

# DESIRE FOR TEXT: BRIDLING THE DIVISIONAL STRATEGY OF CONTRACT

PASQUALE FEMIA\*

## I

### INTRODUCTION

Nous avons un irrésistible besoin d'un texte qui donne au juge le pouvoir de briser les conventions abusives.<sup>1</sup>

In 1907 the French jurist Georges Ripert, considering the first diffusion of standard contracts, regretted the lack of a statute regulating abusive clauses. “We have”—he said—“an irresistible need for a text that empowers the judge to break abusive contracts.” *Un irrésistible besoin*: What can he not resist? *Besoin d'un texte*: In which sense does a text become an object of desire?

Ripert was a conservative thinker: for him, no one but the state should be allowed to rewrite the rights of private citizens. According to his classical scheme, the protection of the individual and the public monopoly on the legislative process support one another: any attempt to reconstruct the categories of private law by emphasizing their social function is treated as a subversion of the fundamental exclusion (there is nothing beyond the individual) that lies at the core of legal science. That is why, twenty-two years later, Ripert harshly criticized Louis Josserand's celebrated work on the social function of rights, charging the author with bolshevism.<sup>2</sup>

---

Copyright © 2013 by Pasquale Femia.

This article is also available at <http://lcp.law.duke.edu/>.

\* Professor of Private Law, Department of Political Science, Seconda Università di Napoli. I would like to thank Alfred Jensen of *Law and Contemporary Problems* for his thoughtful comments.

1. Georges Ripert, *Examen Doctrinal: Jurisprudence Civile*, [N.S. 36 56. Année] REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE [RCLJ] 193, 202 (1907) (Fr.) (treating the subject of “validité et interprétation des clauses de déchéance contenues dans les polices d'assurances”); see also Jean-Pascal Chazal, *G. Ripert et le déclin du contrat*, 2004 REVUE DES CONTRATS [RDC] 244 (Fr.) (providing a biographical account of Georges Ripert's life and work).

2. Georges Ripert, *Abus ou relativité des droits—A propos de l'ouvrage de M. Josserand: De l'esprit des droits et de leur relativité*, 1927, 49 RCLJ 33 (1929) (Fr.) (reviewing LOUIS JOSSERAND, *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITE THEORIE DITE DE L'ABUS DES DROITS* (Daloz 1927) (Fr.)). Josserand answered that the charge was “manifestement inexacte” (manifestly wrong), ironically adding that Ripert had a Bismarckian way of thinking about the law (which Josserand summarized as “les droits, c'est la force”). Louis Josserand, *A propos de la relativité des droits: réponse à l'article de M. Ripert*, 49 RCLJ 277, 280 (1929) (Fr.); see also Christophe Jamin, *Le rendez-vous manqué des civilistes français avec le réalisme juridique. Un exercice de lecture comparée*, 51 DROITS: REVUE FRANÇAISE DE THEORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES [DROITS] 137 (2010) (Fr.) (describing Ripert's philosophy of individual rights as a conservative one). The charge of bolshevism is nonsensical, considering Josserand's defense of the freedom of contract. Jean-Pascal Chazal, *Louis Josserand et le nouvel ordre contractuel*, 2003 RDC 325 (Fr.).

Ripert's critique of Josserand was as fierce as his need for a text was irresistible.<sup>3</sup> The *irrésistible besoin d'un texte* and the desperate search for a trace left by the Legislator are symptoms of *lex-addiction*. According to positive law's theoretical narrative, only legislative intent can, as an immanent *deus ex machina*, solve any legal question. Thus, Ripert sought to curb abusive contracts, but only with the permission of a public text.

More than a century after Ripert's revelation, legal science shows the same difficulties with treating the contract as a source of power. Desire for public text and resistance against complete textualization are two faces of the same phenomenon: all legal writings are in statutes, all legal facts are in contracts. Statutes count as intangible, and thus sacralized, laws. They are a modern rendition of *ius sacrum*.<sup>4</sup> Contracts count as a sacralization of the *private anomie*. Thus, contracts cannot be reduced to their writing not only out of respect for the parties' freedom, but also out of respect for the real event, the real *modus essendi* of the agreement (*volenti non fit iniuria* is a source of *anomie*). In this scheme, contractual fairness is irrelevant; if it is protected, that is only by accident.

The hermeneutic turn, established in European legal science since the mid-fifties of the last century, has not really had any significant effect on the inability of legal science to ensure contractual fairness. The statement, often repeated, that the judges make law, simply hides the issue within the context of creation, a zone of indistinction between law and politics. Judging and adjudication remain mysterious activities, the result of obscure insights, perhaps nothing but representations of a hegemonic sense of order.

A different approach to the problem of contractual fairness is to study the contract as radical writing in a whole intertextual vision of the legal phenomenon.<sup>5</sup> Under this view, laws and contracts are both parts of a global intertext, a set of signs through which they develop every legal communication according to the systemic operational criteria.

This article describes how to study the contract as radical writing, and the implications of such study. Part II begins by revealing a contradiction in the classical model: on the one hand, it insists on an epistemic divide between statutes (writings) and contracts (facts), while on the other hand, it considers both as divided unity. Part III explains the proper sense of the construction of the contract as radical writing and the power effects behind the classical view. Part IV places this discussion in the wider context of the systemic contractual functioning, and describes a systemic problem unveiled by studying the contract

---

3. In a letter to Josserand dated April 29, 1929, Ripert admitted that his words had been poorly calibrated. Letter from Georges Ripert to Louis Josserand (April 29, 1929), available at [http://viewer1.cg69.mnesys.fr/accounts/mnesys\\_cg69/datas/medias/IR\\_pour\\_internet/224%20J.pdf](http://viewer1.cg69.mnesys.fr/accounts/mnesys_cg69/datas/medias/IR_pour_internet/224%20J.pdf) (Fr.).

4. Reiner Maria Kiesow, *Ius sacrum. Giorgio Agamben und das nackte Recht*, 1 RECHTSGESCHICHTE [RG] 56, 70 (2002) (Ger.) (posing "ius sacrum" as the hidden matrix of modern law).

5. See Ino Augsberg, *Reading Law: On Law as Textual Phenomenon*, 22 LAW & LITERATURE 369 (2010) (analyzing the legal system as a specific form of textuality).

as radical writing. Specifically, the contract compels any social phenomenon to shape itself in a fragmented understanding, according to a bare binary logic: the divisional strategy. Part V explores an intrinsic systemic effect of the divisional strategy: the paranomic functioning. Paranoia characterizes every pathologic closure of systemic communication and traces the cognitive limit of the contract. Part VI discusses possible remedies for this problem. The method of piercing the contractual veil is rejected, because it suffers the contradiction of the divided unity. The intertextual understanding of the contracts activates an infrasystemic self-subversion. Within these dynamics, the pathologic functioning is healed by solving a problem of collision between different sources of regulation (public or private) in a heterarchical system. Part VII closely investigates the way to deal with the paranomic functioning through a so-called microphysics of ruptures: as it is impossible to completely remove the divisional strategy, the most suitable level of intervention comes from below, case by case. Restoring a safe systemic communication on the contractual text is the aim of a renewed conception of fundamental rights as self-subversive forces.

## II

### THE DIVIDED FACTUAL UNITY OF CONTRACT AND POSITIVE LAW

The great division between public and private reproduces itself within private law: textuality of statutes (public government) and substantiality of individual transactions (social powers). The public-private divide stands for an ontological break between *ought* (regulation by statute) and *is* (regulation by private ordering). The *ought* of statutory law counts as “and this ought to be how I am” (it is a transcription of a will drawn by a phantom named “the Legislator,” an invisible monster who reveals itself only through infinite writings); the *is* of contract law counts as “and this is how it ought to be” (since the contract is regarded as a pure phenomenon of freedom, what happens in the contractual arena is what has to happen).

The voice of the public sovereign who sits in parliament is heard through writings: before the forms of the parliamentary procedure, before publication, laws do not exist. Their being in force presupposes validity, that is, their being as an ought comes entirely from a complex network of writings, an intertext: they are bare textual facts. Custom is a similar phenomenon: the orality of custom (celebrated in common law) is an epistemic device to regulate the relationship between power and writing less strictly.<sup>6</sup> Customs involve memory and collective memory is built on writings. The ought of customs circulates among many texts, and so the rulers can enlarge or narrow the promise of equal treatment that each norm implies, because the norm is not fixed in a single text (as a statute would be), but only affirmed in a textual net (custom).

---

6. DICTIONNAIRE DE LA GLOBALISATION 113 (André-Jean Arnaud ed., 2010) (defining *coutume*) (Fr.).

On the contrary, the classical legal imagination conceives of private bargaining as a state of social fact. Contract has been considered for a long time a reality before and beyond its form; the texture of written clauses is intended as a set of signs that corresponds to a pre-textual entity behind it. This hypothetical, not yet juridical (prejuridical, properly speaking) *ens reale*—the social, moral, economic mutual consent—counts both as the true object of public regulation by statutes, civil codes, and constitutions, and as the real matter of legal theory's discourses. The propositions of legal science, especially those subtly constructed in continental legal dogmatics, are affected by the rhetoric of presence: the legal discourse searches for the "nature of the contract" (as if it were an inquiry into the nature of the things), the true social (yet not juridical) interests at stake in the bargaining process, and the proper semantics of the living relationship. The space between the words of the contract and the (supposedly all-inclusive) reality of the referred human interaction is filled up with methodological instruments that would restore the contract to the facts.<sup>7</sup>

The rhetoric of substance versus presence, which has marked the operations of legal theory for a long time, is almost unable to react against unequal distributive effects. By comparison, it has plenty of categories to manage the social pathologies of exchanges: *bona fides*, good faith, unconscionability, *clausula rebus sic stantibus*, *exceptio doli*, promissory estoppel, *Geschäftsgrundlage*, reliance, *nullité de protection* and so on.<sup>8</sup> All these categories are reasons to complain about an unfair distributive output, but, unfortunately, they clash with the distorted dialectics between public norms and private facts. In political discourses norms are intended as mechanisms to cause social actions. The validity of norms is above all an imperative for bringing about effects. (The ought is "ought to do.") There is nothing natural in norms; they exist to modify the ordinary course of things. Conversely, legal dogmatics constructs its propositions by treating norms as entities with which science may not interfere. The classical science of norms discloses hidden connections between norms and sheds light on obscure normative meanings, but absolutely forbids itself to make norms. In accordance with this premise, legal science corroborates its propositions about norms by testing their correspondence with the semantics of norms (a semantics fixed by science itself). Coherence between

---

7. Regarding *natura contractus*, see Paolo Grossi, *Sulla 'natura' del contratto*, 15 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 593, 598–99 (1986) (It.). Wilhelm Scheuerle deconstructs the concept of "essence" in his work, *Das Wesen des Wesens*. Wilhelm A. Scheuerle, *Das Wesen des Wesens: Studien über das sogenannte Wesensargument im juristischen Begründen*, 163 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 429 (1964) (Ger.).

8. See CLAUS-WILHELM CANARIS, *DIE BEDEUTUNG DER JUSTITIA DISTRIBUTIVA IM DEUTSCHEN VERTRAGSRECHT* (1997) (Ger.); Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992); James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587 (1981); Denis Mazeaud, *Loyauté, Solidarité, Fraternité: La Nouvelle Devise Contractuelle?*, in L'AVENIR DU DROIT. MELANGES EN HOMMAGE A FRANÇOIS TERRE, 603 (1999) (Fr.); Pietro Perlingieri, *Equilibrio normativo e principio di proporzionalità nei contratti*, 21 RASSEGNA DI DIRITTO CIVILE 334, 348–351 (2001) (It.).

the language of dogmatics and of norms is not considered a good result of doctrinal therapy, but rather as a successful scientific experiment. Decades of linguistic and hermeneutic turns have not changed this epistemic difference between the political discourse's norm-making and legal dogmatics' norm-explaining. (The epistemic difference is nonetheless consistent with the system theory because application-oriented norm-making and norm-explaining correspond to several social-sectorial systems.) This difference itself, then, cannot be questioned, but the scarce awareness of the double-fragmented constitution of scientific legal discourse about human facts, on the other hand, can be.<sup>9</sup> In this pragmatic game, facts and values (is and ought) interrelate in two fundamentally contradictory ways: in one sense, facts are the bare matter on which a would-be democratic collective power improves its strategies of control by norms (here the is-ought divide works as usual); but in another sense, facts are both contracts and norms, a complex constituted by legal science that conceives them as an ineffable divided unity in which only epistemic operations are allowed. Here, indeed, the is-ought divide does not work. The sole admitted value is truth; other values can work only in the darkness.

Neither legal dogmatics nor political discourse can adequately address the problem of unfair distribution. Such a science that describes norms and can only speak about the self-description of legal order would not be asked for remedies against contractual injustice. If one does not like reality, then the need for the text of a lacking positive law sharply increases, because the statutes actually in force do not meet our social wishes and kindle our anger. But needs, anger, or other emotions cannot create norms by themselves.

Anyway something remains. From a system theory point of view, what is *fact* in a communicative network? Strictly speaking, in a system there are no natural facts, but only matrices of communication.<sup>10</sup> Contracts, statutes, customs, and doctrinal theses are all systemic structures (produced by re-entries<sup>11</sup> from the environment) that activate specific functionings. So, the question whether a judge makes law, in counter-majoritarian difficulty, is nonsensical. What is mistaken here is the "making:" "making" law is not creation *ex nihilo*, but a systemic operation. Nor is it limited to reproduction, because its boundaries are indefinable in an unending process of self-subversion.<sup>12</sup> Observing the constitutive contradiction that is the divided unity

---

9. Emiliios Christodoulidis provides a brilliant analysis of law's power of "homology" and its "mechanisms of deadlock" in his article, *Strategies of Rupture*. Emiliios Christodoulidis, *Strategies of Rupture*, 20 LAW & CRITIQUE 3 (2009).

10. The term "fact" is ambiguous. See HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS*, 29–30 (2002).

11. In systems theory, re-entry is a term of art meaning "the re-entrance of the distinction into what the distinction has distinguished." NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 104–105 (Fatima Kastner et al. eds., Klaus A. Zeigert trans., Oxford Univ. Press 2004) (1993); see Gunther Teubner, *Self-Subversive Justice: Contingency or Transcendence Formula of Law?*, 72 MOD. L. REV. 1, 3 (2009) (using the term in this manner).

12. Anton Schütz, *The Twilight of the Global Polis: On Losing Paradigms, Environing Systems and Observing World Society*, in *GLOBAL LAW WITHOUT A STATE* 257 (Gunther Teubner ed., 1997).

of norm–contract (writings–reality) when both of its parts have been reduced to bare facts—that is, objects of legal science (textual and social facts)—the source of the weakness, the cage in which the legal theory has put itself, finally comes into sight.

Putting contract and norms on the same factual plane deprives legal discourses of their pragmatic force to fulfill the regulative functions that every system creates according to its specific code. Private transactions that, intentionally or not, escape the epistemic structures of existing positive norms become, through the operations of the legal interpreters, facts whose qualification, whose systemic sense remains uncertain. Although anyone, in the shadow of trial, reads the clauses of contracts and the sections and subsections of laws in the same way (trying to destroy, under subtle exceptions or interpretations, unpleasant slices of text and exalting the useful ones), contracts and norms remain the opposed polarities of a divided unity. The supposed non-textuality of contract, supported by classical methodology, prevents the judge from substituting himself for the parties. All remedies in contract law are disempowered, because now they must overcome the wall of freedom and privity of contract. Therefore in the classical model remedies are conceived as a solution to a liberty problem, not a regulation problem.

This rhetoric results in vain appeals to morality as the social, regulative, and—above all—unifying factor. But there is no all-embracing reality; the divided unity makes it difficult to control the difference between private and public regulation. Reality is simply a hypothesis that we construct observing a multiplicity of sectorial systems, each having its own modality to know-and-modify the environment. Morality is simply a function of one of those specific communication systems and (as each systemic product) cannot trespass its cognitive limits to become the explanation for a multiplicity of systems. Gunther Teubner has rightly observed that the contract “typically breaks down into several operations within different contexts: (1) an economic transaction . . . (2) a productive act . . . and (3) a legal act that, recursively intermeshed with other legal acts in accordance with the intrinsic logic of the law, changes the legal situation.”<sup>13</sup> In one contract there are not three substances within the same personified subject, but an incommensurable plurality of discourses. Every appeal to morality increases the mistaken construction of material, environmental, metasystemic unity. Outside of the moral system (the constellation of free and unending communications about good and evil), “morals” is the distorted name of everything else: in law, morals count as “fundamental rights of the systemic constitution.” But there is a better explanation for the role of morals: Morals should not be understood as reigning over fundamental rights, as old natural law theories taught, but, on the contrary, should be understood as themselves subject to the systemic autonomy of law, which imposes an interpretation that deconstructs (by re-entries) every moral

---

13. Gunther Teubner, *In the Blind Spot: The Hybridization of Contract*, 8 THEORETICAL INQUIRIES IN L. 51, 52 (2007).

(and epistemic, cultural, scientific, health-related and so on) claim on legal constitutional fundamental rights. It is pointless to claim anything like a unity of human action in the name of morals; rather, according to the societal constitutionalism model, legal theory must acknowledge the indefinite sectorial self-subversive communication movements that are produced by the specific constitution of each system.<sup>14</sup> Unity is not a metaphysical substance in which we all move and stay; unity is a function of each sectorial system. Systems produce unity as a hypothesis to increase the effect of their communicative operations. After a good deconstruction, unity is polyphonic.

The fragmentation of contract concept according to the intrasystemic logic of each system reveals just how deeply inadequate the categorization of classical contract law is in our complex, hyper-differentiated, and global society. Classical contract law cannot solve the regulative question because it thinks in terms of metasystemic unity, treating both law and contract as facts: two divided incommunicable modalities in a single substance. In the classical legal discourse, then, “private” becomes a strategy to escape all needs for justification: “private” means *deprived*, freed from necessity to give reasons.

### III

#### CONTRACT AS WRITING

Another way is possible. The first step is to shift away from the categorization of contract as a fact, and to move to a radical normative view of contract as a source of norms<sup>15</sup> that exist by way of a common textual sphere. Kelsen and his school began to frame contract as a bare source of norms by constructing the *Rechtsgeschäft* (“legal transaction,” according to the English translation of *Pure Theory of Law*<sup>16</sup>) within the celebrated *Stufenbau* (“hierarchical structure”)<sup>17</sup> of legal order. Adolf Merkl, in his 1923 work about *Rechtskraft* (“legal force”) maintains that the *Rechtsgeschäft* (and then the contract, too) is part of a gradual hierarchical “system of legal forms,”<sup>18</sup> and he adds that private or public *Rechtsgeschäfte* are legal phenomena having no peculiar distinctive quality. They represent nothing “but a grade in a hierarchy of legal phenomena of the same kind.”<sup>19</sup> Merkl criticizes the attempts to

---

14. Gunther Teubner, *Fragmented Foundations: Societal Constitutionalism Beyond the Nation State*, in *THE TWILIGHT OF CONSTITUTIONALISM?* 327 (Petra Dobner & Martin Loughlin eds., 2010).

15. LUIGI FERRI, *L'AUTONOMIA PRIVATA* 5 (1959) (It.); Pascal Ancel, *Force obligatoire et contenu obligationnel du contrat*, 98 *REVUE TRIMESTRIELLE DE DROIT CIVIL* [RTD CIV.] 771 (1999) (Fr.).

16. HANS KELSEN, *PURE THEORY OF LAW* 256 (Max Knight trans., Univ. of Cal. Press 1967) (1934).

17. *Id.* at 221.

18. ADOLF MERKL, *DIE LEHRE VON DER RECHTSKRAFT, ENTWICKELT AUS RECHTSBEGRIFF* 213 (1923) (Ger.).

19. *Id.* at 212 n.1.

separate the *Rechtsgeschäfte* from all other elements of the *Stufenbau*, labeling them as “political-oriented exaggerations.”<sup>20</sup>

The second step is to think through the identity-in-kind of every semiotic element that the legal system describes as a source of norms: writing is the constitutive dimension not only of statutes (public legislation) but of contracts, too (private legislation). And so the public–private divide loses a large part of its sense and has to be totally rethought.<sup>21</sup>

“There is nothing before the text”<sup>22</sup>: where the quiet theoretician imagines that there is a contractual (common) will, there is only text. Text is not a simple structure to contain a contractual will; text is a quality, not a form, of normativity. The joint signature of contractual parties activates a “fabulous retroactivity” (Derrida’s *rétroactivité fabuleuse*)<sup>23</sup> that ascribes the contractual norms to an invisible common will. “Will” is an element of psychic systems; in legal systems the will is writing, it is valid if it is arguable, justiciable, accountable in an intertextual process of writing.<sup>24</sup> So, even an oral consent must inscribe itself in the legal hyperscriptural texture.

Oral and even implied-in-fact contracts cannot function beside the writing network. Even where the “paper deal”<sup>25</sup> seemingly dissolves between businessmen, these parties still move continuously in a space built by writings. Businessmen’s looser modality of referring to the textual network is the direct result of their social position (reconstructed as communicative potentialities within the legal system). Modalities of text-referring are strategies of regulation. When the parties struggle (not only, as always, to conquer a bigger slice of the bargaining surplus, but also) over their position after the performance of contractual duties (because a bad contract, especially a repeated unlucky series of bad contracts, could even destroy the loser’s sense of his own life), then the contractual writing works *ex ante* to orient the party’s eventual interaction: the well-ordered written clauses are the “political” constitution of their closed relationship, where each party fears the other’s disruptive power.

When, on the contrary, there is no positional competition between the parties—such that there is no lack of *status*-confidence, no fear of unlucky contractual exit—there is no *effective ex ante* writing. If in this kind of relationship the parties document the legal transaction, formality plays a dull

---

20. *Id.* at 212 n.1 (Merkel is also especially critical of the attempt to distinguish between private and public *Rechtsgeschäfte*).

21. Gunther Teubner, *Societal Constitutionalism and the Politics of the Common*, 21 FINN. Y.B. INT’L L. 2, 2–6 (2010).

22. JACQUES DERRIDA, *DISSEMINATION* 328 (Barbara Johnson transl., Athlone Press 1981).

23. JACQUES DERRIDA, *OTOBIOGRAPHIES: L’ENSEIGNEMENT DE NIETZSCHE ET LA POLITIQUE DU NOM PROPRE* 22 (Galilée 1984) (Fr.) (addressing the topic of human rights); *see also* Marc Amstutz, *Rechtsgenesis: Ursprungsparadox und supplément*, 29 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE [ZFRSOZ] 125, 140–147 (2008) (Ger.) (addressing the same topic).

24. Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 770–773 (1987).

25. Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 44–45 (2003).



role. But the more the relationship becomes a story of conflicts, the more writing increases its relevance: *legal conflict is a textual function*. Within businessmen's markets there is no trustworthy and untextual paradise: the realm of relationships, which theorists have analyzed again and again,<sup>26</sup> remains a modality of a scriptural nomopoietic structure. Trustful and polite relationships between businessmen who do not care about the "paper deal" are narratives of no positional competition: each man reproduces himself through contracting and has no wish for changing patterns of interaction. But outside of this non-conflictual imagination lies the reality of contracts-writing that puts together fear and dominion.

Nowadays, the reality that private entities use contracts to create a mainstream capitalistic reproduction of society differs totally from the nostalgic image of good old merchants writing polite contracts. Contracts work as the constitution of private power in the contemporary reproduction of society. No strategy of dominion exceeds the contractual cognitive autonomy: private (but diffuse and collective) power is constructed, transferred and legitimated solely by contracts. The contract becomes the alphabet of power. "We live more and more contractually," wrote Louis Jossierand in 1937<sup>27</sup>: the diffusion of the contract does not correspond to an increase in freedom, but to a higher concentration of power. Ten years before Jossierand, Gaston Morin noted that the freedom of contract had been replaced by "a dictatorship of owners and corporations, imposing a regulation on a multitude of weaker parties."<sup>28</sup>

Legal theory must point out the cognitive limits of the individualistic and factual categorization. The continual joining of discrete exchanges produces both surface value—the value that every contract exhibits as its specific legal value—and "political" surplus: in the difference between the binary fictional reconstruction of textual normativity and the virtual diffusion and entrenchment of factual power lies the public dimension of contract. Political does not mean "metasystemic." The political surplus of contractual exchange is not a value that crosses the legal system (as legally irrelevant) and flows in another system capable of conferring sense onto it: politics is not the name of an autonomous system, but only a device for allowing contractual power's effects to reenter the legal system,<sup>29</sup> such that those power's effects are conceivable not *in contract*, but *through contracts*.

---

26. See, e.g., Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

27. Louis Jossierand, *Aperçu général des tendances actuelles de la théorie des contrats*, 36 REVUE TRIMESTRIELLE DE DROIT CIVIL [RTD CIV.] 1 (1937) (Fr.).

28. GASTON MORIN, *LA LOI ET LE CONTRAT: LA DECADENCE DE LEUR SOUVERAINETE* 61 (1927) (Fr.); see also Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 220 (1937) ("[T]he great complexes of property and contract which constitute our modern industrial machine, the monopolistic associations of capital, labor, and the professions which operate it, exert under the forms and sanctions of law enormous powers of determining the substance of economic and social arrangement, in large part irrespective of the will of particular individuals.").

29. This pattern of interaction between politics and other social systems derives, with some

#### IV DIVISIONAL STRATEGY

Because of the cognitive autonomy of contractual discourse, the whole spectrum of negotiations develops and increases outside the scope of critical awareness. Under the dominant individual categorization, the law thinks of the global world of bargaining in single contractual units. Contract as an institution (that is, as continuity) is out of place: the tradition of law-regulating-legal-transaction encounters the real continuity of institutions only one contract at a time. Within this pathological fragmentation,<sup>30</sup> legal theory cannot grasp the condensation of power that every transaction gradually creates. Contract law exhibits a strong *divisional strategy*, splitting and forcing every bargaining process, every complex of systemic communicative functions, into an autonomous binary pattern of interaction, named “contract.” Although it is true that all concepts act themselves by means of a severe separation, of a reduction of complexity, in contract law this process—favoring the capitalistic distribution of ownership (always escaping to every request for justification)—radicalizes itself and sees the contract not only as a natural fact (object of neutral epistemic scientific operations), but also as a product, a segment of an unending production, and a great engine to yield externalities and escape any distributive arguments.

Bargaining is an institution for producing order through contracts: without bargaining, these products would suffer—borrowing the language of the European Directive on the sale of goods—from a lack of conformity. A flaw in a contract puts it, literally, out of (legal) order. Arthur Allen Leff said forty years ago, in *Contract as a Thing*, that the right approach “is to think about the paper-with-words which accompanies the sale of a product as part of that product,”<sup>31</sup> and then concluded, in a brilliant final passage, that

the real hope of an exercise like this is necessarily more modest than any total sensory transformation. It can aspire at most temporarily to smash the semantic box in which our current thinking is locked. The next step, and the harder one, is crafting a better cabinet out of materials really available in a real world.<sup>32</sup>

How do we “smash the semantic box”? An appropriate strategy for such rupture is to reenter three concepts: (1) contract language as radical writing, (2) bridling of the divisional strategy, and (3) awareness of continuity.

Continuity is a necessary normative structure. Hermann Heller—arguing polemically against Schmittian decisionism—insisted on this point. He imagined a double movement: “What appears from the top down as command, judicial

differences, from Gunther Teubner, *Societal Constitutionalism without Politics? A Rejoinder*, 20 SOC. & LEG. STUD. 248, 250 (2011) (“[I]t is the internal reconstruction of the external political impulses which matters and that is what is decisive for the sustained transformation of a civil constitution.”).

30. Hugh Collins, *The Sanctimony of Contract*, in LAW, SOCIETY AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895–1995 63 (Richard Rawlings ed., 1997).

31. Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 155 (1970).

32. *Id.* at 157.

decision or legal transaction (*Rechtsgeschäft*), appears from the bottom up as legal proposition (*Rechtssatz*). Without normativity, there can be no decision. Normality and continuity of behavior come together.”<sup>33</sup> Contract, then, expresses only a fragment of the bargaining institution; continuity is a more proper form of normativity because it expresses the temporality in relationships (time is the dimension of contractual power).

Bargaining is a fundamental ordering function of the legal system. The bargaining process shows contractual powers in action: thus, bargaining is the framework for legitimating contractual remedies (such as competition law remedies). Like all institutions, bargaining (the institution of making contracts) makes sense of every action oriented to create and regulate contracts. Making sense, of course, is the first stage of critique.

Contractual discourses deeply shape the individual life, from labor to intimacy, so that the hypocritical constitution of contractual liberty sounds, indeed, like a freedom to contract or to die. Contractual writings are subject to the same social “phenomena of collective addiction,”<sup>34</sup> the same “self-destructive growth-dynamics”<sup>35</sup> that systems theory has recently recognized in communication as a general matter. A contractual addiction syndrome discloses itself when its irresistible attachment to exogenous factors (power, money, knowledge: by contract we can exploit any work value) engenders a compulsion to grow. The contractual addiction causes an uncontrollable increase of its divisional strategy: unemployment, ecological disruption, reduction of work to a bare commodity (without roots and future),<sup>36</sup> and psychic suffering. All these evils remain externalities, unaccountable effects of isolated contracts.<sup>37</sup>

Contractual discourses establish a dictatorship that speaks and dominates by the language of consent. As Friedrich Kessler said,

Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms.<sup>38</sup>

---

33. HERMANN HELLER, STAATSLHRE 265 (Gerhart Niemeyer ed., A.W. Sijthoff 1934) (Ger.).

34. Gunther Teubner, *A Constitutional Moment? The Logics of ‘Hitting the Bottom,’* in THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE: THE DARK SIDE OF FUNCTIONAL DIFFERENTIATION 3, 7 (Poul F. Kjaer, Gunther Teubner & Alberto Febbrajo eds., 2011).

35. *Id.* at 4.

36. Emiliios Christodoulidis & Ruth Dukes, *On the Unity of European Labour Law*, in THE COHERENCE OF EU LAW 397, 403–13 (Sacha Prechal & Bert van Roermund eds., 2008).

37. Alan Schwartz and Robert E. Scott provide an example of a typical divisional strategy in their article, *Contract Theory and the Limits of Contract Law*. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 555 (2003).

38. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

## V

## PARANOMIC FUNCTIONINGS

How can legal theory manage this juristic form of life? Working within the legal system, the contract constitutes a highly specific sectorial instrument of power that (1) confuses norm-writing with fictional consensus and (2) develops a divisional strategy, which splits a complex multipolar interaction into fragmented couples of action. Like all systems, legal contractual communication creates relevance by reduction of complexity. But such complexity reduction is particularly problematic in the contractual context, because here the language of law-application makes each social dissent hard to conceive as a recurring legal dispute. The hegemonic forces at work here arouse a pathological selection of facts. Legal, formal relevance becomes a strategy for darkness, not a simple reduction.

Remedies start from the detection of pathologies. Paranomic functionings are characteristic of these communication pathologies.<sup>39</sup> The parania pathology,<sup>40</sup> which is generated by the absolute closure of systemic discourses, prevents us from understanding the movements of power, even despite the knowledge and observation of valid norms. This is because the cognitive operations that are carried out in the name of the validity of those norms are simultaneously the instruments of a censorship imposed on the recognition of social relations that are being governed: parania is a distorting mirror in which facts reflect rules and rules reflect facts, deforming each other.

For those affected by parania pathology, every speech—speech is the medium through which power<sup>41</sup> constructs and justifies its social actions—exceeds, escapes, and evades the rules and principles that ought to represent it. Paranomic systemic functionings cause an epistemic breakage<sup>42</sup> and must not be confused with the plainer problem of illegality: whereas the problem of

39. Pasquale Femia, *Against the 'Pestilential Gods'*. *Teubner on Human Rights*, 40 RECHTSFILOSOFIE & RECHTSSTHEORIE [R&R] 260, 269 (2011).

40. A similar, but nonidentical, concept of parania is presented in Stathis Gourgouris, *Enlightenment and Parania*, in *VIOLENCE, IDENTITY, AND SELF-DETERMINATION* 119, 122, 137 (Hent de Vries & Samuel Weber eds., 1997). According to him, parania expresses “law’s intrinsic outlaw nature,” *id.* at 122, and “*Paranos* is the one who is simultaneously beside the law and on the other side of law,” *id.* at 137 (italics in original). This definition is closely related to Benjamin’s critique of violence. See Walter Benjamin, *Critique of violence*, in 1 *SELECTED WRITINGS* (1913-1926) 236 (Harvard Univ. Press 1996). Gourgouris associates parania with law as a whole; my use of parania differs insofar as it indicates a specific normative function, a pathological structure of systemic communication. This concept of parania intends to place itself within the system theory.

41. Properly speaking, power is exclusively an intersystemic concept: even within each system we may observe and conceive power. Power operates *over everything* (economic power, symbolic power, academic power, et cetera). Outside of the internal discursive logic there is no power, but only a subject’s multitude of fragmented discourses, blurring or dazzling, in search of any form.

42. An epistemic breakage is a phenomenon of collective knowledge. In his work *Die epistemische Analyse des Rechts*, Dan Wielsch offers a profound analysis of the epistemic legal questions according to systems theory. Dan Wielsch, *Die epistemische Analyse des Rechts: Von der ökonomischen zur ökologischen Rationalität in der Rechtswissenschaft*, 64 JURISTENZEITUNG [JZ] 67, 72–77 (2009) (Ger.).

illegality tests the correct application of the binary systemic code legal-versus-illegal (contract), the problem caused by paranomia calls into question the code itself, and its pathological functioning.<sup>43</sup> Paranomia does not indicate a true social reality hidden beneath its speeches, it is not so simple: there is not another legal reality beyond it, because the *legal* reality is only a product provided by the legal system. Contract, as a source of law, is dominated by the discourses of paranomia, such that it functions as a process of regulative building that constructs its own reality (that is, the modes and codes for a specified interaction), using its entire capacity to shape an epistemic order that accords with hegemonic strategies. Contract law structures intersystemic power (the power that reproduces itself within the system, the power constructed after the re-entry of external social power within the legal system) as a set of rules and categories for interactions that always reserve for themselves an *epistemic surplus value*. When courts apply these rules to human facts, framing human conduct within the qualifying categories of legal dogmatics, hegemonic power always gains a plus. This occurs because, when courts apply the legal construction of power to human conduct, they compound the desires and strategies of multiple participants. Communications from infinite functional differentiations (economy, health, environment, et cetera) melt in legal propositions (after re-entry into the legal system): the result of discourses' hybridization does not exactly match any projects of the involved individuals (even assuming that each individual, each psychic system, is indeed transparent to himself). A residue remains, a gap, a difference: legal power takes possession of just such a difference, as its surplus epistemic value emerging from paranomic regulation. In this way, each "nomic" is paranomic.

## VI

### REMEDIES IN TEXT

Social critics of the negative distributive effects of the systemic contractual regulation have denounced, again and again, the hiatus between the "formal" and the "real": the artificial texture of clauses, on the one hand, and the socio-economic relationship that no formal theory of classical contract law can even grasp in its refined discourses, on the other. The rhetoric of liberty, through codes and statutes, allows collective justice to fall into oblivion. Social critics have tried to confer a great deal of implied meaning onto contractual clauses: "[p]iercing the contractual veil"<sup>44</sup> has become the standard.

The difficulty with the attempt to pierce the veil is that it often leads to a naturalistic approach, which frames positive law and contractual facts as a divided unity. This approach aims to identify a uniform and complete social

---

43. A correction of code (legal-illegal, right-wrong, efficient-inefficient) is granted by the self-subversive internal forces that each system contains. In the legal system the relevant self-subversive force is (the fight against in)justice. See Teubner, *supra* note 11, at 1-23.

44. Gunther Teubner, *Piercing the Contractual Veil? The Social Responsibility of Contractual Networks*, in PERSPECTIVES OF CRITICAL CONTRACT LAW 211, 211 (Thomas Wilhelmsson ed., 1993).

reality behind the contract, under the pierced veil. But the veil project must fail, because society is internally fragmented through a multiplicity of subsystems. No causation, no deterministic engine governs the movements of legal solution: under the veil, there is nothing. One has not to pierce the veil, but to reshape it from an intersystemic point of view. Legal theory must create a new dress, sewn all around the surplus epistemic value brought about by the paranomic functionings, and by doing so induce the legal system to heal by itself. But how can the veil, the paranomic normative artifact, subvert itself?

The textual turn is another way to bridle the contractual Leviathan. Text is no neutral form, but a specific modality of norms. So, it is not a useful idea to search anything behind the text, because the writing remains always the *modus essendi* of what lies behind: a system built on textuality may not escape the writing. Rather, resisting the temptation to search the secret under the written clauses, discloses the normative valuation inherent to the explicit contractual language. The chosen linguistic structure is all that really matters; only by looking to the text is it possible to reconstruct a decent regulation of relationship by integrating both discourses and their dissemination.<sup>45</sup>

An interesting device could be, then, to change the focus of social criticism, analyzing contracts radically as writing.<sup>46</sup> Even if the gap—the epistemic fracture between normative representation and factual development of contractual power—is irremediable, every legal subject has a resource to bridle this confusing regulation under paranomic functionings: the stream of human communicative acts functions as a matrix that merges and shapes continuously discursive fragments. The closeness of systemic discourses must be compared with these diffused, unstructured fragments. Systems are normatively (operationally) closed, but cognitively open<sup>47</sup>: the openness of the text activates a categorical dissemination.<sup>48</sup> Text is the structure of self-subversion.

45. See Marc Amstutz et al., *Civil Society Constitutionalism: The Power of Contract Law*, 14 INDIANA J. GLOBAL LEGAL STUD. 235, 240–43 (2007) (“Polycontexturalization of the Law of the Contract”).

46. The social embeddedness of contract is *embeddedness in text*. See Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CALIF. L. REV. 691 (1974). Contract is a slice of intertext: textuality counts only as fragmented intertextuality. Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 SOC. & LEGAL STUD. 399, 403 (2000) (“Contract today can only be an interrelation between discourses. Contract is intertextuality.”).

47. LUHMANN, *supra* note 11, at 106 (“[T]he legal system operates in a normatively closed and, at the same time, cognitively open way.”); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1427 (1992); see Anton Schütz, *Thinking the Law With and Against Luhmann, Legendre, Agamben*, 11 LAW & CRITIQUE 107, 134 (“[T]he opportunistic formula ‘operationally closed but cognitively open’, has saved autopoiesis . . .”).

48. This systemic concept of text is also different from the textualist concept of text in the debate between textualist and purposivist interpretation, which Pierre Schlag has convincingly criticized. Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 230–34 (2009). Marc Amstutz provides a brilliant analysis of “openness of text” both in the sense of Jacques Derrida and system theory. Marc Amstutz, *The Letter of Law: Legal Reasoning in a Societal Perspective*, 10 GERMAN L. J. 361, 381 (“A legal reasoning doctrine is thus called for that is able to deal with the creation and displacement of differences in the *écriture* of legal texts.”).

The inexorable process of intersystemic self-subversion allows not only the policontextuality of different discourses within the contract: this process, this ongoing internal becoming of practical legal knowledge, is also a way to measure the paranomic gap. When the difference between facts and narrative within the contractual *nomos* irritates so many points (so many subjects) in the streaming communication chain, each subject reacts by raising a motive for internal renovation of the systemic categories. The paranomic discourse and the prediscursive streams of communication clash thoroughly and activate a categorical dissemination.<sup>49</sup> This semiotic pressure reshapes the boundaries of sense<sup>50</sup> and initiates self-subversion. The text of the contractual norm—radically conceived as a paranomic excess—is rewritten by the adjudication game, according to the intertext that results from the infrasystemic subversion.

So, when the courts impose duties and affirm liabilities they do not abusively replace the parties' positions in bargaining: they simply solve a problem of "collision law" between different sources of regulation (private ordering by contractual writings and public legitimations by fundamental rights) in a heterarchical system.<sup>51</sup> Instead of piercing the veil, we must remove a fictive semantics of divisional language and restore a safe systemic functioning. A function system is safe when its distributive output is observable by anyone (or at least anyone who opens communication movements, political moments, and democratic controls through and beyond the system of government).

## VII

### MICROPHYSICS OF RUPTURES

The self-subversive strategy of rupture<sup>52</sup> restores a contractual language of justice by fighting against paranomic functionings (an epistemic phenomenon not to be confused with sham contracts, *fraus legi*, and so on). The divisional strategy grows increasingly hostage to its collective addiction and selects a modality of normative existence that reveals paranomic functionings: externalities increase, the order of powers at work in the contractual relationship flows beneath the written clauses. Detecting paranomies is not a hunt to discover a real matter underneath them, a fabulous nature of the underlying affair. We need no *text ex machina* (statutory law) to solve the

---

49. DERRIDA, *supra* note 22, at 351. The concept of "dissemination" differs from the concept of "polysemy," because "the concept of polysemy . . . belongs within the confines of explanation, within the explication or enumeration, in the present, of meaning." *Id.* The dissemination is generation of meaning. The categorical dissemination is the same productive process during the construction of legal thought.

50. Marc Amstutz, *Eroding Boundaries: On Financial Crisis and an Evolutionary Concept of Regulatory Reform*, in *THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE*, *supra* note 34, at 223.

51. Teubner, *supra* note 46, at 407–410 (treating the subject of "contract as interdiscursive translation").

52. The "strategic decision . . . whether to play the system or to confront it," Christodoulidis, *supra* note 9, at 24 (italics removed), is not a way out of the legal system: the answer to the divisional strategy of contract is systemic internal self-subversion.

puzzle of contract: it would be a categorical mistake to recreate the opportunity for contractual injustice under the horizon of whatsoever new statute is to come. The legal God that sits in the system speaks no more for us: now he flows in the infinite becoming of our legal communication and shines through the global intertext. Instead of preaching *à la manière de* Georges Ripert for a text that comes down from legal heaven<sup>53</sup> we must rewrite it alone: the sacred text is the result of an unending immanent process of re-entry. The critical legal theory elaborates its adequate strategy of rupture by working against the backdrop of the divisional strategy of contract. It is all a question of systemic functioning, and the systems must operate to protect the fundamental rights of the oppressed parties.

The divisional strategy of contracts cannot be completely removed and is, in any event, useful, because it creates irritations with the environment, which, in turn, induce an internal response: increasing individual systemic arrangements. So a strategy of rupture cannot destroy the contract (or, above all, the bargaining process) by trying to delete the divisional strategy. The strategy of rupture can only bring back a safe epistemic approach, in two steps: (1) conceiving of the contract as a fragment of an institution named “contractation” (the bargaining process itself, the practice of legal transactions), (2) applying fundamental rights to the institutional fragment, without using a balancing method.<sup>54</sup> The first step—recognition of contractual fragments—is, of course, necessary, because attempting to construct an alternative language and to remove altogether the divisional effect of contract would be unrealistic (that is, it would be outside of the systemic transcendental categories). But the second step is equally essential; applying fundamental rights instead of using a balancing method works as “counter-matrix”<sup>55</sup> against the “anonymous matrix” of the modern highly fragmented societies.<sup>56</sup> After all, the alternative balancing approach<sup>57</sup> would domesticate the self-subversive force of fundamental rights, turning those rights into a bare matrix of existing (implicit or explicit) rules. Such domestication would create a well-tempered balance of no real consequences. This balancing culture would foster a holistic model that aims to

---

53. See Georges Ripert, *Le socialisme juridique d'Emmanuel Levy. A propos de: La Vision socialiste du Droit*, 1926, 48 RCLJ 21, 31 (1928) (Fr.) (describing and decrying legal prayer).

54. See KARL-HEINZ LADEUR, KRITIK DER ABWÄGUNG IN DER GRUNDRECHTSDOGMATIK 58 (2004) (Ger.); Andreas Fischer-Lescano, *Kritik der praktischen Konkordanz*, 41 KRITISCHE JUSTIZ [KJ] 166, 172–176 (2008) (Ger.); Gunther Teubner, *Transnational Fundamental Rights: Horizontal Effect?*, 40 R&R 191 (2011); *contra* Hugh Collins, *The Impact of Human Rights Law on Contract Law in Europe*, 22 EUR. BUS. L. REV. 425 (2011).

55. Femia, *supra* note 39, at 272.

56. Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors*, 69 MOD. L. REV. 327, 340 (2006) (“If violations of fundamental rights stem from the totalising tendencies of partial rationalities, there is no longer any point in seeing the horizontal effect of fundamental rights as if the rights of private actors have to be weighed up against each other.”).

57. See, e.g., Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 139 (2003) (founding the rationality of balancing on a “disproportionality rule”).



reconstruct the prophecy of restoring a lost unity. Thus, the self-subversive force of fundamental rights would be lost with balancing, along with the unending work that those rights do to reset the systemic boundaries through political moments of ruptures.

The discursive collision between contractual and non-contractual legal writings is infrasytemic and intertextual. The anonymous matrix of other systems (for one, economics) tries to corrupt the discursive systemic structures: the matrix comes from outside the legal system, but the conflict takes place within it, as a clash of private and public legal texts. Fundamental rights modify the norms involved through local ruptures of consolidated meanings. They are the instruments for diffuse microconflicts, not for global conciliation. Legal science can only steer these policontextual conflicts toward a discursive equilibrium of ruptures. This sequence of ruptures protect the autonomy of each system from the hegemonic attack of the other system's matrix.

Law, as every system, is a bundle of unresolved tensions: dissents, real contradictions, a disputed plurality of solutions are the ordinary dimensions of its communicative operations. Of course, being able to reach a perfect total knowledge, whereby one could see the holistic contract in a glorious narrative of global peaceful reality, would be felicitous. But that is a totalitarian (not simply a total) narrative. Reality is constructed by opposite, hegemonic and counterhegemonic, fragments.

## VIII

### CONCLUSION

In the semantic cage in which he had locked himself and his science, Ripert could only desire the desire for text. He could not bear the stories that his colleagues told in their works; he reacted roughly against the attempts to create fairness without the high-descending text he had been waiting for in vain. The language of his colleagues seemed to him a religious rhetoric, a legally sacrilegious abuse of iteration: "Repetition of the same words, intoxication of formulas, legal prayer. The lawyer pronounces the sacred verses with which the duties are written and creates a new world."<sup>58</sup> The Other's rhetoric is legal prayer, *prière juridique*: and jurists shall not pray.

A century of criticism has changed the forms, not the substance of the question. The direct application of fundamental rights (*Drittwirkung* in continental language) has been the secularization of legal prayers during the second half of the twentieth century. Awareness of the systemic functioning of the law shifts the paradigm.

We do not need a *Drittwirkung*, but a semantic destitution of paranomic functionings and categorical dissemination; no all-embracing revolutions (none of us will see a legal sectorial system—legal, not only governmental—collapse

---

58. Ripert, *supra* note 53, at 31.

suddenly in a day), but a diffuse microphysics of ruptures.<sup>59</sup> No fixed set of remedies exists. Rather, we must choose remedies by taking account of third-party effect, liability beyond the parties, duties to renegotiate, or the likely effect of direct imposition of rules<sup>60</sup>: each local system selects its favorite fragments to frame a functional language, and we can use each of these fragments to help us rewrite the contract, thus inducing a microphysical infra-systemic rupture. However, we must not search for an *essentia* within any of these manifold categories: there are structures, the force is the stream of communication, the result is the rewriting.

Every court's removal of paranomic contractual clauses in the name of fundamental rights is counterhegemonic application<sup>61</sup> and induces a re-entry of the communication movements about fundamental rights, a new political moment. In a fragmented system (fragmented as the world itself), the strategies of rupture are fragmented, too.

---

59. According to Foucault, the "microphysics of power" is a way to study the diffusion of power. MICHEL FOUCAULT, *SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON* 34–35 (Gallimard 1975) (Fr.). The microphysics of rupture is a strategy for radical renovation (or self-subversion) from below. ("Rupture" is borrowed from Christodoulidis, *supra* note 9.)

60. See Gunther Teubner, *Expertise as Social Institution: Internalising Third Parties into the Contract*, in *IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS* 333 (David Campbell et al. eds., 2003) (providing an illuminating strategy for choosing remedies).

61. Femia, *supra* note 39, at 273.