

11-1-1992

# A Primer on Deconstruction's Rhapsody of Word-Plays

Arthur Austin

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

---

## Recommended Citation

Arthur Austin, *A Primer on Deconstruction's Rhapsody of Word-Plays*, 71 N.C. L. REV. 201 (1992).Available at: <http://scholarship.law.unc.edu/nclr/vol71/iss1/13>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## ESSAY

### A PRIMER\* ON DECONSTRUCTION'S\*\* "RHAPSODY OF WORD-PLAYS"\*\*\*

ARTHUR AUSTIN\*\*\*\*

*Deconstruction, a method of literary criticism unleashed by Jacques Derrida, has burst into legal academia. The critical legal studies and feminist jurisprudence movements, among others, have used its manipulative techniques to undermine traditional interpretations of law and society. Deconstruction has also made appearances among practitioners and in judges' chambers. In his Essay, Professor Arthur Austin defines this ephemeral theory of meaning and introduces the reader to the key decon players. He then illustrates, both textually and graphically, how deconstruction has been applied to legal analysis. Professor Austin concludes that, although deconstruction may be the ultimate word game, it has no relevance to law. Finally, in a fit of "aporia," the author deconstructs himself.*

#### I. "TO READ IS TO DESIRE THE WORK, TO WANT TO BE THE WORK . . . ."1

Deconstruction is more than a buzzword.<sup>2</sup> Its impact exceeds the

---

\* "The purpose of this typographical maneuver . . . is to indicate that the cancelled words, though inadequate, are the only ones available to the writer. It's a flashy gesture, and it makes an interesting point, though it can quickly become an annoying affection." DAVID LEHMAN, *SIGNS OF THE TIMES* 53 (1991).

\*\* "Deconstruction" is a second choice word. Derrida has confessed on several occasions that he has been somewhat surprised by the way this word came to be singled out, since he had initially proposed it in a chain with other words—for example, difference, spacing, trace—none of which can command the series or function as a master word.

Peggy Kamuf, *Introduction to JACQUES DERRIDA, A DERRIDA READER: BETWEEN THE BLINDS* vii (Peggy Kamuf ed., 1991).

\*\*\* Stephen Cox, *Devices of Deconstruction*, 3 *CRITICAL REV.* 56, 66 (1989).

\*\*\*\* Edgar A. Hahn Professor of Jurisprudence, Case Western Reserve University School of Law. Heidi Emick and Patricia Chambers made important contributions to this paper.

1. ROLAND BARTHES, *CRITICISM AND TRUTH* 93 (Katrine P. Keuneman ed. & trans., 1987).

2. "[I]mportant-sounding word or phrase connected with a specialized field that is used primarily to impress [laypersons]." *THE AMERICAN HERITAGE DICTIONARY* 222 (2d College ed. 1982).

yuppie dedication to "greed."<sup>3</sup> Decon beats paradigm<sup>4</sup> and oxymoron<sup>5</sup> with an eclecticism that other buzzi lack.<sup>6</sup> This accounts for its success—it can be used in any context because no one knows what it means.<sup>7</sup> "Deconstruction is at once the most skeptical of critical methods and the one least well understood by lawyers . . . ."<sup>8</sup>

Deconstruction is not an ephemera.<sup>9</sup> To be "livelier,"<sup>10</sup> Harvard,<sup>11</sup> Yale,<sup>12</sup> and Stanford<sup>13</sup> law reviews publish deconstruction articles. While others profess to understand decon, a growing number of law professors mistakenly think that they practice it.<sup>14</sup> A state supreme court judge advertised for clerks who could apply "deconstructionist textual theory to workers compensation statutes and article 9 of the U.C.C."<sup>15</sup> Partners use it to stay ahead of wily associates who may attempt to sneak it in conversation to make brownie points.<sup>16</sup> There is,

---

3. "Greed is healthy. You can be greedy and still feel good about yourself." A quote attributed to Ivan Boesky, a Wall Street takeover expert caught and sentenced for using inside information. Arthur D. Austin, *Antitrust Reaction to the Merger Wave: The Revolution v. the Counterrevolution*, 66 N.C. L. REV. 931, 941 (1988).

4. Paradigm is the boilerplate reference to THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). "Like a virus, the word spread far beyond science and came to mean basically any dominant idea." *The History of an Unlikely Buzzword*, FORTUNE, Sept. 23, 1991, at 140. A policy planner from the White House is dazzled: Kuhn's book is "in fact the single most cogent description ever written about the sociological nature of intellectual change." James P. Pinkerton, Book Review, AMERICAN SPECTATOR, Dec. 1991, at 12, 15.

5. See John W. Guendelsberger, *The Charge of the Oxymora*, NAT'L L.J., Apr. 24, 1989, at 13.

6. It has even been called an "ominous buzzword." Nina King, *Classroom Notes: A Controversial English Department Deserves High Marks for Teaching*, WASH. POST, April 7, 1991, at R12.

7. An ordinary political article on David Duke becomes more titillating with the title: "Deconstructing Duke." Joe Klein, *Deconstructing Duke*, NEW YORK, Dec. 2, 1991, at 62.

8. RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 211 (1988).

9. See Benjamin Franklin, *The Ephemera*, in POOR RICHARD'S ALMANAC, AND OTHER PAPERS 57 (1886). For a deconstruction of this sentence, see *infra* note 267.

10. Fox Butterfield, *Kenyan's Son Named to Head Harvard Law Review*, N.Y. TIMES, Feb. 6, 1990, at A17.

11. E.g., Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

12. E.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

13. A Stanford Law Review symposium on critical legal studies, conducted by some of the foremost law practitioners of deconstruction, verified that deconstruction was henceforth part of the dialogue in legal education. See Mark V. Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984).

14. See *infra* notes 328-32 and accompanying text.

15. David Margolick, *At The Bar*, N.Y. TIMES, July 5, 1991, at A12.

16. In today's tight job market, brownie points are important.

however, one problem: Applied to law, deconstruction is mischievous nonsense.

Law decon is a fugitive from literary criticism.<sup>17</sup> The positive side of literary criticism is reflected in the writing of talents like Matthew Arnold,<sup>18</sup> Edmund Wilson,<sup>19</sup> and George Bernard Shaw,<sup>20</sup> who elevated the reader's vision of literature. The critic's mission and responsibility is to help the "literate public of his day"<sup>21</sup> and identify merit.<sup>22</sup> The downside is the vicissitudes of academe, which is a maelstrom of Boston style politics and fashion—mostly the latter.<sup>23</sup> The urge to be chic often overcomes truth and candor. As a result, many literary types are takers—that is their profession.<sup>24</sup>

Until recently the text was the source of the critic's message. The critic could be imaginative, vacuous, or political, but no one disputed the author's primary control over the text. The result was a unique discipline in which the critics were always second to the text and the author. No matter how innovative, they had to defer to the "creators."<sup>25</sup> Incapable of creating as authors, they were compelled to seek fame as "critics," intellectual parasites who feed off the work of others.

Successful critics attained fame by creating or attaching themselves to "schools." A school is a disciplined perspective set up to guide one in evaluating text. Realism, Humanism, Aestheticism, and Regionalism

17. See *infra* note 80 and accompanying text.

18. "In his social criticism Arnold stakes everything upon culture; if we would save society in a day of crumbling standards, we must find the best that men have thought and known and make it prevail." THE COLLEGE SURVEY OF ENGLISH LITERATURE 1054 (Alexander M. Witherspoon ed., rev. ed. 1951).

19. "One of his complaints about academicians, indeed, was that they were too lazy to read much, and hence elevated the reputations of unprolific writers . . ." John Updike, *Edmund Wilson and the Landscape of Literature*, ESQUIRE, Dec. 1983, at 428.

20. See GEORGE B. SHAW, *DRAMATIC CRITICISM* (John F. Matthews ed., 1959). It was Shaw who said, perhaps anticipating deconstruction, that once "a revolution becomes a government it necessarily sets to work to exterminate the revolutionist . . . For when the revolution triumphs revolution becomes counter-revolution." Claude Rawson, *Playwright Pleasant and Unpleasant*, N.Y. TIMES, Oct. 20, 1991, § 7 (Magazine), at 3 (book review).

21. T.S. ELIOT, *TO CRITICIZE THE CRITIC, AND OTHER WRITINGS* 21 (1978).

22. "The job of the critic was not to act as judge or executioner over single works, but to be a missionary and elucidator whose voice was heard over the whole country." Michael Holroyd, *George Bernard Shaw, Cub Reviewer*, N.Y. TIMES, Sept. 18, 1988, § 7 (Magazine), at 1, 38.

23. The best description—a virtual training manual—is MARY MCCARTHY, *THE GROVES OF ACADEME* (1951).

24. "He is in it for what he can get out of it, not for the satisfaction of getting something right." RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972-1980)* 152 (1982).

25. The closest that a critic can come to author status is to claim an aesthetic style. See René Wellek, *Destroying Literary Studies*, NEW CRITERION, Dec. 1983, at 1, 3.

have battled at one time or another for control of literary criticism.<sup>26</sup> Deconstruction is a school that reverses the hierarchy of author over critic.<sup>27</sup> "[D]econstruction elevates the interpreter or critic above the literary or philosophical figure that he studies. His (or her) Shakespeare has nothing to learn from Shakespeare himself. The thrill of being Shakespeare's superior is not to be understated."<sup>28</sup>

### A. *Meaning and Deconstruction*

Literary critics deal with the relationship between speech, text, nuance, and meaning. Do words label things that exist independently of language? Is a rose a rose plant whatever the language? It is, of course, never this simple; a rose can be a plant (of many varieties), a name of everything from a football player,<sup>29</sup> or a woman, to a cow,<sup>30</sup> or color.

One way of dealing with this dilemma is to look for meaning in "differentiations"—language serves to simplify meaning by differentiating categories. We refer to the words *cold*, *warm*, *hot*, and *scalding* to describe the temperature of water. While an arbitrary point on the spectrum, *warm* serves to differentiate—or contrast—its category from *cold* or *hot*. The meaning of *warm* is not totally arbitrary since the community can contrast it with the other categories. The letters w-a-r-m compose a "signifier"<sup>31</sup> which evokes the "signified" "warm" in the reader's mind. It is, therefore, the differences that determine meaning.<sup>32</sup> The

---

26. LITERARY HISTORY OF THE UNITED STATES: HISTORY 1358-73 (Robert E. Spiller et al. eds., 4th ed. 1974); see DONALD W. HEINEY, ESSENTIALS OF CONTEMPORARY LITERATURE (1954).

27. For understandable discussions of deconstruction, see JOHN ELLIS, AGAINST DECONSTRUCTION (1989); DAVID LEHMAN, SIGNS OF THE TIMES (1991); FRANK LENTRICCHIA, AFTER THE NEW CRITICISM (1980); Raymond Tallis, *A Cure For Theorrhea*, 3 CRITICAL REV. 7 (1989).

28. Joel Schwartz, *Antihumanism in the Humanities*, PUB. INTEREST, Spring 1990, at 29, 42-43.

29. Earl Campbell was known as the "Tyler Rose" because of his family's 100 acre rose farm. *Class of '91*, CLEV. PLAIN DEALER, July 21, 1991, at 11-D.

30. Rose second of Aberlone was a cow sold as barren who subsequently had a calf. *Sherwood v. Walker*, 66 Mich. 568, 569-71, 33 N.W. 919, 920 (1887).

31. A signifier is "the concretely perceptible component of a \*sign, as distinct from its conceptual meaning (the \*signified). In language, this may be a meaningful sound, or a written mark such as a letter or sequence of letters making up a word. The term often appears in its French form, *signifiant*." CHRIS BALDICK, THE CONCISE OXFORD DICTIONARY OF LITERARY TERMS 205 (1990).

32. It is the system of differentiation, therefore, that is the source of meaning: the way in which a language simplifies an infinitely complex set of phenomena to make up a finite set of categories, to one or other of which all phenomena will be assigned. What then becomes important is the particular set of characteristics that are the basis of the differentiation introduced by the set of concepts.

ELLIS, *supra* note 27, at 46.

reader and the language work together to discover meaning.

I describe this approach because it flushes out the complexities of interpretation methodology and because it constitutes an effective way to describe deconstruction.<sup>33</sup> It is "structuralism," a method of interpretation that proceeded "post-structuralism,"<sup>34</sup> commonly called deconstruction.

Deconstruction exploits differentiation in order to claim that meaning is never ending. Its practitioners have replaced differentiation, or contrasts between words, with the "play" of differences—"the free play of the signifier"<sup>35</sup>—which precludes a finite meaning. Meaning is constantly deferred—postponed indefinitely—and thus is never fixed or "final."<sup>36</sup> There is suspension through *trace*; each word has *trace* of meaning from previous words, while simultaneously "hold[ing] itself open" to the traces of subsequent words.<sup>37</sup> It joins the "inside" of the text to the "outside."<sup>38</sup> It is similar to the flight of an arrow; it is in

33. It is Saussure's technique and serves as the basis for the departure into deconstruction. *Id.* at 45.

Saussure's insights marked a decisive and apparently irreversible shift in the science of linguistics from an "item centered" to a system-centered view of language and inaugurated a linguistics that was concerned less with the relations between individual words and their seemingly autonomous referents than with the systematic relations between words and other words.

Tallis, *supra* note 27, at 10. See generally DAVID HOLDCROFT, *SAUSSURE: SIGNS, SYSTEM AND ARBITRARINESS* (1991) (describing Saussure's theory in depth).

34. "Structuralists are convinced that systematic knowledge is possible; post-structuralists claim to know only the impossibility of this knowledge." JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 22 (1982).

35. Tallis, *supra* note 27, at 34.

36. In Derrida's brand of differential linguistics, the meaning of words is never present but is constantly *deferred*, since words *differ* not only from one another but from themselves. How do words differ from themselves? Part of the explanation is that there is an element of temporality in language, and therefore a word means something different each time it is used . . . ."

LEHMAN, *supra* note 27, at 95. "The sense we have of a presence now deferred and waiting to be reappropriated is but an illusion created by the very process of linguistic deferral, an illusion continuously undercut by the cunning movement of signification as the structure of difference." LENTRICCHIA, *supra* note 27, at 171.

37. TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 128 (1983).

38. EVE TAVOR BANNET, *STRUCTURALISM AND THE LOGIC OF DISSENT* 212 (1989).

It joins the word or meaning which is "present" in the text to words, meanings and associations which are "absent" in the text but implied by the word's chain of associations or differential relations. Of course, the precondition for this operation is to erase such concepts as authorial intention, linguistic intentionality and the difference between conscious and unconscious intentions. Cleverly used, a word in one literary or philosophical text can lead not only to any number of other literary or philosophical texts, but almost anywhere, in a system of "infinite reference of one to another."

motion but at any instant it is not, and "every instant is already marked with the traces of the past and future."<sup>39</sup> As the deconstructionists say, a text never has a "privileged" meaning.<sup>40</sup>

Some deconers prefer to explain the process as a function of "iteration." The meaning of every word will change, however slightly, as it is used in each new context and since "all texts are necessarily constructed through iteration (that is, through the incremental repetition of words in slightly displaced contexts), indeterminacy inheres in writing's very essence."<sup>41</sup> According to Derrida, "the enterprise of deconstruction always in a certain way falls prey to its own work."<sup>42</sup>

The next step seals the demise of the author's influence and simultaneously assures that the reader—and the underprivileged critic—gain total control over the text. The operative term is "textuality." Texts do *not* depend on the author's intention; instead they have a textuality, or meaning, of their own. "All literary texts are woven out of other literary texts, not in the conventional sense that they bear the traces of 'influence' but in the more radical sense that every word, phrase or segment is a reworking of other writings which precede or surround the individual work."<sup>43</sup> Once the connection with the creator-author is severed, an extremely radical implication is accepted by the deconstructionists: The text is no longer bound by *any* convention or rule of language, such as the differentiation or contrast principle.<sup>44</sup> "*There is nothing outside of text* [there is no outside-text; il n'y a pas de hors texte]."<sup>45</sup> "[T]he readers have now overthrown the bosses and installed themselves in power."<sup>46</sup> For Barthes, it meant that "it is the language which speaks, not the author."<sup>47</sup> It is a replay of Orwell's *Animal Farm* in inter-

39. CULLER, *supra* note 34, at 94.

40. "A deconstruction, then, shows the text resolutely refusing to offer any privileged reading . . . [D]econstructive criticism clearly transgresses the limits established by traditional criticism." ELLIS, *supra* note 27, at 69.

41. N. KATHERINE HAYLES, CHAOS BOUND: ORDERLY DISORDER IN CONTEMPORARY LITERATURE AND SCIENCE 181 (1990).

42. JACQUES DERRIDA, *Of Grammatology*, in A DERRIDA READER: BETWEEN THE BLINDS 41 (Peggy Kamuf ed., 1991).

43. EAGLETON, *supra* note 37, at 138. He adds: "There is no such thing as literary 'originality', no such thing as the 'first' literary work: [A]ll literature is 'intertextual.'" *Id.*

44. "[I]ntertextuality" does not indicate merely the strategy of reading one text with another, but the fact that every text is itself already an intertextual event . . . the text is not itself—because the present is not itself." LENTRICCHIA, *supra* note 27, at 175 (quoting John Rowe).

45. Tallis, *supra* note 27, at 12 (quoting JACQUES DERRIDA, OF GRAMMATOLOGY 158 (Gayatri C. Spivak trans., Johns Hopkins Univ. Press 1976) (1967)).

46. EAGLETON, *supra* note 37, at 85.

47. Tallis, *supra* note 27, at 19 (quoting Roland Barthes, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142, 143 (Stephen Heath trans., 1977)).

pretation.<sup>48</sup>

The consequence is an exercise in co-opting the author and text. Under the *Animal Farm* regime: (1) The reader-critics are now in full control of the meaning and the text. They, not the "oppressor"<sup>49</sup> authors, are the creators.<sup>50</sup> (2) There are as many "correct" interpretations as readers.<sup>51</sup> (3) Disputes over conflicting meanings can *never* be resolved because resolution would require appeal to the text—the focus of the dispute. (4) Finally, if there is a "correct" interpretation, it belongs to the deconstructionists.

These alterations are expressed in the deconstructionists' favorite terror-word—"indeterminacy." "The tactic of deconstructive criticism . . . is to show how texts come to embarrass their own ruling systems of logic . . . ."<sup>52</sup> The term is *aporia*—meaning "full of doubts and objections."<sup>53</sup> Meaning is *always* indeterminate. Every word is vulnerable to decon strategy. For example, in the title, "Deconstruction and the Possibility of Justice," "the conjunction 'and' brings together words, concepts, perhaps things that don't belong to the same category . . . and dares to defy order, taxonomy, classificatory logic, no matter how it works: by analogy, distinction or opposition."<sup>54</sup> In other words, "[t]he deconstructive analysis of a literary work nearly always ends in a moment of terminal uncertainty"—an *aporia*.<sup>55</sup>

An exercise in deconstruction is a "performance." The reader identifies a "privileged" interpretation of a text. The essence of the decon performance is an attack on privileged meaning. "Privileged meaning" is a political term of art that serves as a symbol for establishment views. The process of performance is what the deconstructionists like to call

48. "'All Animals are Equal but Some Animals Are More Equal Than Others.'" GEORGE ORWELL, *ANIMAL FARM* 123 (New American Library, 8th ed. 1962) (1946)).

49. "[I]n a relentlessly political environment, the author is easily demonized as the oppressor in the author/critic relationship, demanding a subservience from which the academic critic is determined to be liberated." Norman Fruman, Book Review, *ACAD. QUESTIONS*, Fall 1991, at 91, 95 (reviewing ALVIN B. KERNAN, *THE DEATH OF LITERATURE* (1990)).

50. "Sometimes the reader is said to *discover* the text's range of meanings, sometimes actually to produce and *create* meanings, but common to all versions of this point is the assertion that the critic is far more important and creative than criticism has assumed him to be." ELLIS, *supra* note 27, at 115.

51. "There are no truths, only rival interpretations . . . ." LEHMAN, *supra* note 27, at 67.

52. EAGLETON, *supra* note 37, at 133.

53. From the Greek meaning "unpassable path." CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 49 (1987).

54. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 *CARDOZO L. REV.* 919, 921 (1990).

55. LEHMAN, *supra* note 27, at 55.



"critical terrorism."<sup>56</sup>

The performance is "undermining, subverting, exposing, undoing, transgressing, or demystifying"<sup>57</sup> the privileged meaning. This is done by suggesting a counter or polar interpretation, thereby demonstrating indeterminacy which casts doubt on the legitimacy of the privileged reading. Polar readings—"repressed writing"<sup>58</sup>—are flushed out in the "margins"—such as minor passages, historical references, footnotes—or surmises. The deconstructionist can thus argue that his reading<sup>59</sup>—the polar meaning—is just as correct as any other meaning.

Deconstructionists created a new universe of words such as *foregrounding*, *privilege*, *problematize*, *valorize*, and *contextualize*.<sup>60</sup> These ambiguous terms allow them to speak in a language known only to the insiders. The objective—in fact a "duty"<sup>61</sup>—is to create a verbal fashion that deflects critical attack and retains the author's *ma profondeur*.<sup>62</sup> With "new and strange terminology . . . familiar positions may not seem so familiar and otherwise obviously relevant scholarship may not seem so obviously relevant."<sup>63</sup> Who, for example, can understand, much less criticize this: "We see in this rehearsal of *Foucault* that contemporary criticism cherishes the displacement both of dialectics by diacritics and of totalized organic representations of history by comprehensive graphs of affiliated disciplines in the episteme."<sup>64</sup>

The purists—the defenders of the French vision—disagree with the above survey. To them, it is low-life academic skulduggery that subverts the method and purpose of deconstruction. "Domesticated and neutral-

56. Critical terrorists . . . would like to blow up—metaphorically, of course—the legitimacy of institutions and traditions, canons of taste and judgment, and received values of any kind. And like terrorists, deconstructionists steel themselves to toss their bombs without regard for the comfort of bystanders—in this case, the authors and readers of literature.

*Id.* at 77.

57. ELLIS, *supra* note 27, at 69.

58. "A repressed writing . . . is the 'tension between gesture and statement' in such critical texts which 'liberates the future of a general grammatology.'" NORRIS, *supra* note 53, at 31.

59. The use of "his reading" is obviously a privileged phrase—and therefore the "oppressive"—manifestation of patriarchy. See *infra* note 255 and accompanying text.

60. For a full listing of words and definitions, see LEHMAN, *supra* note 27, at 84.

61. A duty "to avoid transparent language." Tallis, *supra* note 27, at 29.

62. A book by a French historian famous for his profound obscurity was recently translated into plain English. When thus made clear it turned out that his argument was simple, even a little simple-minded. The historian in his eminence was outraged by the lucidity of the translation. It did not capture, he complained, *ma profondeur*.

DONALD N. McCLOSKEY, *IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE* 57 (1990).

63. ELLIS, *supra* note 27, at 142.

64. LEHMAN, *supra* note 27, at 86.

ized, it has been reduced to a tamed dogma of textual nihilism."<sup>65</sup> The purists make an important distinction.

To the finical, deconstruction is a can opener to the arrangement of the text; it is a process of extracting terms that uncover the meaning of the structure. Decon is a frustrating process—one may find an aesthetic reading, but then must feed "this position back into the text, asking what the work has to say about the conclusion reached."<sup>66</sup> It is a "dogged pursuit" to find "some final response to all linguistic and conceptual difficulties."<sup>67</sup> It is not, as the Americans presume, "free-play in the blue."<sup>68</sup> The point of the purists is that deconstruction seeks exchanges, friction, not interpretation. The "goal is not to reveal the meaning of a particular work but to explore forces and structure that recur in reading and writing."<sup>69</sup> It seeks textual knowledge.

### B. *The Players*

To keep up with Edie,<sup>70</sup> poseurs have to know the players.<sup>71</sup> It is not unusual for an agile dilettante to massage a night's conversation by references to the decon stars. Any conversation has to include the following players: Jacques Derrida, Paul deMan, and Stanley Fish.

*Jacques Derrida* started it: "Deconstruction is the brainchild of Jacques Derrida, the Algerian-born French philosopher, a resident of Paris and a frequent visitor to the United States, where he has held faculty appointments at several universities."<sup>72</sup> On the lecture circuit, he is as "hot" as Bruce Springsteen.<sup>73</sup> His passion is the text, and he first gained

65. Allan C. Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L.J. 209, 231 (1984) (reviewing JAMES B. WHIT, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND CONTINUITY* (1984)).

66. CULLER, *supra* note 34, at 240.

67. Stephen Cox, *Devices of Deconstruction*, 3 CRITICAL REV. 56, 64 (1989).

68. LENTRICCHIA, *supra* note 27, at 175.

69. CULLER, *supra* note 34, at 260.

70. "At the beginning, Andy and Edie's [Sedgwick] nights on the town were, as Gerard Malanga said, something 'you'd read about in F. Scott Fitzgerald.'" VICTOR BOCKRIS, *THE LIFE AND DEATH OF ANDY WARHOL* 164 (1989).

71. For a classic account of poseur society, see TRUMAN CAPOTE, *ANSWERED PRAYERS* (1987).

72. LEHMAN, *supra* note 27, at 23. Christopher Norris, the best expositor of Derrida, says: "It was a paper he gave in 1966 at a conference organized by Johns Hopkins University that marked the emergence of 'literary' deconstruction as a force in American criticism." NORRIS, *supra* note 53, at 13.

73. "Many of these French critics were (and still are) invited to American campuses where they dazzled students and faculty alike in lectures, gatherings and sometimes courses. Their appearances became cult-like occasions, and Derrida, for example, could create the pas-

notoriety by lambasting the established view that the spoken word is superior to writing.<sup>74</sup> To him, culture, history, and knowledge come from writing.<sup>75</sup> It was Derrida who popularized the word *différance* to indicate that the meaning is both "differential" and "deferred," "the product of a restless play within language that cannot be fixed or pinned down for purposes of conceptual definition."<sup>76</sup> *Différance* is "a marginal zone where the particular, the unique, and the incommensurate may reside in autonomy from the broader systems that threaten to assimilate, absorb, or reduce them."<sup>77</sup> He is famous for the use of similar terms to prevent "conceptual closure"—the "reduction [of the text] to an ultimate meaning."<sup>78</sup> As Frank Lentricchia says: "Derrida speaks not of a free-play in the world, but of a 'freeplay of the world.'"<sup>79</sup>

The irony of Derrida's success is that he unsuccessfully seeks status as a philosopher while achieving widespread recognition among the literary set. He dominates American literary criticism by giving critics parity with philosophers.<sup>80</sup> Even more disturbing to Derrida disciples like Christopher Norris is the misuse of deconstruction by Americans: "[T]hose zealots of a limitless textual 'freeplay' who reject the very notions of rigorous thinking or conceptual critique."<sup>81</sup> Eagleton calls the notion of "freeplay" "a travesty of Derrida's own work."<sup>82</sup> This is now a moot point—the Americans do use Derrida to justify "freeplay."<sup>83</sup> They have, ironically, deconstructed the Master.

Next to Derrida, *Paul deMan* is the player. In one important respect, he is more celebrated than the Master—deMan is the subject of

---

sion and attract overflow crowds of believers as easily as, say, Bruce Springsteen." Edward Engleberg, *Another French Revolution*, BRANDEIS REV., Winter 1989-90, at 41, 42.

74. For a "portable" Derrida, see JACQUES DERRIDA, *A DERRIDA READER: BETWEEN THE BLINDS* (Peggy Kamuf ed., 1991) [hereinafter DERRIDA, *A DERRIDA READER*].

75. CHRISTOPHER NORRIS, DERRIDA 95 (1987) [hereinafter NORRIS, DERRIDA].

76. *Id.* at 15.

77. HENRY SUSSMAN, *HIGH RESOLUTION: CRITICAL THEORY AND THE PROBLEM OF LITERACY* 46 (1989).

78. NORRIS, *supra* note 53, at 32.

79. LENTRICCHIA, *supra* note 27, at 168.

80. "His work provided a whole new set of powerful strategies which placed the literary critic, not simply on a footing with the philosopher, but in a complex relationship (or rivalry) with him, whereby philosophic claims were open to rhetorical questioning or *deconstruction*." NORRIS, *supra* note 53, at 21.

81. NORRIS, DERRIDA, *supra* note 75, at 27. Lentricchia agrees. LENTRICCHIA, *supra* note 27, at 174-76.

82. EAGLETON, *supra* note 37, at 148.

83. Derrida's obscure syntax invites "freeplay." "[F]or readers with a lifetime to spare, there is also a 100-page essay by Jacques Derrida, dealing with a subject yet to be determined." W. CAIN, *THE CRISIS IN CRITICISM: THEORY, LITERATURE, AND REFORM IN ENGLISH STUDIES* 167 (1984).

one of the most egregious and puzzling scandals in the history of academe.<sup>84</sup>

With subdued flair and an iron-willed intelligence, Paul deMan popularized deconstruction in the United States. Immigrating to this country following World War II with no money or position he became the star at Yale, leading the Yale School of Criticism to unparalleled status.<sup>85</sup> deMan was the Godfather of the Yale Mafia, "a critic who has always given the impression of having a grip on truth."<sup>86</sup> If Derrida advocates parameters on interpretation, deMan advocates total subversion,<sup>87</sup> "a technique of trouble," making the reader "face the trouble already there."<sup>88</sup> To him language can never escape "from the duplicity, the confusion, the untruth that we take for granted in the everyday use of language."<sup>89</sup> His writing is "special" because it puts the readers in a corner where they can only make sense of his analyses by "according belief to what seems implausible or at least unproven."<sup>90</sup> After demonstrating that meaning traces endlessly, deMan demands that the "critic must yet demonstrate that it has no beginning either."<sup>91</sup> He was an expert in academic warfare and was admired as "the only man who ever looked into the abyss [of deconstruction] and came away smiling."<sup>92</sup>

Three years after a death with honors, deMan's reputation was deconstructed—and destroyed. On December 1, 1987, a New York Times headline read: *Yale Scholar's Articles Found in Nazi Paper*.<sup>93</sup> Researching for a doctoral dissertation, a young scholar discovered that for at least two years during the early 1940s, deMan published 170 articles in the leading pro-Nazi Belgium newspaper *Le Soir*. Paul deMan was ex-

84. The closest parallel is playwright Lillian Hellman, who was exposed as living a fabricated life. WILLIAM WRIGHT, *LILLIAN HELLMAN: THE IMAGE, THE WOMAN* (1986).

85. For a first-rate description and analysis of the Yale school, see *THE YALE CRITICS: DECONSTRUCTION IN AMERICA* (Jonathan Arac et al. eds., 1983).

86. LENTRICCHIA, *supra* note 27, at 284.

87. Oddly, however, though Derrida warned that *différance*, as the subversion of all ontological realms, could authoritatively command nothing, the Yale critics have taken *différance* as a radically subversive authority which autocratically commands, as *abyssme*, the whole field of writing, and while doing so establishes writing as a monolith itself that forever escapes determination.

*Id.* at 173.

88. DENIS DONOGHUE, *FEROCIOUS ALPHABETS* 185 (1984).

89. PAUL deMAN, *BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM* 9 (2d ed. 1983).

90. CULLER, *supra* note 34, at 229.

91. WILLIAM RAY, *LITERARY MEANING: FROM PHENOMENOLOGY TO DECONSTRUCTION* 198 (1984).

92. LEHMAN, *supra* note 27, at 156.

93. *Id.* at 158.

posed as a Nazi collaborationist and propagandist. Things continued to unravel: He was said to be a "scoundrel." "Swindling, forging, lying even, were, at least at the time, second nature to him."<sup>94</sup> In addition, a wife and three children whom he never acknowledged turned up, left behind when he came to the U.S. Novelist Mary McCarthy, who got deMan his first teaching job at Bard, summed up years before the scandal: "[He was] given to lying, evasion, fantasy, greed, possibly even theft—in short plastic and formless, with an intelligence that's outdistanced his morals."<sup>95</sup>

In the circus that followed the revelations, deconstructionists battled each other, fought to repel attacks by non-believers, and vilified the press. Bitter opponents of the decon school saw deMan's collaboration and cover-up as self-serving and confirmation that deconstruction was a device to reject history which amounted to nothing more than blatant nihilism.<sup>96</sup> These opponents proffered belief in the total subversion of the text as evidence. Not only was deconstruction compatible with Nazism, it "encourages it."<sup>97</sup> "If the inevitable outcome of mourning is the incorporation of a figure, let us be sure to remember the right one. The number is six million; their name in history is the Jews."<sup>98</sup>

To defend deMan, deconers had to repudiate their basic assumption that meaning is uncertain and never stable. To show that he was irrefutably innocent of the charges of treason—"the facts are otherwise"<sup>99</sup>—his defenders had to rely on a condition of certainty. If, on the other hand, they clung onto the belief of constant uncertainty, the charge could be, as with any reading, "correct"<sup>100</sup>—at least as to some readers. By opting for innocence, the defenders rejected aporia, traces, and iteration.

But either deconstruction was or it was not what it had always previously maintained: an attack on certainty. If it was, then why were deconstructionists now denying it? If it was not, then deconstruction had no point at all. In defending deMan, Der-

---

94. *Id.* at 187.

95. David Lehman, *Paul deMan: The Plot Thickens*, N.Y. TIMES, May 24, 1992, at 1, 19 (book review).

96. "At any rate, shifting attention away from the representational writings of poets, essayists, and fiction writers, and focusing, instead, on the question of *how critics* read would give deMan the opportunity to conceal his past, even from himself." DAVID H. HIRSCH, *THE DECONSTRUCTION OF LITERATURE: CRITICISM AFTER AUSCHWITZ* 72 (1991).

97. Letters, Charles Griswold, Jr., *Deconstruction, The Nazis, & Paul deMan*, N.Y. REV. BOOKS, Oct. 12, 1989, at 69.

98. Tobin Siebers, *Mourning Becomes Paul deMan*, in *RESPONSES ON PAUL DEMAN'S WARTIME JOURNALISM* 363, 366 (1989) [hereinafter *RESPONSES*].

99. Peter Shaw, *The Rise and Fall of Deconstruction*, COMMENTARY, Dec. 1991, at 50, 51 (quoting J. Hillis Miller).

100. See *supra* note 51 and accompanying text.

rida, J. Hillis Miller, Geoffrey Hartman, and their followers ended up doing to deconstruction what deconstruction had set out to do to meaning and certainty: [T]hey left it ruins.<sup>101</sup>

To supporters, deMan lived two lives: On the "empirical" level of reality, he did whatever was necessary to survive; on the "higher" level he developed theories designed to subvert "every sentiment or prejudice that had made a mess of his early life in Belgium."<sup>102</sup> In the most bizarre twist of the chaos, Derrida and other defenders deconstructed deMan's pro-Nazi articles to exonerate a fallen comrade. Deconstructing one of the more notorious articles, Derrida, in "an astonishing 30,000 word cry of pain,"<sup>103</sup> found a code message defending the Jews. Lehman summarizes:

Making a deconstructive move you demote the center and elevate the marginal; you repeat yourself, add an emphasis, drop a qualifier, insert a few parenthetical digressions—and in the end you get just what you expected to find: [O]ne of those undecidable aporias that not only let deMan off the hook, just a little, but also let you salute deMan's theory of reading in the process.<sup>104</sup>

The stakes are high; if deMan is corrupt, some critics argue, so is deconstruction.<sup>105</sup> The puzzle lingers:<sup>106</sup> "If one wants to refuse him, one first has to refute. And who can even recognize where the deManic lies."<sup>107</sup> Put to the test of interpreting a real life situation, deconstruc-

101. Shaw, *supra* note 99, at 51.

102. Denis Donoghue, *The Strange Case of Paul DeMan*, N.Y. REV. BOOKS, June 29, 1989, at 32, 36.

103. James Atlas, *The Case of Paul DeMan*, N.Y. TIMES, Aug. 28, 1988, § 6 (Magazine), at 36, 37.

104. LEHMAN, *supra* note 27, at 238. Bernstein says:

Mr. Derrida's partial defense of deMan itself raises some difficult questions. His reading of the 1941 article is intense, exhaustive and often persuasive. But is it merely a clever use of the doctrine of the indeterminacy of the text, a ruse to exonerate deMan? Presumably, Mr. Derrida's text is also subject to a range of interpretations, including, perhaps, some that he did not intend.

Richard Bernstein, *The deMan Affair: Critics Attempt to Reinterpret A Colleague's Disturbing Past*, N.Y. TIMES, July 17, 1988, § 4, at 6.

105. Professor Hirsch is outspoken: "In this world, Paul deMan . . . permitted himself to become an accessory to the Nazi crimes, not by 'transmitting orders,' but by helping to circulate the poison that infected the entire society." HIRSCH, *supra* note 96, at 83.

Derrida seeks to separate deMan from deconstruction by arguing that "[i]t was more than twenty years after the war that deMan discovered deconstruction." JACQUES DERRIDA, *MEMOIRS FOR PAUL DEMAN* 245 (rev. ed. 1989).

106. Louis Menand, *The Politics of Deconstruction*, N.Y. REV. BOOKS, Nov. 21, 1991, at 39.

107. Richard Klein, *DeMan's Resistances: A Contribution to the Future Science of deManology*, in *RESPONSES*, *supra* note 98, at 295.

tion's impotence was exposed.<sup>108</sup>

If Derrida and deMan are the intellectual anchors of the deconstruction movement, Professor *Stanley Fish* is the publicity agent and provocateur.<sup>109</sup> He is a frequent contributor to law journals, a professor at Duke Law School, and chairman of the Duke English Department,<sup>110</sup> known as the Fish Bowl. Professor Morris Zapp, an ambitious character who sprinkles titillating comments in David Lodge's novels, is said to be patterned on Fish's flashy style.<sup>111</sup> Like Zapp, he is "a new breed of superstar as much concerned with professional notoriety as with the humdrum details of scholarship."<sup>112</sup> It was Zapp who said, "Well, I'm a bit of a deconstructionist myself. It's kind of exciting—the last intellectual thrill left. Like sawing through the branch you're sitting on."<sup>113</sup>

Fish's *Is There a Text in this Class?* is a boilerplate cite in legal decon. He writes that interpretation is a process of progressively "decertaining"<sup>114</sup> the text. "The objectivity of the text is an illusion and moreover, a dangerous illusion, because it is so physically convincing."<sup>115</sup> Thus, there is no fixed meaning of a text, except in the experience of the reader "and that experience is compromised the moment you say something about it."<sup>116</sup> Like Morris Zapp, Fish likes to play games

108. One of the most important consequences of the deMan crisis has been the demonstration that the central tenets and techniques of deconstruction have proven utterly useless in disclosing anything special about controversial texts in a real situation, as opposed to the abstractions deriving from this or that "reading" of Rousseau or Nietzsche or whoever, where nothing of consequence is really at stake.

Norman Fruman, *Deconstruction, deMan, and the Resistance to Evidence: David Lehman's Signs of the Times*, ACAD. QUESTIONS, Summer 1992, at 34, 45.

109. Professor Fish got some unwelcome publicity when he accused the National Association of Scholars of being "racist, sexist, and homophobic." Jeffrey Hart, *Epistemological Fascism at Duke*, NAT'L REV., Dec. 17, 1990, at 44, 58. The backlash was enough to make Fish wish he were Morris Zapp, his fictional counterpart in David Lodge's *Small World* (1984). The best response came from Professor Hart of Dartmouth: "Of course, this is a lie. But it is consistent with Stanley Fish's theory of knowledge, which holds that there is no objective and checkable truth." Hart, *supra*, at 58.

110. [A]dministrators here are apparently very proud of the Duke English department, since they hold it up as some kind of jewel in the university's crown. While some of those in the new wave might be as good as they say, one wonders whether or not the university hasn't been victimized by its own press releases.

Interview with Kenny J. Williams, *Caste and Class in a University Town*, ACAD. QUESTIONS, Spring 1991, at 41, 49.

111. ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* 146 (1990).

112. Adam Begley, *Souped-Up Scholar*, N.Y. TIMES, May 3, 1992, § 6 (Magazine), at 38.

113. DAVID LODGE, *SMALL WORLD: AN ACADEMIC ROMANCE* 118 (MacMillan Books, 1984).

114. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 23 (1980).

115. *Id.* at 43.

116. *Id.* at 65.

to baffle and stay ahead of his colleagues and rivals.<sup>117</sup> Anticipating George Will's effort to intellectualize baseball,<sup>118</sup> Fish deconstructed Dennis Martinez and Earl Weaver.<sup>119</sup> He seemed to be adopting a form of literary populism which allows the reader the discretion to define his own experience as the meaning—a meaning that has no more validity than any other.<sup>120</sup>

Nevertheless, Fish avoids the trap of indeterminacy. He argues that interpretation is, after all, restrained by the existence of "interpretive communities." These "communities" are groups composed "of those who share interpretive strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intentions."<sup>121</sup> In reality, this does not change anything; interpretation is still fluid. Communities grow and decline, "providing just enough stability for the interpretive battles to go on, and just enough shift and slippage to assume that they will now be settled."<sup>122</sup> In theory, the critic "loses the freedom to choose between the establishment and the opposition."<sup>123</sup>

## II. THE SECOND AMENDMENT DECONSTRUCTED

Deconstruction is generally practiced in two ways or two styles, although it most often grafts one on to the other. One takes on the demonstrative and apparently a historical allure of logico-formal paradoxes. The other, more historical or more anamnestic, seems to proceed through readings of texts, meticulous interpretation and genealogies.<sup>124</sup>

As a political missile and plastic word game, law deconstruction has

---

117. Ray first says that Fish "is not normally associated with post-structuralism," then deconstructs himself: "[H]is sustained effort to formulate a notion of meaning transcendent of the subjective/objective opposition does culminate in a historical version of Derrida's iterability that displays most of the hallmarks of post-structuralism." RAY, *supra* note 91, at 152.

118. GEORGE F. WILL, *MEN AT WORK: THE CRAFT OF BASEBALL* (1990). But see DAN JENKINS, *YOU GOTTA PLAY HURT* 285 (1991) ("Most baseball players were a sorry lot, as I had known them, basically the dumbest and lowest-rent collection of athletes I had ever encountered . . .").

119. Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987).

120. "Literary populism . . . gives the reader the 'right' to fabricate his own private meaning of a work, as if this were an extension of the citizen's right to his opinion." Gerald Graff, *Culture and Anarchy*, NEW REPUBLIC, Feb. 14, 1981, at 36.

121. FISH, *supra* note 114, at 171.

122. *Id.* at 172.

123. PHILIP GOLDSTEIN, *THE POLITICS OF LITERARY THEORY: AN INTRODUCTION TO MARXIST CRITICISM* 196 (1990).

124. Derrida, *supra* note 54, at 957-59.



no limits. It has been applied to areas of the law such as contracts,<sup>125</sup> torts,<sup>126</sup> labor,<sup>127</sup> and gender,<sup>128</sup> to name several. Nothing is off limits, however explicit, however settled.<sup>129</sup> With one interesting exception (which I will discuss), the Second Amendment has escaped a workout by the deconstructionist. This oversight is surprising since it is an ideal text; short and concise but full of hidden tensions residing in the margins and folds waiting to be manipulated<sup>130</sup>—the classic tug between the ingenious and obtuse.<sup>131</sup> It contains enough stress and gaps to give Professor Morris Zapp multiple *Aporia* orgasms.<sup>132</sup> A cunning deconstructionist can find within the amendment's text oppression, capitalism, "no nukes," or "a nuke in every home." The Second Amendment says:

*"A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."*<sup>133</sup>

The conventional—"privileged"—interpretation is: In a democratic form of government there is always the possibility of an internal coup by totalitarian forces who would use the standing army to gain control. Citizen militia, either organized or acting as guerrillas—may be last resort

125. Clare Dalton, *Deconstructing Contract Doctrine*, 94 YALE L.J. 997 (1985).

126. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

127. See, e.g., Karl Klare, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 65 (David Kairys ed., 1982).

128. See, e.g., Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

129. This includes the Constitutional Provision that "No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty-five Years . . ." U.S. CONST. art II, § 1, cl. 5.

The age requirement could refer to a "certain level of maturity." Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1174 (1985). Professor D'Amato attacks the provision head-on; he assumes that provisions of the Constitution are subject to amendment and thus "must be assumed to have been superseded or qualified by any relevant amendment." Now comes the *aporia*. He refers to the Fifth and Fourteenth Amendments as "relevant." "Age discrimination—in a matter that restricts the right of the people to elect a President of their own choosing—would clearly violate the due process clause of the fifth amendment, and the due process and equal protection clauses of the fourteenth amendment." Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250, 255 (1989).

According to my colleague Erik Jensen, while "funny," D'Amato's deconstruction is "utter nonsense."

130. It has been called "one of the worst drafted of all [constitutional] provisions." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644 (1989).

131. See POSNER, *supra* note 8, at 242.

132. In his famous striptease, Zapp said: "The reader plays with himself as the text plays upon him, plays upon his curiosity, desire, as a striptease dancer plays upon her audience's curiosity and desire." LODGE, *supra* note 113, at 26.

133. U.S. CONST. amend. II.

defenders and thus must be assured of a supply of arms.<sup>134</sup> Whether the Second Amendment refers to a collective right exclusively limited to organized militia or national guard (exclusively state's right view) or also constitutes a private constitutional right (individual right) is a matter of dispute.<sup>135</sup>

### A. Derrida and Clint Eastwood Decon the Second Amendment

#### A well-regulated militia

The International being necessary  
Mercenary Army needs  
mercenarys, bodyguards,  
and protection specialists  
\$20 membership includes  
lifetime membership,  
certificate, one-year  
employment record file,  
decal. Or write for info.  
(Soldier of Fortune)<sup>140</sup>

Nov. 30 First These, in the day when heaven was falling,  
segment of goose The hour when earth's foundations fled,  
and brant season ends<sup>136</sup> Followed their mercenary calling  
And took their wages and are dead.  
Their shoulders held the sky suspended;  
The House rejected They stood, and earth's foundations stay;  
a proposed ban on assault What God abandoned, these defended,  
weapons . . . And saved the sum of things for pay.<sup>137</sup>

one day after 22 people were slain by a gunman. . . .<sup>138</sup>

MAKE MY DAY \$220,000 paid for gun  
that killed Oswald.<sup>139</sup>

The above is a "Double Session;"<sup>141</sup> it imitates the visual impressions created by Derrida's *Glas* in which he juxtaposed quotations from

134. See Peter Feller et al., *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 52 (1966).

135. See, e.g., David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789-93.

136. Calendar, AKRON BEACON J., Nov. 15, 1991, at B6.

137. A.E. HOUSMAN, *Epitaph on an Army of Mercenaries*, in COLLECTED POEMS 144 (1959).

138. Jeffrey Birnbaum, *Assault Weapon Ban is Rejected by the House*, WALL ST. J., Oct. 18, 1991, at A16.

139. Steve Marshall, *\$220,000 Paid For Gun That Killed Oswald*, USA TODAY, Dec. 27-29, 1991, at 1.

140. *Classified*, SOLDIER OF FORTUNE, April 1986, at 112.

141. "The Double Session" is one example of a technique that Derrida frequently uses to bring home the effects of intertextuality, the ways in which writing cannot be contained within the limits of a book, an authoritative discourse or self-enclosed system of meaning. This technique takes the form of a graphic reminder, of printing two very different texts on a single page and virtually forcing the reader's eye to shuttle incessantly between them.

NORRIS, *supra* note 53, at 46.

The Double Session technique is by no means original with Derrida. According to William S. Burroughs' biographer, Burroughs discovered a similar technique by accident; a friend sliced through a pile of newspapers, then made a mosaic out of the strips. Calling this the cut-up method, Burroughs cut out strips—sentences, words, paragraphs—and mixed them to create a new form of literature.

It made explicit a simple sensory process that was going on all the time anyway—which is that when you're reading a newspaper, say, you're reading one column but you see the other columns as well, and the bus you're on and the person sitting next to you. There was a juxtaposition of what you were doing and what was happening around you. What the cut-up method did was incorporate that juxtaposition. Marcel Duchamp had done it years before by placing four unconnected texts in four

Hegel and Genet<sup>142</sup>—the former a philosopher, the latter a thief-turned writer. A reading of a double session “should no longer be carried out as a simple table of concepts or words, as a static or statistical sort of punctuation.”<sup>143</sup> My objective is to create an “unexpected encounter” of brutality and bravery.<sup>144</sup> The advertisement from Soldier of Fortune illustrates the contemporary corrupt associations that collect around the Constitution and Second Amendment, while A.E. Housman’s poetry reminds us of the many foreigners who fought to make the Second Amendment possible. As Derrida said, we are faced with “a double that nothing anticipates, nothing at least that is not itself already double.”<sup>145</sup> What we get is a sense of invasion; each side of text “invades” the other’s space and “play[s] havoc with the logic of meaning.”<sup>146</sup> Everything becomes elusive and evasive. “While reading one column you are reminded that the gist lies elsewhere.”<sup>147</sup> Housman’s poem appears, at least typographically, privileged, but in fact must contend with the acid reference to the House vote. Likewise, hunting geese collide with a human bloodbath(—does it?).<sup>148</sup> Traces shout everywhere, mixing and attacking, confirming Derrida’s view that ideas come from all texts and that “terms are indissociably entwined in a strictly undecidable exchange of values and priorities.”<sup>149</sup> It’s like footnotes barking<sup>150</sup> from below the line—an encounter between texts is “like going downstairs to answer the doorbell while mak-

---

divisions of a square. Von Neumann had introduced the cut-up principle of random action in his *Theory of Games and Economic Behavior*.

TED MORGAN, LITERARY OUTLAW 321 (1988). To Burroughs, the idea of mixing up a Shakespeare sonnet and an Eisenhower speech was a great breakthrough. When he described cut-ups to Samuel Beckett, the latter snorted: “That’s not writing, it’s plumbing.” *Id.* at 323.

Burroughs even thought “that by mixing up medical articles they would locate a cure for cancer.” *Id.* at 324.

142. For a reprint of a page from *Glas*, see DERRIDA, A DERRIDA READER, *supra* note 74, at 172. Norris said: “I shall not have very much to say about *Glas* since it is a work (like *Finnegans Wake* (sic)) that defeats the best efforts of descriptive analysis or summary.” NORRIS, DERRIDA, *supra* note 75, at 46.

143. JACQUES DERRIDA, DISSEMINATION 194 (Barbara Johnson trans., 1981).

144. “On every page, *Glas* demonstrates the borderless condition of texts, and their susceptibility to the most unexpected encounters.” NORRIS, DERRIDA, *supra* note 75, at 315.

145. *Id.* at 206.

146. NORRIS, *supra* note 53, at 24.

147. CULLER, *supra* note 34, at 136.

148. For a Double Session graphic that uses a collection of views on deconstruction to create a pattern of collusion, see Arthur Austin, *What Differs? Who Differs? What is the Difference?*, 13 CARDOZO L. REV. 1351 (1991).

149. NORRIS, DERRIDA, *supra* note 75, at 56.

150. “[T]he ‘barking’ from the cellar of the page has taken over.” Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 MIAMI L. REV. 1009, 1011 (1990) (citing Stanley Tobin, Book Review, 11 STAN. L. REV. 410, 412 (1959)).

ing love."<sup>151</sup> (What is a brant anyway?)<sup>152</sup>

### B. Radical Chic Crit

A familiar tactic for radical crits is to use deconstruction to expose an oppressive meaning lurking in what appears to be a benign "privileged" interpretation. Hence my hypothetical crit deconstructionist—"the lawyer as janitor"<sup>153</sup>—would seek to show that the Second Amendment was not intended to protect citizens against the dangers of a standing army—the privileged interpretation. Instead it was meant to be used to protect the interests of property owners and rich merchants—the privileged capitalist class of today's society. As John Jay said: "The people who own the country ought to govern it."<sup>154</sup>

In this case, the most productive maneuver is to look to the "margins" of fugitive incidents of English history to get something that subverts the privileged meaning. The deconer knows that there is always a counter interpretation lurking somewhere in the margin. In this case, it is the English Game Act of 1671 which said that to lawfully keep a gun or bow, one had to have an income of at least 100 pounds—except those who were above the rank of esquire or owners (or keepers) of forests.<sup>155</sup> This law confirms the English "distrust of the lower classes,"<sup>156</sup> an attitude that persisted in the Colonies.

---

151. The line between deconstruction and footnoting is as thin as snake hair. For example, Bowersock cites Noel Coward for the above comment. G.W. Bowersock, *The Art of the Footnote*, 53 AM. SCHOLAR 54 (1983-84). The *Wall Street Journal* used the comment without attribution. Paul Barrett, *To Read This Story in Full, Don't Forget to See the Footnotes*, WALL ST. J., May 10, 1988, at 1 n.1. Rice, in a subsequent article, gave attribution to me. Timothy R. Rice, *In Defense of Footnotes*, NAT'L L.J., June 20, 1988, at 13, 14 n.13. In concluding that "the boilerplate attribution may be wrong and, worse, bowdlerized," Aaron M. Fine offered the following quote by Coward's biographer:

My interpolations in quotations from Noel's writings and letters are contained within square brackets, which will I hope make for smoother reading and will avoid the bane of footnotes, which Noel would have hated. He could never bring himself to glance at one, he said, after John Barrymore expressed the opinion that having to look at a footnote was like having to go down to answer the front door just as you were —.

Letter from Aaron M. Fine, NAT'L L.J., July 4, 1988, at 12 (quoting Cole Lesley).

152. "The smallest species of wild goose." OXFORD UNIVERSAL DICTIONARY 215 (3d ed. 1955).

153. Ken Emerson, *When Legal Titans Clash*, N.Y. TIMES, (Magazine), April 22, 1990, at 26, 66 (attributing description to Professor Duncan Kennedy).

154. CLARENCE CRAMER, AMERICAN ENTERPRISE: FREE AND NOT SO FREE 105 (1972) (quoting John Jay).

155. Caplan, *supra* note 135, at 797; see David Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 19 (1987).

156. Robert Cottrol et al., *The Second Amendment: Toward an Afro-American Reconsideration*, 80 GEO. L.J. 309, 319 (1991).

With this information from the margin on the table, the privileged meaning is less determinate, and thus more problematical.<sup>157</sup> A few more fugitive footnotes from the margins such as medieval law allocating arms on the basis of social and political status<sup>158</sup> and the French protecting the class interests of the nobility by prohibiting commoners from possessing swords as well as guns<sup>159</sup> and—*aporia*! French class bias favoring arms is fed back to the trace as part of the motion of the arrow, which continues to challenge the privileged meaning of the Second Amendment. As a text, it is “no longer a finished corpus of writing, some content enclosed in a book or its margin, but a differential network, a fabric of traces referring endlessly to something other than itself, to other differential traces.”<sup>160</sup>

If one stopped at this point,<sup>161</sup> one would have a competing—or “correct”—interpretation: The Amendment allows the monied class to maintain its own private militias—or “police”—to protect its property or to stifle opposition to its imperialist business practices. The “correctiveness” of this decoding is dramatized by the Pinkerton detectives who offered a service known as the “guard system” which was “a uniformed military organization designed to prevent crime by guarding certain businesses at night.”<sup>162</sup> Pinkerton’s became notorious for strike breaking, prompting a famous ballad, “Father Was Killed by the Pinkerton Men.”<sup>163</sup> They remain today as a shadow police force.<sup>164</sup> Hence, to the crit, the Second Amendment marginalizes, rather than protects, the lower classes.

---

157. A crit buzzword comparable to the yuppie’s “minimalism.” See MARISSA PIESMAN ET AL., *THE YUPPIE HANDBOOK* 23 (1984).

158. James B. Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. VA. L. REV. 171, 175 (1975-76).

159. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 235 n.137 (1983).

160. DERRIDA, A DERRIDA READER, *supra* note 74, at 257.

161. Crits inevitably stop deconing when they uncover a politically correct interpretation. See *infra* note 294 and accompanying text.

162. FRANK MORN, *THE EYE THAT NEVER SLEEPS* 98-99 (1982); e.g., GEORGE O’TOOLE, *THE PRIVATE SECTOR: PRIVATE SPIES, RENT-A-COPS, AND THE POLICE-INDUSTRIAL COMPLEX* (1978).

163. “God help them tonight in the hour of their affliction Praying for him who they’ll ne’er meet again Hear the poor orphans tell their sad story Father was killed by the Pinkerton men.” MORN, *supra* note 162, at 103 (quoting S. G. SPAETH, *WEEP SOME MORE MY LADY*, 235 (1927)).

164. See Michael Allen, *Big Security Companies, Branching Out, See Some Flecks of Gold in Private Eyes*, WALL ST. J., Nov. 6, 1991, at B1.

C. *Feminist Deconstruction of Second Amendment Phallogocentrism*<sup>165</sup>

There were no founding mothers at the 1787 Constitutional Convention, and the founding fathers had decided views about women's place in society.<sup>166</sup>

A feminist deconstruction focuses on the patriarchal implications circulating in the Second Amendment.<sup>167</sup> Her perspective toward the Amendment is from "the experience of being watched, seen as a 'girl,' restricted, marginalized."<sup>168</sup> The feminist deconstructionist looks for hidden implications in the word "arms"—and finds paydirt. Arms symbolize the male ethic of individualism, power,<sup>169</sup> and aggression.<sup>170</sup> Beginning with the Revolutionary War, when dueling became "an American institution,"<sup>171</sup> and extending to today's gang wars, arms have defined machismo. The Founding Fathers expressed "'an almost religious quality about the relationship between men and arms.'"<sup>172</sup> Hunting—the use of arms to kill animals—is considered a "rite of passage for young males."<sup>173</sup> Arms are used to sexually exploit women.<sup>174</sup> The Supreme Court has helped as a source of "margins."<sup>175</sup> In interpreting

---

165. That's why I created the term 'phallogocentrism,' to refer to one single structure of thought which both gives priority to logos and the voice, the *phone*, and to the masculine position in philosophy. . . . I've tried to highlight a connection between the statement of masculinity, the placing of a man in a hierarchical position over woman, politically, sociologically, philosophically, and ontologically as well, the connection between that and logocentrism.

RAOUL MORTLEY, *FRENCH PHILOSOPHERS IN CONVERSATION* 104 (1991) (quoting Jacques Derrida from an interview).

166. Ruth B. Ginsburg et al., *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 12.

167. "Under patriarchy, men are the model and the embodiment of the fully human; to maintain their status and power, men are entitled to exercise both subtle and violent control over women." Lynne Henderson, *Law's Patriarchy*, 25 LAW & SOC. REV. 411, 412 (1991).

168. CULLER, *supra* note 34, at 44.

169. "Men have never had any problem with the concept of power. They want it purely, directly, unapologetically, libidinally. It is their entitlement and driving force." Maureen Dowd, *Power: Are Women Afraid of it—Or Beyond It?*, WORKING WOMAN, Nov. 1991, at 98.

170. A colleague tells me that a "big" Saturday night in Oklahoma was "the boys getting together to clean their guns." Sept. 16, 1991, 11:40 a.m.

171. WILLIAM O. STEVENS, *PISTOLS AT TEN PACES: THE STORY OF THE CODE OF HONOR IN AMERICA* 30 (1940).

172. Kates, *supra* note 159, at 229 (quoting C. Asbury, *The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution* 88 (1988) (unpublished doctoral thesis, University of Michigan)).

173. See, e.g., William Faulkner, *The Bear*, in *THE PORTABLE FAULKNER* 227 (Malcolm Cowley ed., 1954).

174. "Eight topless beauties captured on tape firing exotic weapons into the Sierra Nevada mountains, featuring the world's best machine guns and assault weapons. HOT GUN—HOT GIRLS!" Advertisement, *SOLDIER OF FORTUNE*, Nov. 1991, at 68.

175. Marginal may refer to status, such as a minority or female, or to a source of repressed

the Amendment, the Court quotes with approval the definition of the principle of the assize of arms as implying "the general obligation of all *male* inhabitants to possess arms."<sup>176</sup> Colonial America required every male to serve in the militia and to keep and maintain his own arms.<sup>177</sup> Moreover, weapons are like Maypoles<sup>178</sup> and, with their phallic connotations, are phallogocentric.<sup>179</sup> The owner of the New England Patriots football team—a sport that serves as a womb for macho types—jokingly compared his players' genitalia to Patriot missiles.<sup>180</sup> Thomas Jefferson had patriarchy on his mind when he wrote Washington: "One loves to possess arms."<sup>181</sup> A man's world is classic patriarchy: "[A] world without rules . . . sentimental [men], weeping over a thousand points of light, while reading about Iraqi body counts dry-eyed."<sup>182</sup> The penis, the ulti-

---

(oppressed) meaning. The latter meaning is used here. "Another common operation is that which takes a minor, unknown text and grafts it onto the main body of the tradition, or else takes an apparently marginal element of a text, such as a footnote, and transplants it to a vital spot." CULLER, *supra* note 34, at 139.

To seek out the marginal is to identify elements heretofore thought to be unimportant.

This is an identification of the exclusions on which hierarchies may depend and by which they might be disrupted but it is also the beginning of an encounter with previous readings which, in separating a text into the essential and marginal elements, have created for the text an identity that the text itself, through the power of its marginal elements, can subvert.

*Id.* at 215.

176. *United States v. Miller*, 307 U.S. 174, 179 (1939) (emphasis added).

177. Kates, *supra* note 159, at 214.

178. RICHARD P. KNIGHT ET AL., *SEXUAL SYMBOLISM: A HISTORY OF PHALDIC WORSHIP* 93 (1966).

179. Nothing stays the same, and the search for a unified field theory of oppression has led to a new deconstructive catchall for the metaphysical conspiracy at the bottom of our woe. The trendy coinage is *phallogocentrism*, a merger of logocentrism and phallogocentrism. The right-minded critic sets out to undo "patriarchal" assumptions. In particular, you want—as one enthusiast puts it—to deconstruct "singularity, embodied in the phallus, asserted in logos, inscribed in an egotistical I."

LEHMAN, *supra* note 27, at 103.

Modern society, as the post-structuralists would say, is "phallogocentric"; it is also, as we have seen, "logocentric", believing that its discourses can yield us immediate access to the full truth and presence of things. Jacques Derrida has conflated these two terms to the compound "phallogocentric", which we might roughly translate as "cocksure". It is this cocksureness, by which those who wield sexual and social power maintain their grip . . .

EAGLETON, *supra* note 37, at 189.

180. "On Feb. 4, Kiam, continuing in his buffoon's role, told a joke at a dinner . . . , saying that what Olson and the Iraqi army had in common was that they had both seen Patriot missiles up close." Leigh Montville, *Season of Torment*, *SPORTS ILLUSTRATED*, May 13, 1991, at 65. Kiam was referring to allegations of genital exposure by three New England players to a female sports writer.

181. Don B. Kates, Jr. et al., *How to Make Their Day*, *NAT'L REV.*, Oct. 21, 1991, at 30, 31.

182. Phillis Theroux, *Man and Animal at Yale*, *N.Y. TIMES*, Sept. 25, 1991, at A23.

mate weapon of patriarchy, is used to invade, possess, and subjugate women.<sup>183</sup> "[T]he gun," as noted by Richard Hofstadter, "cannot and will not be given up because it is a basic symbol of masculinity."<sup>184</sup>

The net effect is that the accepted meaning of the Amendment has a new, more subtle, context: "[I]t is not a single structure with a privileged relationship to the process of communication as it occurs in any situation but a structure that changes when one situation, with its assumed background of practices, purposes, and goals, has given way to another."<sup>185</sup> Sources from the margin, hidden in the fold, show that patriarchy is the *real* context and that the Second Amendment preaches this ethic by permitting, actually endorsing, the use of force by males to protect their castle and what Fortune calls a "trophy wife."<sup>186</sup> Since every *man's* castle subsumes married women as property,<sup>187</sup> this further stigmatizes women as oppressed and keeps "his . . . foot on her throat."<sup>188</sup> It is a form of male domination at work in the margins of the Constitution<sup>189</sup> and demonstrates an effort to maintain the universal custom of subjection of women to men.<sup>190</sup> "Palm Beach society is now free to play."<sup>191</sup> The

---

183. "His thrusting into her is taken to be her capitulation to him as a conqueror; it is a physical surrender of herself to him; he occupies and rules her, expresses his elemental dominance over her, by his possession of her in the fuck." ANDREA DWORKIN, *INTERCOURSE* 63 (1987).

184. Richard Hofstadter, *America as a Gun Culture*, AM. HERITAGE, Oct. 1970, at 82.

185. FISH, *supra* note 114, at 318.

186. "Powerful men are beginning to demand trophy wives. 'The culture of self-indulgence has just crept up to the CEO level . . . Indulgence is an issue for people who have worked very hard to get where they are. They feel they've earned it, they're entitled to it.'" Julie Connelly, *The CEO's Second Wife*, FORTUNE, Aug. 28, 1989, at 52 (quoting Harry Levinson).

187. *At common law* it was a man's world. Husband and wife were one, and the one was the husband. The married woman had little control over her property. She could not make a will. She could bring no actions except in conjunction with her husband, even in cases of personal assault upon her. Her husband could collect her choses in action and keep the proceeds. Property-wise her position was one of almost complete dependence on the male—her husband, her son, and others—the most striking manifestation being the ability of her deceased husband's collateral relatives to protect their inheritances by subjecting her person to the indignities of the writ de ventre inspiciendo.

JAMES CASNER ET AL., *CASES AND TEXT ON PROPERTY* 220 (3d ed. 1984).

188. *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 74-75 (1985).

189. "[M]ale dominance is perhaps the most pervasive and tenacious system of power in history[.] . . it is metaphysically nearly perfect." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638 (1983).

190. JOHN S. MILL, *The Subjection of Women*, in A SELECTION OF HIS WORKS 259, 261 (J. Robson ed., 1963).

191. "With the trial of William K. Smith and all the unwelcome publicity and scrutiny that came with it finally over, this enclave of wealth and privilege is breathing a sigh of relief." Larry Rohter, *Palm Beach Society is Now Free to Play*, N.Y. TIMES, Dec. 13, 1991, at A26.



"A" in the word "arms" is a sadistic and sexist twist of the Scarlet Letter.<sup>192</sup> Moreover, the feminist can detect even more repression: The recognition and elevation of arms as the function of the male characteristics of autonomy, individualism and aggression, expressly rejects the feminine "voice" which seeks community, nurturing, and the ethic of care.<sup>193</sup> Deconstructed, the Second Amendment is a legacy of the patriarchal warrior culture in which women were reified as possessions, "while men became the reifiers because they conquered and protected."<sup>194</sup> It encourages threats of "clitorectomy" on women lawyers.<sup>195</sup>

### D. *The NRA's Turn*

If the crits and feminists can deconstruct to satisfy their agendas, the National Rifle Association (NRA) can deconstruct to find a "correct" version of the Second Amendment. Their ideal scenario includes the right of every individual citizen to bear arms and, more importantly, a guarantee as to the discretion in the selection of arms.<sup>196</sup>

According to privileged history, it was the colonists' fear of the power of a standing army, controlled by the central government, that motivated the Second Amendment.<sup>197</sup> They remembered incidents like "the repeated efforts of the British Governor, General Gage, to prevent the formation of a militia by the tactic of disarming the colonists and confiscating their stores of arms."<sup>198</sup> Even that legendary pacifist, Gandhi, chastised the British for disarming the Indian people.<sup>199</sup> Hence the explanation for the reference to the necessity of a "well-regulated militia." But a close look at the margin uncovers a tension, a challenge.

---

192. NATHANIAL HAWTHORNE, *THE SCARLET LETTER* (1850).

193. See *infra* notes 253-54 and accompanying text.

194. GERDA LERNER, *THE CREATION OF PATRIARCHY* 49 (1986).

195. "Threatening an adversary with harm to her private parts is not so funny, ruled an Illinois disciplinary panel." The letter said: "'Should you succeed on your motion, we would . . . send somebody over to perform a clitorectomy [sic] on you.'" The author's explanation: He thought "she 'would get a kick out of' the letter." Randall Samborn, *Lawyer Repri-manded*, NAT'L L.J., Dec. 2, 1991, at 2.

196. Including explosives: "Powerful explosives from common fertilize [sic]. For step by step instructions send \$1.00 and stamped envelope to . . ." *Miscellaneous*, GUNS MAG., Nov. 1991, at 102.

197. Whisker, *supra* note 158, at 178; see Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 397 (1960).

198. David I. Caplan, *Restoring The Balance: The Second Amendment Revisited*, 5 FORD-HAM URB. L.J. 31, 35 (1976).

199. "Gandhi listed as his major grievance against the British their disarming of the Indian people: [G]ive us back our arms, he said, and then we will decide whether or not we wish to use them." Elaine Scarry, *War and the Social Contract: The Right to Bear Arms*, 2 YALE J.L. & HUMAN. 119, 121 (1990).

What happens if the local militia, the last resort against the tyranny of the standing army, is somehow subverted? Suppose the militia loses its independence?

In reality, the militia has never been independent; it has been used to break strikes<sup>200</sup> and, as recently as 1970, was used against college students at Kent State.<sup>201</sup> Moreover, the state militias are now under the control of the federal government.<sup>202</sup> Under these circumstances, the individual right theory becomes compelling as a last barrier against the double threat of a militia and standing army. This perspective invokes another tension: How can individuals expect to cope with the brute firepower of *two* armies? It is much worse than dealing with General Gage and his muskets.

The NRA deconstructed answer: Balance the odds, allow the individual citizen parity with the threat by allowing them access to the most modern weaponry, i.e., "part of the ordinary military equipment."<sup>203</sup> The editor of *Soldier of Fortune* says: "[T]he U.S. Constitution protects the right of individuals to keep and bear arms for use by a *well-regulated militia*—meaning military weapons . . ."<sup>204</sup> The operative phrase is *military weapons*. Even more significant is the fact that the first Senate did not "limit the Second Amendment to keeping and bearing of arms 'for the common defense,' " thus "against a narrow construction of 'arms' to those suitable for militia or military duty."<sup>205</sup> Hence, individual citizens are entitled to own and operate weapons like rocket launchers, machine guns, and tanks.<sup>206</sup> Next, the Bomb in every backyard.

200. GUSTAVUS MYERS, *HISTORY OF THE GREAT AMERICAN FORTUNES* 247 (1936).

201. See JAMES MICHENER, *KENT STATE: WHAT HAPPENED AND WHY* 188 (1971).

202. National Defense Act, ch. 134, 39 Stat. 166 (1916), *repealed by* Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 1; Act of June 28, 1947, ch. 168, 61 Stat. 191, *repealed by* Act of Jan. 2, 1968, 81 Stat. 756; see Monte M.F. Cooper, Note, *Perpich v. Department of Defense: Federalism Values and the Militia Clause*, 62 U. COLO. L. REV. 637, 640 n.20 (1991).

203. *United States v. Miller*, 307 U.S. 174, 178 (1939).

204. Robert K. Brown, *Command Guidance*, *SOLDIER OF FORTUNE*, Sept. 1991, at 1 (quoting U.S. CONST. amend. II) (emphasis added).

205. David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 631 (1986) (quoting JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820)).

206. Since modern weapons are expensive, only the rich could have their own tanks. To equalize the opportunity, the less affluent could entice sponsors like tennis players. Similar to Andre Agassi, tanks would sit in the backyard with: "Sponsored by Bud—The Tank with the Gusto." Selling arms to private parties would help support a sagging industry that now depends on foreign sales. See Amy Borrus et al., *A New World Order for U.S. Arms Makers*, *BUS. WK.*, Nov. 25, 1991, at 48, 49.

*E. Using Deconstruction To Make First Strike Policy*

The first strike nuclear policy has been thwarted through deconstruction of the Second Amendment. An English professor laments the prospect of a President's exercising the discretion of pushing the button without some form of external oversight.<sup>207</sup> Her source of a margin is Article I, Section 8, which requires Congressional approval for war. To the Professor, this section indicates a wide distribution of authority among the citizenry to make war: "[C]onsent and the express act of contract become more explicit, not less explicit, at moments of war."<sup>208</sup> She then connects the Second Amendment to the "distribution theory" and concludes that its purpose was to disperse authorization to use arms for military actions "throughout the population in the widest possible way."<sup>209</sup> Her objective is to deconstruct first strike discretion by using the Second Amendment to require that "the declaration passes through many numerical gates in order to go into effect."<sup>210</sup>

The response from a commentator shows the built-in dilemma hiding in deconstruction: If Professor Scarry can create a "new interpretive consensus," then so can the NRA rely on Stanley Fish's interpretive community to support its views.<sup>211</sup> "One can easily imagine the counter-argument constructed by a legal scholar hired by the National Rifle Association, which would tend to the conclusion that everyone should have a nuke in his backyard."<sup>212</sup>

*F. The Right to a Coat of Arms*

A deconstruction . . . always has for its target to reveal the existence of hidden articulations and fragmentations within assumably monodic totalities.<sup>213</sup>

An ingenious deconer can manipulate the Second Amendment so that it has nothing to do with weapons, but instead assures the right to a coat of arms.

When the Second Amendment was enacted, titles of nobility were condemned as symbols of tyranny and thus not recognized by the framers of the Constitution. That populist instinct—"an ideological tradi-

---

207. See Scarry, *supra* note 199, at 124.

208. *Id.* at 120.

209. *Id.* at 121.

210. *Id.* at 123.

211. Peter Brooks, *The Rhetoric of Constitutional Narratives: A Response to Elaine Scarry*, 2 YALE J.L. & HUMAN. 129, 131 (1990).

212. *Id.* at 130.

213. CULLER, *supra* note 34, at 247 (quoting PAUL DEMAN, ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST 249 (1979)).

tion"<sup>214</sup>—remains intact today.<sup>215</sup> Then, as now, merit and achievement are, at least ideally, the factors that determine status. From the guises of social mobility the first shadow from the margin appears. Having banished the titles of nobility as anti-democratic expressions of corruption, the framers nevertheless recognized the status of gentlemen as consistent with their ideals, a status that any *male* could achieve through hard work. In fact, *they*, the framers, were gentlemen. In short, the gentleman was to be the ideal of the new country.<sup>216</sup> "America is 'status-obsessed' given to inventing and reforming 'the age-old idea of the gentleman to fit the circumstances of a commercial culture.'"<sup>217</sup> This is the shady side of the marginal interpretation; the framers wanted to establish a new class—the gentleman—and needed a way to protect it. And when given a new reading, this is what the Second Amendment does.

The "points of juncture and stress"<sup>218</sup> are in the words—"keep," "bear," and "arms." These terms have to be extricated from the ordinary relationship of adjoining words. "Arms" refers to heraldry or coats of arms. "There is no reason why any American should not bear arms, if entitled to them; in fact, there is every reason why he should bear them . . ."<sup>219</sup> The word "bear" assures people of the right to publicly display the design. Finally, the reference to "keep" is significant;<sup>220</sup> to "keep" a coat of arms means that all hereditary rights are protected from political interference. "A man's son would feel a natural pride in preserving the memorial of his father's reputation, by assuming, and also by transmit-

214. William Schneider, *JFK's Children: The Class of '74*, ATLANTIC MONTHLY, March 1989, at 35, 45.

215. Jim Hightower, *I Do Not Choose to Run: Raising Issues, Hope and Hell*, 248 THE NATION 160, 161 (1989). See generally Sidney Blumenthal, *Populism in Tweeds*, NEW REPUBLIC, Nov. 15, 1991, at 10 (describing the new populist movement in the United States).

216. Sir Thomas Smith offers this definition of gentleman:

They may be good cheap in this kingdom: [F]or whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labor, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman.

1 WILLIAM BLACKSTONE, COMMENTARIES, \*406 (quoting Sir Thomas Smith, Commonwealth of England, b.1, c.20)).

217. Benjamin DeMott, 'Visions of Gentility,' N.Y. TIMES, Dec. 15, 1991, at 24 (book review) (quoting DAVID CASTRONOVO, THE AMERICAN GENTLEMAN 15 (1991)).

218. "It is clear, however, that deconstruction is, among other things, an attempt to identify grafts in the texts it analyzes: [W]hat are the points of juncture and stress where one scion or line of argument has been spliced with another?" CULLER, *supra* note 34, at 135.

219. EUGENE ZIEBER, HERALDRY IN AMERICA 75 (1984).

220. "The concept of keeping has no special military connotation. Keeping is not often used in any but a common sense." Hardy, *supra* note 205, at 629.

ting, his device."<sup>221</sup>

At this point, the reference in the first phrase of the Amendment to a *militia* makes sense. Militia is a group used to conduct war and war is the origin for the use of coats of arms. In battle, arms identified comrades. "Arms let us know, if the Bearers are Noblemen or Gentlemen, and what their Dignity is; that appearing by their Helmets . . ."<sup>222</sup>

### III. THE NEW CHIC IN LAW SCHOOL

The critical legal studies movement has undermined the central ideas of modern legal thought . . .<sup>223</sup>

Deconstruction is the ideal pastime for narcissistic literary types dedicated to parlor word games and writing silly articles on Batman as homosexual camp.<sup>224</sup> They toast impotence. The more grotesque the fad, the more fervent the dedication.<sup>225</sup> But deconstruction is now fashionable in law schools, where students are supposedly taught to ignore mush and "logic-chop." It is, indeed, one of the most bizarre events in legal education: a French fad on literary criticism threatening to change the course of legal education. Obviously the question is—why?

Unknown to alumni struggling to survive in a tight market,<sup>226</sup> law schools today bear little resemblance to the enterprises of the 1960s and '70s. Despite turmoil in the university system during those years, law schools remained enclaves of vocationalism and traditionalism.<sup>227</sup> Things have changed. The major difference is in the *persona* and aspirations of a new group of young faculty who trickled in during the late 1970s. They are legacies of the anti-Vietnam movement who endeavor to carry on the spirit of Jerry Rubin's *Do It!*<sup>228</sup> mentality. Pot belly or not,

---

221. ZIEBER, *supra* note 219, at 11.

222. *Id.* at 13.

223. Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 563 (1983). After quoting a passage from Unger, William Ewald says: "As with this passage, so with Unger's philosophy as a whole: It tries very hard to impress, and it is not impressive." William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L.J. 665, 756 (1988).

224. See Ellen K. Coughlin, *Looking for the Messages in Batman and Donald Duck: Researchers Turn to the Comics*, CHRON. HIGHER EDUC., Sept. 5, 1990, at A5, A8.

225. The Andy Warhol craze is a classic example. Warhol "sent out an actor . . . to pretend he was Andy Warhol and five colleges . . . swallowed the bait, paid the fees, and never knew the difference." BOCKRIS, *supra* note 70, at 223.

226. Who have confronted headlines like "Skadden Arps Pink Slips 45 Associates," NAT'L L.J., Oct. 7, 1991, at 2.

227. "There had been much talk of change, but little change had occurred." ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 232 (1983).

228. This refers to a book by Jerry Rubin, a yippie leader of the 1960s who said: "The goal of the revolution is to eliminate all intellectuals, create a society in which there is no distinction

they have infiltrated the system.<sup>229</sup> They are part of the "new front line of radical politics."<sup>230</sup> A growing number have graduate degrees in disciplines such as English,<sup>231</sup> history, and economics<sup>232</sup> and believe in teaching "[a]lmost [a]nything."<sup>233</sup> Just like the other parts of the university milieu,<sup>234</sup> the common theme is political activism. Garry Wills' "Fat Demagogue" is now a dean.<sup>235</sup>

The new activists are a Coalition of three groups: the critical legal studies people—CLS or "crits,"<sup>236</sup> feminists, and the "people of color" movement. Although each has its own agenda, they share the aspiration of revolutionizing legal education as a preface to revising law.<sup>237</sup> Here enters deconstruction: From a political weapon in the literary battleground, it now emerges as bludgeon for the Coalition's revolution,<sup>238</sup> es-

between intellectual and physical work: a society without intellectuals." JERRY RUBIN, *DO IT!* 213 (1970).

229. "[Y]esterday's student radical is today's tenured professor or academic dean." KIMBALL, *supra* note 111, at xiv.

230. A number of prominent former New Left activists now hold teaching jobs, and many are carrying on the battles of the protest movement in the contexts of the academic disciplines. No definitive numbers are available on how many former radicals have become faculty members, but many old New Leftists say—and many conservatives complain—that the university has become the new front line of radical politics.

Michael W. Hirschorn, *A New-Left Challenger Comes to an Uneasy Peace With Academe*, *CHRON. HIGHER EDUC.*, June 29, 1988, at A3.

231. I privilege English over the other disciplines. That is my bias which comes from the opportunity to talk to William Faulkner in classes at the University of Virginia. For an account of Faulkner's classroom conferences, see WILLIAM FAULKNER, *IN THE UNIVERSITY: CLASS CONFERENCES AT THE UNIVERSITY OF VIRGINIA 1957-1958* (Frederick L. Gwynn et al. eds., 1965).

232. Posner explains that the "flight from humanities to law by graduate students and young faculty . . . [started in the 1970s when they] saw jobs and promotion opportunities drying up and salaries falling steeply in real (that is, inflation-adjusted) terms and decided to go to law school . . . ." POSNER, *supra* note 8, at 12 (1988).

233. Charles Rothfeld, *What Do Law Schools Teach? Almost Anything*, *N.Y. TIMES*, Dec. 23, 1988, at B8.

234. For coverage of what one writer calls the victim's revolution on campus, see DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 1-23 (1991). See generally CHARLES SYKES, *THE HOLLOW MEN: POLITICS AND CORRUPTION IN HIGHER EDUCATION* (1990) (discussing the crisis in higher education and focusing on its impact upon Dartmouth College).

235. Garry Wills, *The Sixties*, *ESQUIRE*, Oct. 1973, at 135.

236. For the most balanced and thorough treatment of the CLS movement, see ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990).

237. Although a minority, the Coalition nevertheless can be influential. It has become the main issue at many law schools, dividing faculty and students. See generally Ken Emerson, *When Legal Titans Clash*, *N.Y. TIMES*, April 22, 1990, (Magazine), at 26 (exploring the rift at Harvard Law School).

238. "Law is conceived to be the instrument of ideology, the ideology of the ruling class,

pecially for the radical crits.<sup>239</sup> "CLS specialists approach the law as a branch of literature. . . . They accept as a given, and even revel in, the indeterminacy of all texts, all writing."<sup>240</sup>

Deconstruction is the intellectual fiber of the radical movement.<sup>241</sup> It is like a tattoo to a biker.<sup>242</sup> Professors from other disciplines in the university loop who have been disdainful of legal scholarship<sup>243</sup> consider law deconstruction a step toward respectability. On the other hand, the dwindling group of traditionalists in legal education see deconstruction as an exercise in cynicism and crass opportunism.<sup>244</sup> As we shall see, they have valid reasons for this concern.

Following accepted practice, the radicals have selected what they consider the most traditional and privileged description of the legal establishment to serve as the target of their deconstruction efforts.<sup>245</sup> The privileged meaning, according to their conventional wisdom, is a system of patriarchal values, which they identify as neutrality, individualism, and objectivity.<sup>246</sup> Judges, for example, make impartial decisions based on neutral laws. Likewise, decision-making and analysis is rational,

---

and it is the legal scholar's duty to demystify it, exposing rhetoric as sham and putative truths as spurious." LEHMAN, *supra* note 27, at 38.

239. ALTMAN, *supra* note 236, at 19.

240. LEHMAN, *supra* note 27, at 38.

241. I would exclude the "people of color" movement from the deconstruction group; their primary concern is their exclusion from the legal academy and a lack of recognition of their scholarship as "distinctive." See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1745-46 (1989).

242. Or ex-marine: "Gary Steuer paid \$50,000 for one tattoo—but the brightly colored illustration covers almost his entire body and it won him the title '1991 World's Best Tattooed Man!'" Peter Reilly, *He's Tattoo Much*, NAT'L ENQUIRER, Nov. 12, 1991, at 16.

243. For example, publication requirements for law professors generally are strikingly modest compared to standards applicable to faculty in most other disciplines. Extensive outside activities divert time and energy from research, thereby reducing the quantity (and perhaps the quality) of legal scholarship. This could reinforce the opinions of intellectual traditionalists who maintain that law schools do not belong in universities. Law schools in this view are trade schools whose primary loyalty is to the bar; their existence on campus undermines the cohesion of the academic community and detracts from the central purposes of higher education.

Jonathan L. Entin, *The Law Professor as Advocate*, 38 CASE W. RES. L. REV. 512, 532 (1988) (citations omitted).

244. See generally Louis Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 455 (1984) (describing the Critical Legal Studies movement as "a fountain of confusion . . . simply offering surrealistic pictures for our minds").

245. For self-serving histories of the crit movement, see John H. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

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

thereby excluding emotional factors, empathy for the status of a party, or consideration of irrelevant facts. In other words, everyone is treated as equal before the law.<sup>247</sup>

When this is deconstructed, something totally different appears. To the crit, the system is a political cover-up: Neutrality and objectivity exist only to protect wealth and the beneficiaries of a capitalist system. "[L]egal rules are 'empty vessels' into which individuals can pour virtually any content they please."<sup>248</sup> Moreover, "what passes as legal interpretation can be nothing more than the unconstrained creation of meaning, based on whatever moral or political conceptions the official happens to embrace."<sup>249</sup>

When threatened by "outsiders" such as minorities or women, the patriarchal judicial system ignores objectivity to favor "its people and institutions." Ostensibly objective rules in fact favor the perpetuation of establishment power and white-male bias. The Tyranny of Objectivity<sup>250</sup> and neutrality thus serves as a facade to give the *appearance* of an even handed system so as to maintain the status quo,<sup>251</sup> and thereby continue the marginalization of the oppressed.<sup>252</sup>

The feminist mode of deconstruction is consistent with its adherents' specialized agenda. To them, the real meaning of law is the oppression of women. For example, the system speaks in terms of protecting individual rights which, in reality, is meaningless to women because it is only male rights that are protected.<sup>253</sup> Likewise, the system does not recognize that women speak in a different "voice"—one embodying nurture, empathy, and the ethic of care.<sup>254</sup> Deconstruction is used to show that patriarchal values devalue women.<sup>255</sup>

247. See David Kairys, *Introduction to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1 (D. Kairys ed., 1982).

248. ALTMAN, *supra* note 236, at 90.

249. *Id.* at 92.

250. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376 (1986).

251. *Id.* at 1377-78.

252. Ironically, Mark Tushnet considers the term "crit" to be marginalizing. Tushnet, *supra* note 245, at 1517 n.10.

253. Robin West says that women are totally excluded from male jurisprudence. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58 (1988).

254. The boilerplate reference for this is Carol Gilligan's *In A Different Voice*. See Joan M. Shaughnessy, *Gilligan's Travels*, 7 LAW & INEQ. J. 1, 3-5 (1988).

255. "Feminist work has thus named the power of naming and has challenged both the use of male measures and the assumption that women fail by them." Martha Minow, *The Supreme Court, 1986 Term-Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 61 (1987).



## IV. GO BACK TO FRANCE—OR—STOP SUBVERTING DERRIDA

Perhaps, then, the word 'meaning' should also be discarded, since it carries with it the notion of message or point. The meaning of an utterance . . . is its experience—all of it—and that experience is immediately compromised the moment you say something about it.<sup>257</sup>

The flashiest colors in the rainbow coalition are sported by Stanley Fish . . . . During our interview Fish wore a bold shirt and gold chain, although he seemed equally proud of his deep tan and casually brushed back silver hair.<sup>258</sup>

[Y]ou are not the *you* that you started with. Time has moved on since you opened your mouth to speak, the molecules in your body have changed, what you intended . . . .<sup>256</sup> What is lost . . . in Fish's . . . belief, is the wavering between knowledge and doubt, power and impotence . . . .<sup>259</sup>

"Fish applies his ideas systematically, he's soon ready to call the First Amendment 'the first refuge of scoundrels . . . .'"<sup>260</sup>

## A. Irrelevant to Law

Other than as a source of amusement,<sup>261</sup> deconstruction has no relevance to law. In the humanities, interpretation is a series of arguments among academics that *never* crowns a winner.<sup>262</sup> It is fun and games, "an opportunity for joy, freedom, and play."<sup>263</sup> It is Professor Morris Zapp enjoying himself on the sexist<sup>264</sup> "call girl circuit."<sup>265</sup> "Write a paper and see the world!"<sup>266</sup> Ephemera is aporia.<sup>267</sup> In law, interpreta-

256. LODGE, *supra* note 113, at 25 (quoting Morris Zapp).

257. FISH, *supra* note 114, at 65.

258. D'SOUZA, *supra* note 234, at 173.

259. RAY, *supra* note 91, at 169.

260. Begley, *supra* note 112, at 50.

261. A colleague ingenuously deconstructed Buffalo Law Review (the publication) to mean a review of the law of buffalos (the animal). He then discussed the "law of buffalos." Erik M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 KAN. L. REV. 433, 433-35 (1990).

262. "[T]he field of criticism is contentiously constituted by apparently incompatible activities." CULLER, *supra* note 34, at 17.

263. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 461 (1987).

264. "The phrase 'call girl circuit' in the text, even after reference to the [sic] Mr. Koestler's title in the footnotes, was offensive to several people in the Law Review office." Letter from Sybil Kiskien, Articles Editor, *Arizona Law Review*, to Arthur D. Austin (Sept. 22, 1989) (on file with the author) (discussing Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 6 (1990)).

265. "It becomes a habit, maybe an addiction. You get a long-distance telephone-call from some professional busybody at some foundation or university—'sincerely hope you can fit it into your schedule—it will be a privilege to have you with us—return fare economy-class and a modest honorarium of . . . .'" ARTHUR KOESTLER, *THE CALL GIRLS* 23 (1973) (quoting Harriet Epsom).

266. LODGE, *supra* note 113, at 231.

267. The phrase, "Deconstruction is not an ephemera," see *supra* text accompanying note 9, is Fishbait for decon. The words "deconstruction" and "ephemera" collide. One interpretation is that deconstruction is not closure, that instead it is a constant process of challenge and inquiry. Derrida would relate the sentence to other texts to produce a *Glas*. The obvious—privileged—interpretation is that it is a negation of deconstruction as a buzzword. This poses a deMan Archie Bunker contradiction: Archie says "What's the difference? (I don't give a damn what the difference is.)" deMan says: "The same grammatical pattern engenders two meanings that are mutually exclusive: [T]he literal meaning asks for the concept (difference)

tion is a serious task that affects the harmony of society. The consequences of deconstructing L'Isle de Gilligan<sup>268</sup> are considerably different from deconstructing the Second Amendment, a statute, or case law. Legal interpretation is *not* fun and games. Derridaisms do not work in the real world.<sup>269</sup>

The rule of law relies on certainty, stability and predictability. "Law is a much more pragmatic enterprise than philosophy."<sup>270</sup> Posner goes to the essence: "[A] statute is better understood not as a literary work but as a command."<sup>271</sup> Changes occur but only after thorough analysis and reflection. In contrast, deconstruction defies stability by asserting that the reader controls the text and whatever a reader says is "correct." As a result, all six of the deconstructed interpretations of the Second Amendment discussed above are "correct," at least for an instant, as part of the Arrow of "trace."<sup>272</sup> Only a vain academic would suggest that the Second Amendment protects the right to a coat of arms or a backyard nuke and that an eighteen year old is eligible to be a President.<sup>273</sup> Likewise, we are in big trouble if there "are as many plausible readings of the United States Constitution as there are versions of *Hamlet* . . . ."<sup>274</sup>

For law, there is a more slippery implication: The deconstructionists' "idea is not that there are no right answers, but rather that there can *never* be a right answer."<sup>275</sup> Stanley Fish weasels out of this hook by allowing the judgments of what he calls interpretative communities to

---

whose existence is denied by the figurative meaning ['I don't give a damn what the difference is']. PAUL DEMAN, *ALLEGORIES OF READING* 9 (1979).

268. "The 'island' of the title is a pastoral dystopia, but a dystopia with a difference—or, rather, a dystopia with a difference (in, of course, the Derridean sense), for this is a dystopia characterized by the free play of signifier and signified. The key figure of 'Gilligan' exacts a dialect of absence and presence." Brian Morton, *How Not to Write for Dissent*, *DISSENT*, Summer 1990, at 299.

How about this real-life deconstruction: "A local television station is investigating how the sound track from a hard-core pornographic movie ended up on a 'Gilligan's Island' episode." Wire Reports, *Porn track plays during 'Gilligan,'* CLEV. PLAIN DEALER, Jan. 16, 1992, at 1C.

269. "Many of Derrida's methods are not compelling according to conventional reasoning. These would include methods such as puns, the red-handed simile, and paradoxes which reason that when an evil is projected from the body to the outside, that proves it is as much 'of' the inside as the outside." Donald F. Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 262, 372 (1987) (footnote omitted).

270. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 754 (1987).

271. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 264 (1990).

272. See *supra* note 37 and accompanying text.

273. D'Amato, *supra* note 129, at 255.

274. Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391 (1982).

275. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 12 (1986).

prevail.<sup>276</sup> In other words, *persuade* a majority that your reading is *the* correct one, and you win. As Fish said: "This is persuasion. It has nothing to do with truth or knowledge. It is an art . . ."<sup>277</sup> that plays to crowd psychology: "In crowds the foolish, ignorant, and envious persons are freed from the sense of their insignificance and powerlessness, and are possessed instead by the notion of brutal and temporary but immense strength."<sup>278</sup> As Judge Posner observes, Professor Fish's concept is a "sociological generalization" about the process of consensus rather than a guide to interpretation.<sup>279</sup>

A crowd psychology approach reduces the rule of law to the level of a form of media manipulation.<sup>280</sup> "The medium is the message."<sup>281</sup> It denigrates the credible critic.<sup>282</sup> "What we see at work throughout is a deliberate attempt to supplant reason by rhetoric, truth by persuasion, using the simple device of denying that there is any essential distinction to be made between them."<sup>283</sup> It is interesting to note that M.H. Abrams accuses Fish of ignoring his own theory by making interpretations that "never entirely depart from implicit reliance on the old way of reading texts."<sup>284</sup> Thus, when push comes to shove, Fish is like practicing lawyers who make a living predicting determinacy.<sup>285</sup>

Textuality teaches that the reader creates meaning and that meanings are infinite, changing within minutes—even seconds—as the environment and perceptions change. Words keep deferring—"tracing"—to

276. FISH, *supra* note 114, at Ch. 15. For a short history of interpretive communities, see POSNER, *supra* note 271, at 436 n.17.

277. D'SOUZA, *supra* note 234, at 174.

278. GUSTAVE LE BON, *THE CROWD* 50-51 (Compass ed., The Viking Press 1960) (1875).

279. POSNER, *supra* note 271, at 450.

280. Including the swamp of "subliminal seduction." See WILSON B. KEY, *SUBLIMINAL SEDUCTION* (1973).

281. "All media work us over completely. They are so pervasive in their personal, political, economic, aesthetic, psychological, moral, ethical, and social consequences that they leave no part of us untouched, unaffected, unaltered. The medium is the message." MARSHALL MCLUHAN ET AL., *THE MEDIUM IS THE MESSAGE* 26 (1967).

282. "Great critics have fortunately eluded 'interpretative communities,' resisted or contradicted them. Fish's theories encourage the view that there are no wrong interpretations, that there is no norm implied in a text, and hence that there is no knowledge of an object." Wellek, *supra* note 25, at 5.

283. KIMBALL, *supra* note 111, at 164.

284. M.H. Abrams, *How To Do Things with Texts*, 46 *PARTISAN REV.* 566, 580 (1979).

285. The deconstructionist theory . . . fails to realize that most adjudication is simply a matter of housekeeping. To suggest that legal doctrine does not control in these instances is to suggest that the white line does not keep drivers on the right side of the road, even when they have no desire to drive on the left.

Kenny Hegland, *Goodbye to Deconstruction*, 58 *S. CAL. L. REV.* 1203, 1213 (1985). For a discussion of the determinacy of certain legal questions, see Kent Greenawalt, *How Law Can Be Determinate*, 38 *UCLA L. REV.* 1 (1990).

the future and referring to the past. As Gertrude Stein said of the city of Oakland: "There's no there there."<sup>286</sup> Or, as the elusive "laureate of absence," Henri Mensonge said: "[T]here is no about about for any thinking to be about."<sup>287</sup> This is the black hole for the law deconstructionist: Any interpretation a crit offers is in turn subject to deconstruction, then that interpretation is fed back into the text for even more interpretation,<sup>288</sup> and so on.<sup>289</sup> The deconstruction "argument means nothing and establishes nothing."<sup>290</sup> "It can displace a hierarchy momentarily, it can shed light on otherwise hidden dependences of concepts, but it cannot propose new hierarchies of thought or substitute new foundations."<sup>291</sup> Other than to create a self-serving interpretative community<sup>292</sup> or falling to fatigue,<sup>293</sup> there is only one way to evade this black void; stop performance of deconstruction and announce that "emancipa-

---

286. LEHMAN, *supra* note 27, at 98. Stein also told Ernest Hemingway: "Remarks are not literature." Daniel Stern, *The Trouble With Schlifkin*, N.Y. TIMES, Nov. 3, 1991, at 10 (reviewing JOSEPH EPSTEIN, *THE GOLDIN BOYS* (1991) (quoting Gertrude Stein)).

287. MALCOLM BRADBURY, *MY STRANGE QUEST FOR MENSONGE* 63 (1987).

288. "Deconstructive readings may thus refuse to make aesthetic richness an end. Whenever one comes to what might seem a stopping point—a nice paradox or symmetrical formulation—one feeds this position back into the text, asking what the work has to say about the conclusion reached." CULLER, *supra* note 34, at 240.

289. Any attempt to offer its own vision of a reconstituted society would merely result in the replacement of one form of consciousness with another; "liberal consciousness" would simply be exchanged for "Critical consciousness". The CLS vision would be equally illegitimate and would amount to just another form of domination. The implication of this insight for the Critical scholars seems to be that each individual must be left to act alone, free from the constraints of any inhibiting consciousness.

Allan C. Hutchinson et al., *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 229 (1984).

290. ALTMAN, *supra* note 236, at 93.

291. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 786 (1987).

However, as it is a method designed to erode a system of meaning omnivorously and without regard to the ideological content of the system (presumably any system containing values expressed in language is equally vulnerable), it is clearly not a method for building a radical negative critique that implies a systematic reconstruction grounded on a different social theory or moral vision. What is more, the validation of a technique that may easily chew up any radical alternative probably inhibits the development of one.

Brosnan, *supra* note 269, at 375-76.

292. "Why stop the deconstruction here? . . . The answer is that the relatively autonomous self is more than happy to stop the deconstructive ride and the interpretive community thesis is a better place to get off than most." Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 47 (1987).

293. "If deconstructive criticism is a pursuit of differences—differences whose suppression is the condition of any particular entity or position—then it can never reach final conclusions but stops when it can no longer identify and dismantle the differences that work to dismantle other differences." CULLER, *supra* note 34, at 242.

tion and enlightenment" have been achieved.<sup>294</sup> This is the accepted—but obviously spurious—practice of crit deconstructionists; they stop when they have flushed out what they deem to be the correct view.<sup>295</sup> "[T]hough postmodernist Marxists babble about indeterminacy of meaning, they do not wish to leave the meaning of what *they* consider central in an indeterminate state."<sup>296</sup> Then they self-destruct. "At the moment the choice is made, the critical theorist is, strictly speaking, no longer a deconstructionist."<sup>297</sup>

### B. *Suspect Motivation*

The *motivation* of deconstruction flushes out another reason for its incompatibility with law. Deconstruction is an academic game—a political attack; its practitioners cite "Che Guevara on Guerrilla Warfare."<sup>298</sup> The political emphasis is the legacy of the French connection,<sup>299</sup> where the appeal of deconstruction was its effectiveness in undermining "a single authoritative traditional opinion on literary texts."<sup>300</sup> It is thus not surprising that one of the radical's "central goals" is "the dejustification of legal rules."<sup>301</sup> The law radicals call this "trashing."<sup>302</sup> "Take specific

294. Balkin, *supra* note 291, at 765.

295. *Id.* at 764-66.

Not only does a deconstructionist begin deconstructing for a reason, she also ends her deconstruction for a reason. The reason may be complex or simple. She may stop because she has demonstrated to her own satisfaction that Justice Scalia's opinion is incoherent, or that apartheid is evil, or because she realizes that she is beating a dead horse by looking at the back of cereal boxes. She may cease deconstructing because her editor told her that the article had to be twenty-thousand words and no more, or because she has run out of bond paper, or even because she is in a hurry and needs to get to the grocery store before it closes. In theory, however, one could go on. One could go on forever. In fact, of course, we always do stop. We decide, at some point, that there is nothing more to be decided about this undecidable text. If we always have an ax to grind when deconstructing, at some point we do find it necessary to bury the hatchet.

J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1627-28 (1990).

296. HIRSCH, *supra* note 96, at 171.

297. Balkin, *supra* note 291, at 766.

298. David Fraser, *If I Had a Rocket Launcher: Critical Legal Studies as Moral Terrorism*, 41 HASTINGS L.J. 777, 782, 785 (1990) (citing Guyora Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 GEO. L.J. 1, 1-14 (1987)).

299. "Derrida made it plain that his intent was to baffle and provoke, rather than reach any common ground of discussion." NORRIS, *supra* note 53, at 108.

300. ELLIS, *supra* note 27, at 84. "The French deconstructionists were dedicated to unmasking this bourgeois imposture by means of their own countertheory of the indeterminacy of language and meaning, and in that sense they considered themselves to be embarked on a politically revolutionary undertaking." Shaw, *supra* note 99, at 52.

301. Schlegel, *supra* note 245, at 407.

302. "The slogan of the student rebels of the 1960s—'Trash the glass of ruling class'—

arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (not the germ of truth) in the internally contradictory, incoherent chaos we've exposed."<sup>303</sup> In other words, if something is running smoothly, trash it with anti-intellectual and non-analytical arguments.<sup>304</sup> Reduce everything—especially thought—to the lowest common denominator of equalitarianism.<sup>305</sup> It's fun.<sup>306</sup> To Alice B. Toklas, trashing<sup>307</sup> is trashing<sup>308</sup> is trashing<sup>309</sup> and "as an expression of the spirit of legal iconoclasm, is nothing new."<sup>310</sup>

Critics say that law deconstruction delivers a nihilistic message.<sup>311</sup> "[I]t insists not that everything has been said but that nothing can be said—that words have reached their tautological ends."<sup>312</sup> This is a valid criticism;<sup>313</sup> its primary message is critical terrorism without positive remedy. "Each interpreter seems especially skilled in criticizing others;

reemerges in the critique of law . . ." Günter Frankenberg, *Down By Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360, 389 (1989).

303. Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984). See Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1981) (presenting a general defense of the values of trashing).

304. "It is true that our utopian 'work' has been strictly anti or nonintellectual." Kelman, *supra* note 303, at 335-36.

305. "[D]ebunking is one part of an explicit effort to level, to reintegrate the communities we live in along explicitly egalitarian lines rather than along the rationalized hierarchical lines that currently integrate them." *Id.* at 326.

306. "Why defend [trashing]? For one thing, trashing is fun. I love trashing." Freeman, *supra* note 303, at 1230.

307. One could be talking about the use of "pipes, steel plates, water heaters, radiators, windshield wipers, car bumpers—all the trash that society throws away" to create abstract art. Joe Mullins, *Artist Turns Trash into Sculptures Worth \$30,000*, NAT'L ENQUIRER, Oct. 29, 1991, at 20.

308. It could refer to "trashing" outer space with debris. *Trashing Space*, SCI. AM., Aug. 1987, at 14. Or, it could refer to the "Trash Police." Elizabeth Fischer, *The Trash Police*, N.Y. TIMES, Dec. 20, 1991, at A35.

309. The crits would no doubt be piqued to learn that trash is slang for "Money ca. 1590-1830 . . . . As the O.E.D. remarks, Shakespeare's 'who steals my purse, steals trash' was prob[ably] an operative factor." ERIC PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 907 (5th ed. 1961). There is another definition they would like: "The young call looting [from shops] 'trashing', and the word suggests what is happening. The status of goods changes from something with a price to trash." ERIC PARTRIDGE, A CONCISE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 473 (Paul Beale ed., 1989).

310. A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 824 (1990).

311. *Id.* Delivered in their disingenuous vocabulary. Schwartz, *supra* note 244, at 440-44.

312. LEHMAN, *supra* note 27, at 41.

313. The same criticism applies to literary deconstruction. "What is at issue is not nihilism itself, but the insincerity of the nihilism expressed here, which is that of a clever child who has learned to play with words. . . . It is, once again, a nihilism in bad faith." HIRSCH, *supra* note 96, at 78.

the moves by which one undermines (or deconstructs) one's opponents are increasingly well known."<sup>314</sup> It also spreads more mischief. Many young faculty are already disdainful of law as a profession.<sup>315</sup> They came to teaching to get away from practice.<sup>316</sup> As a Harvard Law student mused: "Always keep in mind that most professors have had less experience practicing law than the average 3L."<sup>317</sup> Deconstruction and trashing exacerbate this bias by encouraging faculty to attack, for "fun" and fashion, the establishment, its ideals, and traditions.<sup>318</sup> Practitioners, without knowing it, are the "privileged" enemy.<sup>319</sup> In the process, law faculty seek dialogue with more congenial friends in the university loop and, as a federal judge complained, law academics "are writing for each other."<sup>320</sup> A former dean of Yale Law School complains that "law professors today are more concerned with intellectual currents among their colleagues in the arts and sciences and less concerned about law practice and the output of the bench."<sup>321</sup>

### C. Subverts Scholarship

Narcissism and power politics are having a subtle but decisive effect on legal scholarship. Just when the quality of work was improving—especially with first rate interdisciplinary writing—deconstruction appears to seduce young people into the black hole of trashing. Unfledged writers do not understand that deconstruction is "performance," rather than analysis and scholarship. "Deconstruction is first and last a textual activity . . . ."<sup>322</sup> It is not, for example, a work of scholarship to assume

314. Sanford Levinson, *On Dworkin, Kennedy, and Ely: Decoding The Legal Past*, 51 *PARTISAN REV.* 248, 263 (1984).

315. "Very few of the CLS academics engage in any traditional lawyering tasks, whether reform-oriented litigation, preparation of legislative statutes, or the like." Sanford Levinson, *On Critical Legal Studies*, *DISSENT*, Summer 1989, at 360, 364.

316. "Law school teaching increasingly recruits those 'who for one reason or another are not happy in practice, adapted to practice or interested in practice.'" Martha Middleton, *Legal Scholarship: Is It Irrelevant?*, *NAT'L L.J.*, Jan. 9, 1989, at 1, 8 (quoting Judge Richard A. Posner).

317. Alysse MacIntyre, *You Mean You Really Wanted to Come to HLS?!*, *HARV. L. REC.*, Sept. 13, 1991, at 8.

318. Shaw says that deconstruction created a "vacuum." Into the vacuum thus created moved the minions of the politically correct, ready, precisely on the deconstructionist model of vilification, to 'unmask' and anathematize any who resisted the new regime as racist, homophobic, anti-female, Eurocentrist." Shaw, *supra* note 99, at 53.

319. Duncan Kennedy suggests law firm "trashing." See *infra* note 363.

320. Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 *J. LEGAL EDUC.* 313, 320 (1989).

321. John C. Metaxas, *Two Justices, Self-Congratulation Mark Harvard Anniversary Bash*, *NAT'L L.J.*, Sept. 22, 1986, at 4 (quoting Dean Wellington).

322. CHRISTOPHER NORRIS, *THE DECONSTRUCTIVE TURN: ESSAYS IN THE RHETORIC*

polar positions as a preface for polemic. Moreover, "this rush from one end of the spectrum to the other inevitably leaps over and avoids previous thought on these issues, thought that had frequently explored what lies between the two ends of the spectrum with considerable subtlety."<sup>323</sup> It is even more disturbing to see the growing tendency of people using deconstruction as a rationalization for punk legal lit.<sup>324</sup> Impressionable writers seriously deconstruct the case of the letters "c" and "f" in crit<sup>325</sup> and feminism.<sup>326</sup> It is like making a career of following the Grateful Dead.<sup>327</sup>

Because it is anti-establishment, a growing number of young professors affect decon without knowing what it is. Like that great brain surgeon, Jethro Boudin of the *Beverly Hillbillies*, they play the role of "lawyer as astrophysicist."<sup>328</sup> They become instant "experts" on people like Wittgenstein,<sup>329</sup> Bloom,<sup>330</sup> and Derrida. Decon is difficult to understand and thus "safe." Derrida is purposely vague and the people who write about him and the topic add layers of confusion to the subject. It is, as noted, a field that specializes in mystery.<sup>331</sup> It was Stanley Fish who purportedly summed up the decon state of mind by saying that decon "relieves me of the obligation to be right . . . and demands only

---

OF PHILOSOPHY 6 (1983). As a result, "it is neither possible nor desirable to state a deconstructionist creed." Balkin, *supra* note 291, at 746.

323. ELLIS, *supra* note 27, at 141.

324. See, e.g., Guyora Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 GEO. L.J. 1 (1987); Fraser, *supra* note 298.

325. "I find the term 'crits' marginalizing and when used by adherents of critical legal studies almost an internalization of that marginalization." Tushnet, *supra* note 245, at 1517 n.10.

326. Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 61 n.1 (1988); see also Mary Dunlap, *The "F" Word: Mainstreaming and Marginalizing Feminism*, 4 BERKELEY WOMEN'S L.J. 251, 251-52 (1989) (arguing that the negative connotations associated with the word "feminist" are a result of society's refusal to accept the feminist commitment to empower women).

327. Who, despite an anti-materialistic image, were the top touring act of 1991, grossing \$35,243,237. *Top 10 Touring Concert Acts of 1991*, AMUSEMENT BUS., Dec. 25, 1991.

328. Mark V. Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979).

329. How can anyone understand a man who gave away the family fortune? "So," [the notary said,] "you want to commit financial suicide!" RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 171 (1990).

330. Reference to "Bloom" is instant *aporia*; to which Bloom am I referring? Harold, of Yale, Allan, of The Closing of the American Mind fame, or James Joyce's Leopold Bloom?

331. See *supra* note 61 and accompanying text. As a colleague of Morris Zapp complained: "There was a time when reading was a comparatively simple matter, something you learned to do in primary school. Now it seems to be some kind of arcane mystery, into which only a small elite have been initiated." LODGE, *supra* note 113, at 27.



that I be interesting.' ”<sup>332</sup>

The consequence is immature scholarship—a hodge-podge of trashing, polemic, and shallow value judgments. “Weird” case scenarios are concocted for verbal gamesmanship.<sup>333</sup> On occasion, trashing turns to insult.<sup>334</sup> Writers use the word to be part of the fashion.<sup>335</sup> Members of the new chic use the word to rationalize simple (and simplistic) disagreement.<sup>336</sup> Moreover, each writer seemingly uses a private form of decon with private rules unknown to the reader. As one writer warns: “I am not using ‘deconstruction’ in the technical sense used by critical legal scholars influenced by Jacques Derrida . . . but in the emerging popular sense of deconstructing a social phenomenon into its component parts.”<sup>337</sup> Say what?<sup>338</sup> The cumulative effect has been a devaluation of legal publications and emphasis on gamesmanship with student editors who lack the background to understand what is happening.<sup>339</sup> It is hubris to publish self-parodies like *Roll Over Beethoven*.<sup>340</sup>

#### D. *Where Are the Solutions?*

In developing its unique accommodation to other forms of literary decon, crits and others identify a politically charged privileged meaning which flushes out the existence of an opposite polar interpretation, creating indeterminacy and an open season for “correct” meanings. There are, however, two serious defects in this process.

First, deconstructionists typically assume a simplistic version of a

---

332. LEHMAN, *supra* note 27, at 75 (quoting Stanley Fish).

333. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 420 (1985).

334. “Under the circumstances, I take some pleasure, not however unmixed with regret, in noting that the Framers would have understood the phenomenon that Professor Tribe’s work represents: [T]hey called it corruption.” Mark Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 710 (1980) (reviewing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978)).

335. Alex M. Johnson, *The New Voice of Color*, 100 YALE L.J. 2007, 2050 (1991).

336. See, e.g., Robin West, *Deconstructing the CLS-Fem Split*, 2 WIS. WOMEN’S L.J. 85 (1986).

337. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 797 n.1 (1989).

338. The “what” comes from someone who says that “my attack on ‘authorship’ aspires to ‘deconstruct.’” Then says “[m]y objectives may be less than completely true to the aims of deconstruction. My emphasis on the role of ideology in the story of ‘authorship’ suggests general ‘post-structuralist,’ rather than specifically deconstructionist tendencies . . . .” Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 456-57.

339. See Arthur Austin, *Commentary on Jensen’s Commentary on Commentary*, 24 CONN. L. REV. 175 (1991). Biting the bullet, the faculty at George Mason University is converting its law review into a faculty-edited journal. Ken Myers, *Law Review Editing: Profs Enter Where Students Used to Tread*, NAT’L L.J., Oct. 14, 1991, at 4.

340. Peter Gabel et al., *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1983-84).

privileged meaning.<sup>341</sup> Although this is an accepted sleight-of-hand tactic in academic gamesmanship, it is a fatal flaw in law. It is true that general principles guide law; nevertheless the reality is that our legal system is a mixture of values, of visions, of rules and discretion, and of positive law and natural law.<sup>342</sup> Hence, the assumption of an exclusive privileged meaning does not hold up.<sup>343</sup> Moreover, the privileged meaning is unenviably a carefully constructed paradigm to fit the deconstructor's bias.<sup>344</sup> As Professor Schwartz says: "The most common, and most disingenuous, misrepresentation in CLS writing is the false attribution to ideological opponents of a ridiculous position that can then serve as a straw man to be demolished."<sup>345</sup>

Second, after an attack, deconstruction stops; it's all over for the deconstructionist.<sup>346</sup> The system is evil and should be replaced by a new vision. Respectable analysis does not cease at this point. It is at this point that the analyst—or lawyer—is obligated to show why the traditional view is wrong and why the new view is legitimate and worthy of replacing the old interpretation.<sup>347</sup> The reason the law deconstructionists avoid analysis is to go immediately to trashing. They practice the "art of erosion."<sup>348</sup> "Positive proposals from the CLS movement never go far beyond a general endorsement of equality, participatory democracy, and (sometimes) socialism."<sup>349</sup>

Duncan Kennedy, revered among the crits as "a cross between Rasputin and Billy Graham,"<sup>350</sup> supplies a classic example of "platitudinous"<sup>351</sup> writing. He is a political writer who poses as a jurisprudent. Kennedy is best known for combining legal deconstruction with a theory

341. Ellis says that the reason for adopting a narrow and authoritative privileged interpretation is that it rationalizes the deconstruction. "To say that a text has one meaning sounds inherently very restrictive; that makes the leap to 'no limit on meanings'—the typical leap to an opposite extreme—more plausible." ELLIS, *supra* note 27, at 125.

342. See POSNER, *supra* note 271, at 405.

343. It does not, moreover, hold up in literature either. ELLIS, *supra* note 27, at 125.

344. "CLS not only too easily assumes that everyone in a society reflects the same hegemonic vision, but also too gullibly—or too arrogantly—tends to interpret the language of others literally and to treat all expressions as sincere reflections of basic beliefs." Stephen Diamond, *Not-So-Critical Legal Studies*, 6 CARDOZO L. REV. 693, 707 (1985).

345. Schwartz, *supra* note 244, at 446. "[W]e must try to present the most subtle and sympathetic interpretations of an opponent's viewpoints before we uncharitably 'trash' them." Cornell West, *CLS and a Liberal Critic*, 97 YALE L.J. 757, 759 (1988).

346. See *supra* note 295 and accompanying text.

347. ELLIS, *supra* note 27, at 71.

348. Todd Gitlin, *Postmodernism: Roots and Politics*, DISSENT, Winter 1989, at 101, 108.

349. Phillip E. Johnson, *Do You Sincerely Want To Be a Radical?*, 36 STAN. L. REV. 247, 282 (1984).

350. Schlegel, *supra* note 245, at 392.

351. Johnson, *supra* note 349, at 283.

of contradiction to produce two competing visions: altruism and individualism. "Altruism enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism. (Love thy neighbor as thyself.)."<sup>352</sup> Individualism on the other hand, says, "I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others."<sup>353</sup>

This is obviously an elevated and abstract set of visions—equal to the 1960s cult of Consciousness III engineered by Charles Reich.<sup>354</sup> But Kennedy exacerbates the problem by constantly waffling in acknowledging the mushiness of his visions: He confesses that it is impossible to "prove" or "disprove"<sup>355</sup> the validity of either vision.<sup>356</sup> It is, however, his "deconstruction to indeterminacy" that best dramatizes the irrelevance of deconstruction to law.

Kennedy does not accept the existence of an underlying structure of fixed principles with a margin of exceptions. "What distinguishes the modern situation is the breakdown of the conceptual boundary between the core and the periphery, so that all the conflicting positions [altruism and individualism] are at least potentially relevant to all issues."<sup>357</sup> The result is every case or legal conflict "will raise the fundamental conflict of individualism and altruism."<sup>358</sup> Under these conditions, in which every case could involve an effort to impose either an altruism or individualism structure, conflicts resolution would be virtually impossible. Altman says: "Indeed, the typical experience that lawyers and judges have of the law, quite the opposite of these radical claims, is that law does have an objective structure and that one must know that structure in order to practice law competently."<sup>359</sup>

While Kennedy writes political essays, others preach love—read Professor Singer: "The goal of politics and law should be to organize

---

352. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717 (1976).

353. *Id.* at 1713.

354. In 1970, Yale Professor Charles Reich published *The Greening of America*, an anti-establishment manifesto which became an instant success. "So everybody knows by now that *Greening* is an Important Book, the In thing to read this season, the one to wave around if you're hip." David Brudnoy, *One, Two, Many Consciousnesses III*, 22 NAT'L REV. 1354, 1354 (1970).

355. Kennedy, *supra* note 352, at 1722-23.

356. He sums up by admitting that "[a]s with Romanticism, we can believe in the usefulness of the notion of altruism without being able to demonstrate its existence experimentally, or show the inevitability of the association of the elements that compose it." *Id.* at 1723.

357. *Id.* at 1737.

358. *Id.* at 1766.

359. ALTMAN, *supra* note 236, at 139.

social life in a way that will maximize the number and variety of social situations in which contact among people is experienced as mutually self-validating and loving rather than mutually isolating and threatening."<sup>360</sup> Then, as Professor James Gordon observes, after an exercise in shoveling smoke, Kennedy, Singer, and friends "zoom off in their BMWs and Jaguars to continue their class struggle against hierarchy and privilege."<sup>361</sup>

### *E. Big Losers: Students*

The ultimate negative effect is on students as deconstruction is now *de rigueur* in many classrooms.<sup>362</sup> It is not taught as a process of interpretation or as a crossover from literary criticism but as a means of subverting the "establishment."<sup>363</sup> Students are told that rational analysis is politically wrong, that objectivity is oppressive, and that a neutral system hides evil subjectivity. Under intellectual populism, everyone's judgment is equal.<sup>364</sup> The TV program *L.A. Law* is assigned for discussion and

360. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 70 (1984).

361. James D. Gordon III, *Law Review and the Modern Mind*, 33 ARIZ. L. REV. 265, 269 (1991).

362. Professor Fiss says that the CLS movement—the prime support of deconstruction—"has not peaked and continues to hold its sway within the academy." Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 246 (1989). He adds that "students everywhere feel a special affinity to critical legal studies." *Id.*

363. Decon Duncan Kennedy advises young law firm associates not to laugh at jokes and throw "[b]lank expressions where the oppressor expects a compliant smile." Duncan Kennedy, *Rebels From Principle: Changing the Corporate Law Firm From Within*, HARV. L. SCH. BULL., Fall 1981, at 36, 39.

The strategy I am proposing involves fighting with your elders and betters—sassing them, maybe; undermining them, maybe; hurting their feelings, certainly . . .

. . . If you think before you act, if you are subtle, collusive, skillful and tricky, if you use confrontation when confrontation will work, you should be able to do left office politics without being fired, and make partner.

*Id.* at 40.

For the reaction to Kennedy's article, see *Responses*, HARV. L. SCH. BULL., Spring 1982, at 30, 30.

Kennedy gets as much—or more—than he gives. In reply to his suggestion that law professors periodically change place with law school custodial staff, a janitor said:

We can't even get them to empty their own trash! I'd settle for that rather than some highfalutin, job swapping idea that this guy knows this would never happen in a million years. Maybe he can sell that line to a bunch of fruitcake students, but he can't fool us janitors.

Brian Timmons, *That's No Okie, That's My Tort Professor*, WALL ST. J., April 3, 1990, at A24.

364. "For me education is not, and cannot be, an interchange between equals. If every person's opinion is valued equally, regardless of ability or training or experience, education is simply not taking place." G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569, 586 (1982).

taken seriously.<sup>365</sup> Students assume, as members of the fun generation,<sup>366</sup> that "anything goes,"<sup>367</sup> and it does. Carried to its logical conclusion, deconstruction rationalizes plagiarism: Once on paper, the writer loses property interest in the text to the reader.<sup>368</sup> As the former Dean of Duke Law School observed, deconstruction advocates are more likely to train crooks than teach lawyers.<sup>369</sup> It misleads the gullible; why else would a student write on the last page of his exam: "I have deconstructed this exam and the grade is A+." My reply: "According to my deconstruction, you get a C+. My deconstruction counts, yours does not." See J. DERRIDA.

---

365. Stephen Gillers, *Taking L.A. Law More Seriously*, 98 YALE L.J. 1607, 1607 (1989).

366. Law school is a shopping mall where entertainers like Stevie Wonder counter student boredom with singing lectures. "The importance of getting people's attention and then using that attention to make a better world was stressed in a rare lecture delivered . . . by Steveland Morris, better known to the world as musical genius Stevie Wonder." Gregory Klima, *Wonder Speaks, Sings*, HARV. L. REC., Apr. 27, 1984, at 1, 1. Law school is "above all—fun." *At Harvard, Where Studying Law Is Fun*, HARV. L. SCH. BULL., Summer 1988, at 28, 28 (quoting Harvard law student).

367. "The 'fundamental contradiction' deconstructed every normative structure, be it legal or political, and allowed nothing to remain in its wake besides interest and preference." Fiss, *supra* note 362, at 247.

368. LEHMAN, *supra* note 27, at 59. There is, under this logic, a positive side: Footnotes would become obsolete. See generally Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987) (describing the evolution and various techniques of article differentiation and its impact on the author's career).

369. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984). For the reaction, see Peter W. Martin, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 1 (1985).

"Deconstruction is dubious philosophy and still more dubious social action."<sup>370</sup> I try to put myself "at a point so that I do not know any longer where I am going."<sup>371</sup> "BY GIVING CREDENCE TO THE IDEA THAT WORDS ARE INADEQUATE TO EXPRESS CONCEPTS, *PACIFIC GAS* UNDERMINES THE BASIC PRINCIPLE THAT LANGUAGE PROVIDES A MEANINGFUL CONSTRAINT ON PUBLIC AND PRIVATE CONDUCT."<sup>372</sup> [I can't understand what the young are saying. They can't speak properly.]<sup>373</sup> An "important tendency in contemporary critical theory—the tendency to conclude that one speck ruins the whole fruit, that a blurry distinction must be a false distinction."<sup>374</sup>

Rumors that deconstructive criticism denigrates literature, celebrates the free association of readers, and eliminates meaning and referentially, seem comically aberrant when one examines a few of the many examples of deconstructive criticism.<sup>375</sup>

---

370. Cox, *supra* note 67, at 67.

371. LENTRICCHIA, *supra* note 27, at 174 (quoting Jacques Derrida, *Structure, Sign, and Play in the Discourse of the Human Sciences*, in *THE STRUCTURALIST CONTROVERSY: THE LANGUAGES OF CRITICISM AND THE SCIENCES OF MAN* 247, 267 (Richard Macksey et al. eds., 1972)).

372. *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988).

373. *A Thousand Words Before Breakfast* (Interview with Anthony Burgess), *THE ECONOMIST*, Oct. 19, 1991, at 105, 106.

374. Menand, *supra* note 106, at 40.

375. CULLER, *supra* note 34, at 280.

