way in which language evolves]. As it is a product of both the social force and time, no one can change anything in it, and on the other hand, the arbitrariness of its signs theoretically entails the freedom of establishing just any relationship between phonetic substance and ideas.")

¹³ Rosalind Coward and John Ellis, *Language and Materialism: Developments in Semiology and the Theory of the Subject* (London: Routledge, 1977), p. 12.

If the *langue* is only discoverable through a study of *parole*, how do we conduct the study? Historically, looking at the development of English, or French, or whatever, in evolutionary time? How much time? How do we fix the limits of study? It is here that we encounter Saussure's second distinction, the distinction between synchronic and diachronic analysis.¹⁴ For some, diachronic study was the only way to understand how languages formed, through historical, functionalist, and evolutionary treatments of the way in which language changed over time.¹⁵ This is the diachronic search for historical origins, where it all started, and what happened from there.¹⁶ Saussure contrasted this with the synchronic, in which the totality of the language was studied in series of frozen moments, snapshots in time.¹⁷ To be sure, Saussure recognized that the agent's *parole* necessarily changes the *langue* over time. But the structuralist method, in its search for a total understanding of the system, bracketed out temporal links in a causal chain in favor of a static and relational analysis of the system. Thus, language was to be "explained" neither by the "real" world to which language seemed to be related, nor by the agent's operation of the language over time. Rather, linguistic explanation followed purely through reference to relations in the interspace between a background system of norms and the uttered manifestations made possible by that background. As Jonathan Culler put it, "despite pretensions to causal analysis, one might say that what is being offered is a structural rather than a causal explanation: one attempts to show why a particular action has a significance by relating it to the system of underlying functions, norms, and categories which make it possible."¹⁸

In the starry night of the French 1960s, it was increasingly common to analyze social practices in the light of Saussure's linguistic devices. This socio-linguistic posture had been a work in progress since World War II, with Lévi-Strauss at the helm.¹⁹ In his wake, Saussure's semiology was taken beyond linguistics and applied to much of the social world, including the rituals of familial relations, myth-making, cuisine, and poetry, among other things.²⁰ That is, the structuralist took a given field, say

¹⁴ Saussure, *General Course in Linguistics*, supra note 7, at 79–100.

¹⁵ *Id.* ¹⁶ *Id.* ¹⁷ *Id.* at 82.

¹⁸ Culler, Ferdinand de Saussure, supra note 8, at 88.

¹⁹ See, e.g., Claude Lévi-Strauss, *Structural Anthropology* (New York: Anchor Books, 1967); Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1966). For discussion, see Edmund Leach, "Structuralism in Social Anthropology," in *Structuralism: An Introduction* (David Robey, ed.) (Oxford: Clarendon Press, 1973).

²⁰ See, e.g., *The Structuralists: From Marx to Lévi-Strauss* (Richard T. De George and Fernande M. De George, eds.) (New York: Anchor Books, 1972), p. ix.

fashion, and suggested that the style of dress in a particular community could be explained by way of Saussure's view of the language system.²¹ Just as French is governed by a deep totality of coding means (*langue*), Barthes suggested that there was a language of fashion – fashion was *uttered* through the medium of dress.²² And just as there are a virtually unlimited number of French utterances, so too are there many ways to dress.

But structuralism was not simply a proxy for the obvious sense of open-endedness apparent in our choices to say certain things or wear certain outfits. More importantly, structuralism was also an argument about the background *constraints* on what we say, or what we wear. These limits are found in the structure's *langue*, governing and shaping the surface-level forms in ways that were almost always invisible to the user of the grammar, at least when everything was working normally. And so, to repeat, structuralists sought to explain what appeared to be random social practices as constituted and controlled by these backgrounded grammars. As Culler explained, “structuralism thus involves the attempt to spell out, explicitly, what members of a culture know without knowing it: the structures that underlie cultural practice, and make possible, for instance, people's judgments about what is ordinary, strange, meaningful, or meaningless.”²³

What the structuralists were *not* generally interested in explaining, however, was the role of individual agency, the moment of existential decision that might operate from within the structure.²⁴ And it is here that the conflict between structuralism and existential phenomenology seemed its most severe. For whereas structuralist analysis seemed decisively in favor of dehumanizing the analysis of structure and agent,

²¹ For the broad strokes, see Gilles Deleuze, “How Do We Recognize Structuralism?” in *The Two-Fold Thought of Deleuze and Guattari: Intersections and Animations* (Charles J. Stivale, ed.) (New York: Guilford Press, 1998), p. 254.

²² Jonathan Culler, “Introduction,” in *Structuralism: Critical Concepts in Literary and Cultural Studies* (Johnathan Culler, ed.) (London: Routledge, 2006), p. 3 (“To investigate neckties, for instance, structuralism would attempt to reconstruct (a) the structure of neckties themselves (the oppositions – wide/narrow, loud/subdued – that enable different sorts of neckties to bear different meanings for members of a culture) and (b) the underlying ‘vestimentary’ structures or system of a given culture (how do neckties relate to other items of clothing and the wearing of neckties to other socially-coded actions?)”). See also Roland Barthes, *The Fashion System* (Matthew Ward and Richard Howard, trans.) (Berkeley: University of California Press, 1990).

²³ Culler, *supra* note 22, at 3.

²⁴ Philippe Descola, *Beyond Nature and Culture* (Chicago: University of Chicago Press, 2013), pp. 110–111.

existential phenomenology was entirely committed to the reverse. Or, at least, so the story went.²⁵

Before moving forward, however, I should emphasize that none of the Harvard structuralists worked under a single set of influences. Duncan Kennedy, for example, was very much indebted to both Sartre's phenomenology and Lévi-Strauss's structuralism, whereas Unger's relation to those thinkers was more ambiguous.²⁶ But the question of influence is, in some important ways, not about what *caused* the Harvard School to turn out as it did. The question of influence, rather, is about the general intellectual milieu in which the Harvard School ought to be situated. If structuralism is a family of thinkers and disciplines, the Harvard School was certainly a part of it.

The Rise of Legal Structuralism (1975–1984)

Duncan Kennedy circulated the first of the Harvard School's works – *The Rise and Fall of Classical Legal Thought* – in 1975. The first proper publication, however, belonged to Roberto Unger, with his *Knowledge and Politics* (1975), which was promptly followed by his *Law in Modern Society* (1976). Kennedy's two subsequent and lengthy articles, "Form and Substance in Private Law Adjudication" (1976) and "The Structure of Blackstone's Commentaries" (1979), round out the Harvard School's basic platform. Other Harvard Law Professors, such as Gerald Frug and David Kennedy, would very soon apply that platform to particular semiotic subsystems, beginning in 1980.²⁷ Eventually, legal fields as diverse as international law, labor law, antitrust law, local government law, and property and contract, would all serve as vehicles for structuralist analysis.²⁸

²⁵ For discussion, see Hugh Silverman, *Textualities: Between Hermeneutics and Deconstruction* (New York: Routledge, 1994). I return to this issue in Chapter 2.

²⁶ Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington, DC: Beard Books, 2006); Roberto Unger, *Knowledge and Politics* (New York: Free Press, 1975), pp. 127–130. In Unger's case, I should clarify that while he is ambiguous on his precise intellectual relations with the structuralists – sometimes very critical, sometimes very friendly – his views are available at length in his nonlegal works. See Roberto Unger, *Social Theory: Its Situation and Its Task* (Cambridge: Cambridge University Press, 1987).

²⁷ Gerald E. Frug, The City as a Legal Concept, 93 *Harvard Law Review* 1057 (1980); David Kennedy, Theses about International Law Discourse, 23 *German Yearbook International Law* 353 (1980).

²⁸ Duncan Kennedy provides a list of exemplary works in *The Rise and Fall of Classical Legal Thought*, supra note 26, at xliii.

I explain Harvard School structuralism in three parts. The first concerns the interaction between existential phenomenology and legal structuralism in the construction of the legal subject: the *jurist*. The second turns to the legal language of liberal legalism with a focus on that language's constitutive antinomies. The third continues the discussion of liberal legalism, but shifts from *langue* to *parole*, and the implications of lexical indeterminacy.

1 *The Author Isn't Dead; He's a Jurist*

I begin with some conventional Cartesian talk, with a view toward quickly complicating it. The legal subject is an agent we can call the *jurist*. The jurist is anyone trained to “think like a lawyer,” whether a judge, professor, attorney, or some other legal sophisticate. In contrast is the legal object, law's language system.²⁹ In the analytic philosophy of language, we might then go about understanding the various elements in the subject-object interface.³⁰ But the Harvard School's approach to this subject-object problem is phenomenological and semiotic rather than analytic.³¹ The legal language never has a positive essence or any ontologically uniform objectivity that might be conceived or articulated independent of the jurist's consciousness. The reality of the language englobes the jurist, and only manifests once it is already in the interactive space of juridical speech. This embeddedness, in which legal subject and legal object are now really two words for what is practically the same thing, is what Kennedy called “legal consciousness.”³² And legal consciousness is “legal thought,” “the conceptual apparatus, the reasoning techniques, the legal ideals and the key images that the elite bar, including judges, treatise writers and important lawyers, deploy when they make legal arguments or give opinions or declarations about what the law ‘is’ or ought to be.”³³ Consequently, the Harvard School's jurist is not some autonomous subject rationally contemplating an independent world in the warmth of his man-cave. For even as I began by noting the existence of a legal subject (the jurist) and a legal object (the language), these two elements become indistinguishable in the milieu of legal thought, manifested in what I will later define as a “style of argumentative practice.”

²⁹ Unger, *Knowledge and Politics*, supra note 26, at 80.

³⁰ See, e.g., J. L. Austin, *How to Do Things with Words* (J. O. Urmson and Mariana Sbisá, eds.) (Cambridge, MA: Harvard University Press, 1975); John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969).

³¹ Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buffalo Law Review* 205 (1979), p. 209.

³² *Id.* at 2. ³³ *Id.* at ix.

Drawing on Sartre's reworking of Husserl in *Being and Nothingness*, Kennedy suggested that the legal language had an existence-as-appearance made real in the encounter with the jurist's legal consciousness. That is, while it could be that a universe of law existed outside of or beyond its solicitations to legal consciousness, there was no way to understand that "object" in any meaningful way. The Harvard School's approach, in other words, was not empiricist. The meaningful existence of the legal language could only be found in its "adumbrations" for and "solicitations" of the jurist's consciousness. To further underline the point, there was nothing ontologically independent about the legal language – the language of law never comes *to* the jurist's consciousness. The structure of the legal language was always already the very stuff of legal consciousness. Legal consciousness does not exist in the absence of the legal language.

The Sartrean variety of phenomenological existentialism counsels an absolute view of freedom through consciousness – consciousness *decides*, intends to encounter an object, always. But a Sartrean freedom of decision immanent in consciousness, in the work of both Kennedy and Unger, was always realized only in the constraints of the legal language and its backgrounded interactions *with* legal consciousness. Legal consciousness, in other words, always exists in a unity of freedom and constraint. This is a version of what Sartre called the "paradox of freedom," in which consciousness is at once totally determined and totally free. The situation of the legal object may be totally determined – the jurist has no control over the existence of the legal materials that appear to her. Those materials are sourced in the decisions of other people, often ranging over the course of several centuries, and it would be silly to suggest that the jurist is "free" to conceptualize those materials any way she might like. Nevertheless, while the situation of the legal object is determined, the meaning of the object is open: the jurist *always* has a decision to make about what to do with the situated materials, which materials to read, which materials to ignore, which materials to read closely, and so on. It is because the jurist *always* faces such decisions that we sense the resonance of Sartre's remark: "We are condemned to be free."

For Kennedy and Unger, this attachment to an existential conception of freedom and constraint was consistently fastened to the structuralist view of law.³⁴ Like Kennedy, Unger believed that legal consciousness was

³⁴ Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976), p. 136; Unger, Knowledge and Politics, *supra* note 26, at 124;

a structure of argumentative practice, a practice that was neither logical nor causal,³⁵ but manifested as a juridical experience.³⁶ As Unger explained, “To grasp a way of thinking we have to understand the problems with which it is concerned and the methods it uses to solve them. The problems and methods become in turn intelligible in the context of an experience of the world. Problems, methods, and experience constitute the ‘deep structure’ of the thought.”³⁷ For Kennedy, ground zero involved the “experience of unresolvable conflict among our own values and ways of the understanding the world . . .”³⁸ It is easy to see why. Although it is certainly true that Sartre’s phenomenology and Lévi-Strauss’s structuralism came to be seen as incompatible in their central commitments, it is also easy to see why Kennedy and Unger were so interested in bringing together these phenomenological and structuralist ideas in the terrain of a stylized and structured form of legal consciousness: In the context of the object of legal language, the semiotic *langue* and *parole* bore an undeniable resemblance with the “situation” and “decision” of phenomenological existentialism. But before pressing that issue further, we must turn to the jurist’s know-how, the terrain of the legal language.

2 *The Legal Language: Constitutive Antinomies*

In these early works from the 1970s, the target of the Harvard School was “liberal legalism.”³⁹ More specifically, the target was the language system of liberal legalism, or what we can call liberal legal thought. What was liberal legal thought? First, here is what it was not. It was not the universe of Law, a legal reality encompassing pretty much whatever one might want to define as having a legal aspect. “Law,” in this extremely broad sense of actors, institutions, processes and the like, *could be* synonymous with liberal legalism. But it is not necessary to make such a leap, and my suggestion is that we don’t. Second, even in the more particular territory of legal language, we should not make the mistake of conflating liberal legalism with all forms of legal thought. Liberalism is merely a subset in the larger category of legal language, whereas “Republicanism”

Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harvard Law Review* 1685 (1976), p. 1775; Kennedy, *The Structure of Blackstone’s Commentaries*, supra note 31, at 213.

³⁵ Unger, *Knowledge and Politics*, supra note 26, at 118.

³⁶ *Id.* at 108–109. ³⁷ *Id.* at 8.

³⁸ Kennedy, *Form and Substance in Private Law Adjudication*, supra note 34, at 1712.

³⁹ Kennedy, *The Structure of Blackstone’s Commentaries*, supra note 31, at 211; Unger, *Knowledge and Politics*, supra note 26.

or “Buddhism” might be contenders for other structures of legal thought. Thus, while it might be tempting to mistake the Harvard School’s target to have been *American Legal Thought*, the actual target was more discrete: what Unger called a “*style of thought*,” the style(s) of liberal legalism.⁴⁰ As Unger explained, “Much in modern thought is irreconcilable with liberal principles; the polemic against them dates back to the time of their original formulation.”⁴¹ Liberal legalism, to underline the point, should be confused as a proxy for neither the entirety of American Legal Thought nor the entire universe of legality.⁴²

What then *was* liberal legal thought? At the level of deep grammar – the *langue* – liberal legalism was constituted by an antinomy between two general theses. The first thesis was that human beings are and ought to be motivated by Thomas Hobbes’ theory of social conflict, rooted in equal rights of self-preservation.⁴³ I call this the first thesis of free competition. The second thesis was that in order for society to enjoy the benefits of the new individualism, the freedom of the individual could never be free.⁴⁴ I call this the thesis of social control. The antinomy between these two theses, Kennedy and Unger agreed, was pervasive in its constitution of an entire legal language.⁴⁵ Kennedy wrote that there existed a “fundamental contradiction” between the theses of free competition and social control, and that it formed the very “essence of every problem” and that “there are simply no legal issues that do not involve directly the problem of the legitimate content of collective action.”⁴⁶ And Unger, in his exploration

⁴⁰ Unger, *Knowledge and Politics*, supra note 26, at 8. ⁴¹ *Id.*

⁴² To be sure, Kennedy and Unger both spoke at times as if the antinomies of liberal legalism were universal, features of an inescapable human condition. And Unger, especially, continues to talk that way today. Both Kennedy and Unger were criticized in this respect by the poststructuralists, as I discuss further below.

⁴³ Unger, *Knowledge and Politics*, supra note 26, at 63–83.

⁴⁴ Kennedy, *Form and Substance in Private Law Adjudication*, supra note 34, at 1719.

⁴⁵ Foucault described the antinomy in the following terms: “If man is indeed, in the world, the locus of an empirico-transcendental doublet, if he is that paradoxical figure in which the empirical contents of knowledge necessarily release, of themselves, the conditions that have made them possible, then man cannot posit himself in the immediate and sovereign transparency of a *cogito*; nor, on the other hand, can he inhabit the objective inertia of something that, by rights, does not and can never lead to self-consciousness.” Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Psychology Press, 2002), p. 322.

⁴⁶ Kennedy, *The Structure of Blackstone’s Commentaries*, supra note 31, at 213. Granted, this certainly sounded like liberal legalism was *everything*. Kennedy wrote that “Most participants in American culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it.” *Id.* at 211. Kennedy’s future explanations of the modern/postmodern prove