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"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction

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"LE HORS DE TEXTE, C'EST MOI"
The Politics of Form and the
Domestication of Deconstruction

*Pierre Schlag**

Il n'y a pas de hors de texte.

Jacques Derrida¹

L'état c'est moi.

Louis XIV²

What are the politics of deconstruction? What political implications does deconstruction yield for law? Does deconstruction have any politics?

To deconstructionists, these are familiar questions. Their frequency is second only to the primordial question: "What is deconstruction?" I have heard this last question many times. Legal thinkers want to know: What is deconstruction? Of course, legal thinkers already have at least some vague ideas about deconstruction. They know, for instance, that deconstruction is a challenge to the established ways of legal thought. They know that deconstruction is radical in some unspecified way. Beyond that, however, they are not sure. And so they ask: What is deconstruction?

In a sense, this appears to be a perfectly innocent question. And yet for the deconstructionist, the question is far from innocent. And so the deconstructionist might answer the question as follows:

"What is deconstruction?" It is important to answer this question

* Professor of Law, University of Colorado. B.A. 1975, Yale University; J.D. 1978 UCLA School of Law. Copyright by Pierre Schlag 1990 (All rights reserved). I wish to thank Jack Balkin for his genuine intellectual interest and candor in discussing the matters in this article — particularly given that I am critical of some stances he has taken. Thanks as well go to David Carlson, David Eason, and Steve Smith for their comments on a draft of this piece and for conversations on the state of current legal thought. I am very grateful to Steve Winter who pushed this article and my thinking along and who was very generous with his suggestions, his time, and his discussion.

¹ This slogan is often translated as "There is nothing outside the text." This translation has often produced the mistaken impression that Derrida is saying something like "everything is text," or "text is all there is." See Edmundson, *The Ethics of Deconstruction*, 27 Mich. Q. Rev. 622, 629 (1988). A better translation of Derrida's slogan (albeit a less elegant one) might be, "There is no outside of the text." This in turn would mean, *inter alia*, that all that is accessible as knowledge is mediated by the text (and whatever characteristics, textuality may have) and/or that whatever can be known as such must have the capacity to be textually comprehensible.

² J. Bartlett, *Familiar Quotations* 312 (1980).

on its own terms. Already we know from the question, something about the shape that an "intellectually serious" answer is expected to take. We know, for instance, that the normal expectations are that deconstruction will be a "what," in other words, "a something"—with all that is implied in being "a something," including substantiality, unity, essence, singularity. The question asked, after all, is not: "What are deconstructions?" Still less, "How is deconstruction?" So the very posing of the question "What is deconstruction?" already invokes and confirms a series of privileged categorial matrices to define an acceptable answer, that is, an "intellectually serious" answer. . . . The question is thus already an establishment of a certain politics of discourse—a definition of the acceptable bounds of discourse, a delimitation, a structuration of the field of acceptable (i.e. "serious") intellectual discourse. . . .

Now, the interesting thing about this sort of answer, is the kind of reaction it will often trigger in the very legal thinkers who first asked, "What is deconstruction?" Faced with this sort of answer, these legal thinkers will often be annoyed and will often react dismissively. They will react dismissively for the simple reason that the answer presented is not the sort of "answer" they had in mind. It is not the sort of "answer" they intended.³ For them, the deconstructionist answer is evasive. It is not straightforward.

These reactions are perfectly understandable. Indeed they are perfectly sensible—sensible, that is, within the framework of traditional legal discourse. Yet ironically, these dismissive reactions by legal thinkers are a *rhetorical* confirmation of precisely what the deconstructionist said above.⁴ Indeed, these dismissive reactions confirm that the question "What is deconstruction?" is not just a question—but also an affirmative political act regulating the rhetorical paths that the intellectual traffic in questions and answers must take. As such, the question already constitutes the shape the answer must assume if that answer is going to be admissible within the norms of traditional legal discourse.

That the asking of such a seemingly trivial question—"What is deconstruction?"—can be seen as a political act, as a manifestation of

³ As Charles Yablon argues, a question is an expression of its author's desire. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 *Cardozo L. Rev.* 917, 928 (1985). And desire is itself always already structured.

⁴ We find like a rule of speech or textual rule, that the question can be inscribed only in the form dictated by the answer which awaits it, that is, which did not wait for it. It need only be asked how the answer has prescribed the form of the question—not according to the necessary, conscious, and calculated anticipation of someone who is conducting a systematic expose but somehow unawares.

J. Derrida, *Form and Meaning: A Note on the Phenomenology of Language*, in *Speech and Phenomena and Other Essays On Husserl's Theory of Signs* 126 (1973).

social power congealed in linguistic forms, no doubt comes as news to traditional legal thinkers. Indeed, *as legal thinkers*, it may even come as news to us. It may come as news to us precisely because, *as legal thinkers*, we are almost completely unaccustomed to thinking of *linguistic form* as a matter of politics. What's more, we are particularly unaccustomed to thinking of the *linguistic form* of *our own* legal thought as a matter of politics.

We are unaccustomed to thinking in all these ways precisely because traditional legal discourse deprivileges and subordinates form. Indeed, at whatever level of abstraction traditional legal discourse operates—whether it be doctrine, theory, or hermeneutics—traditional legal discourse immediately proceeds to the “substantive” discussion of its object without pausing to consider the form within which that “substantive” discussion has already been framed.

But this is hardly surprising. On the contrary, traditional legal discourse routinely conceives (and almost invariably) treats the grammar and elements of its own discourse—the words, the sentences—as if they were weightless inconsequential forms allowing the transmission of any important “*substantive*” rational meaning.⁵ By trivializing form in this way, traditional legal discourse represses inquiry into its own form. To the extent that the form of traditional legal discourse is treated as weightless, inconsequential, it is also treated as neutral—in

⁵ Legal thought is hardly alone in treating language this way. For a discussion of the ways in which our general language re-presents language as an empty form—a conduit for “substance,” see Reddy, *The Conduit Metaphor—A Case of Frame Conflict in Our Language about Language*, in *Metaphor and Thought* 284 (A. Ortony ed. 1988).

As Reddy shows, we are often trying to *get our thoughts across* better and so we try to *pack our thoughts in* as few words as possible, though sometimes our *sentences are filled* with *too many thoughts* and the result is that the reader has great difficulty *extracting the meaning*. Id. at 287-90.

As these examples, drawn from Reddy's work demonstrate, our metaphorical descriptions of language cognitively establish language as an empty conduit, a vehicle for “substantive” meaning and thought. As Reddy demonstrates, not only does the conduit construction of language create a false understanding of communication, but it produces significant social pathology as well:

This model of communication objectifies meaning in a misleading and dehumanizing fashion. It influences us to talk and think about thoughts as if they had the same kind of external intersubjective reality as lamps and tables. Then when this presumption provides dramatically false in operations there seems to be nothing to blame except our own stupidity and malice.

Id. at 308.

For what will no doubt become part of the seminal work introducing such cognitive-linguistic insights to legal thought, see Winter, *Bull Durham and the Uses of Theory*, 42 *Stan. L. Rev.* 639 (1990) [hereinafter *Bull Durham*]; Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 *U. Pa. L. Rev.* 1105 (1989); Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 *Mich. L. Rev.* 2225 (1989).

other words, neither here nor there. And being neither here nor there, it is, of course, not worth talking about—or so it appears from the perspective of traditional legal discourse.

What is interesting about this repression of form is that the repression is itself effectuated by means of form. What we have here is a *nested repression*: the repression of the repression. Not only does legal discourse repress inquiry into its own form, but this repression is repressed in the very form of traditional legal discourse. Indeed, in its very form, traditional legal discourse has already framed its own form as an empty conduit, a mere vehicle, a container for “substantive” thought. In other words, the form of traditional legal discourse has already relegated its own form to the status of the secondary, the derivative, the trivial. Not surprisingly, the substantive dimension of traditional legal discourse follows suit: the substantive self-representation of traditional legal discourse affirms that form is subordinate and secondary to so-called “important” normative legal concerns and commitments—whether it be rule of law, or justice, efficiency, or whatever.

The short of it is: the power of traditional legal discourse to repress inquiry into its own form is awesome. Not only does traditional legal discourse repress its own form (at both the formal and substantive levels), but having accomplished this repression, it then conveniently “forgets” that there has been any repression of form at all. Having thus dismissed rhetoric and form from the stage, having instituted this dismissal in its very own rhetorical form, and finally having “forgotten” both of these moves, it is no wonder that traditional legal discourse cannot recognize its own politics.⁶

* * *

What then are the politics of deconstruction in law? What political implications does deconstruction yield for law? This essay has already begun to provide some answers to these questions.⁷ Part of

⁶ This “forgetting” by traditional legal discourse that it has already dismissed form from the stage, helps explain why the question “What is deconstruction?” *seems* so innocent to traditional legal thinkers. It *seems* innocent for traditional legal thinkers precisely because its form has already been “forgotten.”

This “forgetting” also helps to explain why traditional legal thought has been so resistant to the otherwise transparently correct observation that law is politics. It is part of the political character of traditional legal thought to exclude and marginalize certain ideas, images, concepts, etc., and to do so in a way which systematically “forgets” that there has been any exclusion. So not only does traditional legal discourse purge law of the political, but it “forgets” that it has done so. But, of course, both the purge and the forgetting are themselves quintessentially political acts.

⁷ The short formulaic version of the answer goes like this: Contemporary legal thought is, in its form (and sometimes its substance), given to a methodological and ontological individu-

the answer still to come is that deconstruction seeks to challenge and subvert our image of the political. In other words, deconstruction seeks to displace our pre-formed view of the identity, the form, and the location of the political.⁸ Deconstruction seeks to effectuate this displacement and subversion by *engaging* our tacit understanding of what constitutes the political . . . and accordingly everything else as well. In law, deconstruction is thus a kind of engagement with traditional legal discourse—an engagement that seeks to subvert the categorical regimes in force within that discourse. As Derrida puts it:

What is somewhat hastily called deconstruction is not, if it is of any consequence, a specialized set of discursive procedures, still less the rules of a new hermeneutic method that works on texts or utterances in the shelter of a given and stable institution. It is also, at the very least, a way of taking a position, in its work of analysis, concerning the political and institutional structures that make possible and govern our practices, our competencies, our performances. Precisely because it is never concerned only with signified content, deconstruction should not be separable from this politico-institutional problematic and should seek a new investigation of responsibility, an investigation which questions the codes inherited from ethics and politics. This means that, too political for some, it will seem paralyzing for those who only recognize politics by the most familiar road signs. Deconstruction is neither a methodological reform that should reassure the organization in place nor a

alism. As a matter of form, the author of contemporary legal thought invariably situates his (very coherent, self-directing, and largely autonomous) self outside the text—outside the text of social relations, outside the text of academic production, outside the text of history and psychology, etc. In a phrase: *le hors de texte, c'est moi*. This methodological and ontological individualism embedded in the very *form* of legal thought is redistributed and reproduced in the reader and in the consumers of legal thought. This methodological and ontological individualism is associated and supports a number of ideological commitments that become unbelievable (if not silly) once articulated in substantive terms:

- The conceit that legal thinkers are in control of their own thoughts
- the assumption that theory is sharply distinct from practice and somehow governs practice from some safe and stable place outside practice
- the view that substance governs form
- etc.

Despite the transparent silliness of these conceits (once articulated) they remain embedded in the very form of traditional legal thought. Not surprisingly, they regularly slip out into its “substance”.

⁸ When, therefore, both Marx and Derrida speak of the necessity of reconsidering the way we fashion categories—through what procedures, on what grounds, for what ends—it is because such categories as “the economic” [or the “political”] falsely represent the world by positing nonexistent homogeneous grounds that reduce out complex relations and forces that are not amenable to simple categorical representation as homogeneous entities and that require what Marx calls a different mode of exposition.

flourish of irresponsible and irresponsible making destruction, whose most certain effect would be to leave everything as it is and to consolidate the most immobile forces within the university.⁹

If *engagement* of the traditional discourse describes the project of deconstruction, then deconstruction can fail in (at least) two ways. First, deconstruction can fail because it becomes too challenging, too heretical, too much of a departure from accepted discursive practices.¹⁰ In this case, deconstruction can fail because the traditional discourse will identify and marginalize deconstruction as unintelligible, as absurd, as beyond the pale.¹¹ Deconstruction, however, can also fail in a second and perhaps more interesting manner. Deconstruction can fail to engage if it becomes subsumed and coopted by the categorial regimes of traditional legal discourse.¹²

It is this latter possibility—this possibility of failure by cooption that is of concern here. This possibility of the cooption of deconstruction is intimately related to the question of the politics of deconstruction. It is related because the politics of deconstruction in law (if any) will depend precisely on what the politics of traditional legal discourse do to deconstruction and vice versa.

If traditional legal discourse succeeds in transforming deconstruction into just another *technique*, just another *theory*, just another *method* for making arguments, then deconstruction will have no particular politics—which is to say that it will have the conservative effect of preserving the politics of the status quo. Deconstruction will become powerless to displace and subvert the categorial regime in force precisely because it will have become subsumed with that very same categorial regime—the one that systematically transforms intel-

⁹ Derrida, *The Contest of Faculties*, as cited in J. Culler, *On Deconstruction: Theory and Criticism After Structuralism* 156 (1982). I had wanted to put in italics for emphasis in this quote. But as it turned out, I wanted to emphasize each and every sentence.

¹⁰ Richard Posner, who seems clearly interested in making deconstruction fail, has adopted exactly this strategy in his efforts to exclude deconstruction from legal thought. See R. Posner, *Law and Literature: A Misunderstood Relation* 213-220, 215 (1988) ("The relevance of all this for law is obscure. . . the purposes and techniques of authors of literary texts are different from those of the authors of legal texts.") See also, Brosnan, *Serious But Not Critical*, 60 S. Cal. L. Rev. 259, 372-73 (1987) (noting that insofar as deconstruction assumes "a willingness to put aside normal analysis and ideology, an effort to effect delegitimation through deconstruction inappropriately assumes in its reader the presence of the very attitude it is trying to bring about.")

¹¹ See Winter, *Indeterminacy & Incommensurability in Constitutional Law* (forthcoming in 78 Cal. L. Rev.)

¹² To some degree, these two paths of failure correspond to the dead ends already described by Derrida. Indeed Derrida has noted that deconstruction must "avoid both simply *neutralizing* the binary oppositions of metaphysics and simply *residing* within the closed field of these oppositions, thereby confirming it." J. Derrida, *Positions* 41 (1981).

lectual endeavors into just another technique, just another theory, just another method. If deconstruction is subsumed in this way, then it will have failed to challenge (let alone, displace) *the practices* of traditional legal discourse. If this happens (which it very well might), then deconstruction will have been successfully coopted by traditional legal discourse.

I think it is easy to see how this cooption might happen. There is at work within the very practice of traditional legal discourse a fairly crude and powerful rhetorical subject-object economy. *Traditional legal discourse rhetorically establishes the self of the legal thinker as a privileged individual subject—as the author of his own thoughts, the captain of his own ship, the Hercules of his own empire.*¹³ Constituted as a privileged individual subject, the legal thinker systematically treats any new knowledge (whether it be microeconomics or deconstruction) as just another technique, just another method, just another thoroughly objectified resource-field for legal arguments. This rhetorical economy is so powerful that even when the legal thinker encounters some knowledge that is transparently anti-methodological or anti-instrumentalist, the legal thinker will, often as not, nonetheless deploy this new knowledge in a methodological, instrumentalist way. And, *in one sense*, nothing could be more natural: in a discourse that systematically instructs and constructs its readers and writers to deprive their own form, these sorts of cannibalistic transformations are exactly the sort of thing to be expected.¹⁴ Indeed, if your discourse systematically represses form, one would expect your transformations to be a little weird.

The importance of this rhetorical economy on the character of traditional legal thought is difficult to overstate. One result of this rhetorical economy is that, at least since the time of Langdell¹⁵ and virtually without interruption since, traditional legal discourse has systematically rejected any *serious* consideration of the social, the psychological, and the rhetorical context of *its own* productions.¹⁶ On

¹³ This establishment of the individual subject is at once evidenced in and enforced by the American stylistic insistence on using the active voice in "good writing"—an insistence that one encounters fairly often in the student law review editing process. One of the less innocent consequences of this "merely stylistic" insistence is that individual subjects are unthinkingly established as the authors—that is, the agents—of all noteworthy social, political and epistemological acts.

¹⁴ See Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 Stan. L. Rev. 929 (1988) [hereinafter *Cannibal Moves*].

¹⁵ This rhetorical economy, of course, antedates Langdell—but Langdell provides an apt marker to symbolize the emergence of this rhetorical economy within American academic legal thought.

¹⁶ Since the time of Langdell, American legal thought has produced two well-known move-

the contrary, there has been a sustained tendency on the part of the legal thinker to *exteriorize*, and correspondingly objectify all legal problems, issues, and solutions. The sustained drive within legal thought, at least since Langdell, has been to produce instrumentally useful legal knowledge without, of course, any serious consideration of the desirability of this instrumentalist paradigm of intellectual production.¹⁷ Regardless of their identity, the knowledges wielded by the legal thinker (i.e., sociology, psychology, rhetoric, etc.) have almost always been turned *outward*—in a manner that exempts the legal thinker himself from the reach of these knowledges. Indeed, *the very form of traditional legal discourse systematically renews and replenishes the pleasant Langdellian fantasy that, in his role as authorized legal speaker, the legal thinker is outside the reach of these knowledges.*

Now, this systematic exteriorization, this unwillingness to interrogate the legal subject, is *not just* some intellectual failing on the part of the legal thinker. Rather, the legal thinker has been rhetorically constructed this way by the very legal texts he reads and writes.¹⁸ The very form of legal discourse exempts him (the judge, the legal academic, the lawyer, the law student) from considering the social, psychological, rhetorical status of *his own* legal thought.

The legal thinker speaks from a position of authority and *while he is speaking in role*—that is, while he is at the podium—he will *as a matter of form* present the self that is speaking—that is, his self—as an autonomous, coherent, integrated, originary self capable of rational argument and moral choice. Later on, out in the hall, in informal conversation, the legal thinker will, of course, readily admit that he is just as much a fit subject for sociological, economic, psychoana-

ments that have attempted to direct the attention of legal thought to its own social or rhetorical situation: legal realism and critical legal studies. Both of these movements have been met with widespread pathological responses throughout the academy—leading to loss or denial of jobs and the retardation of the intellectual development of legal thought.

¹⁷ This description of the legal academy's sustained and unexamined commitment to the production of instrumentally useful legal knowledge is consistent with Lyotard's description of "performativity" as the criterion for modern (not postmodern) science. Lyotard, *The Postmodern Condition: A Report On Knowledge* 46 (1979) ("The production of proof . . . thus falls under the control of another language game, in which the goal is no longer truth, but performativity—that is, the best input/output equation . . . Scientists, technicians, and instruments are purchased not to find truth, but to augment power.").

For a demonstration of the significance of the critical legal studies attempt to understand and resist the instrumentalization of (legal) thought and culture, see Binder, *Beyond Criticism*, 55 U. Chi. L. Rev. 888 (1988).

¹⁸ With only a few exceptions, I have more or less deliberately used the male pronoun to describe the traditional legal thinker. Traditional legal thought strikes me as essentially a male production—and it would seem perverse to hold women responsible for its character.

lytic explanations as the next guy. But when he is doing law, when he is in role, the rhetorical form of his statements will effectively deny all these twentieth-century knowledges in favor of eighteenth-century Lockean fantasies. What's more, the legal thinker will invite the authorized audience (i.e., other members of the legal community) to participate in the same fantasies: the members of this authorized audience will be treated and thus constituted as autonomous, coherent, integrated, ordinary selves capable of rational argument and moral choice.

The intellectual consequences of these rhetorical conceits are extremely important.¹⁹ Indeed, even when significant *substantive* efforts are made to focus legal thought on late twentieth-century social life, on the postmodern condition, even then, *the aesthetic, the form*, of legal thought often remains captive to eighteenth-century metaphysics. At the level of form, the self of the legal thinker remains autonomous, self-directing, coherent, integrated and originary—in short, as if it were the autonomous author of its very own thoughts. These tacit assumptions of form yield some bizarre intellectual creations.

Unfortunately, it is difficult for us to apprehend the bizarre and wondrous character of these creations because, we are complicit in the very reproduction of precisely these wondrous creations. And thus, rather than considering them bizarre, we often consider these creations routine. More accurately, we don't consider them at all: they *are* our routine.²⁰

Among the sort of intellectual work we consider routine—indeed the very height of seriousness—are, for instance, historical accounts offered by legal thinkers who boldly situate themselves outside of (or ever so conveniently at the end of) history.²¹ Similarly, we routinely accept as normal social science work done by legal thinkers whose

¹⁹ For one thing they lead to a great deal of misunderstanding. For instance, the *cls* claims of contradiction have been misunderstood by many legal thinkers (opponents and adherents) precisely because these thinkers have been unable to apprehend that the contradictions traverse the very *self* of the legal thinker (i.e., them). They have been unable, in other words, to understand that the *cls* claim is that there is no place for the self to stand outside of the contradictions. Legal thinkers are often incapable of thinking such self-decentering thoughts precisely because as academic professionals, their self, their individual subjectivity, has always already been put off limits.

²⁰ For a discussion of the routine of normative legal thought, see Schlag, *Normative and Nowhere To Go*, 43 *Stan. L. Rev.* (forthcoming) [hereinafter *Normative and Nowhere To Go*]. For a discussion of the general significance of routine in social interaction, see P. Wohlmuth & L. Goldberg, *The Significance of Routine in the Operation of Human Regulatory Systems: Reexamining the Relationship of ADR to Law* (forthcoming in *Dispute Processing: Legal and Anthropological Perspectives* (B. Aginsky, M. Lowy, V. Rohrl & D. Wesckstein, eds. 1991).

²¹ For discussion and criticism of this trend, see Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1984).

thought processes and occupational situation are themselves apparently immune from the effects of social forces.²² We have seen structuralist accounts transformed into transcendental truths announced by speakers who are apparently (and quite mysteriously) outside the deep structure.²³ In sum, we routinely treat ourselves as if we were outside the historical, the social, the structuralist text.

And now that deconstruction is making its appearance in law, we face the very real possibility that the law's *formal* answer to Derrida's "*Il n'y a pas de hors de texte*" will be, *once again*, yet another instantiation of the legal thinker's favorite refrain: "*Le hors de texte, c'est moi.*" In other words, the risk is that, at the very moment that deconstruction is making its entry into the law, the legal thinker will *once again* situate his self outside the reach of deconstruction. This is not a hypothetical or a remote risk. The reason it is neither hypothetical nor remote is that, as legal thinkers, we are all enmeshed in this *self-indulgent* traditional discourse. And since there is no question of making a radical rupture with this traditional discourse²⁴—neither as reader, nor author—the legal texts are always already constituting and confirming us in the privileging of our self as rational, coherent, and originary. In its formal structure, traditional discourse systematically reproduces and confirms each of us in the privileging of our own individual self.²⁵ The irony is that even when we seek to displace the grammar and matrices of traditional legal discourse, they often re-enlist even our best subversive efforts within their own formal struc-

²² For criticism of this trend, see Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *Stan. L. Rev.* 575, 617-18 (1984).

²³ For criticisms of this tendency, see Gabel & Kennedy, *Roll Over Beethoven*, 36 *Stan. L. Rev.* 1, 15-16, 36-37 (1984).

²⁴ For Derrida's description of the problematic and ambivalent situation of deconstruction with regard to radical breaks, see J. Derrida, *The Ends of Man*, in *Margins of Philosophy* 135 (1982).

²⁵ For this reason, it is not enough to become self-conscious of this systematic process. To be sure, self-consciousness may help. It may even be necessary. But self-consciousness here is not enough. What is required is a displacement, a subversion of the discursive practices that constitute each of us. What is required is deconstruction.

In this connection, it seems that the arguments of some cls scholars about the ideological role of traditional legal discourse must be pushed further. There has been a tendency in some cls scholarship to assume that the self-conscious recognition that traditional legal discourse is mystifying will instance the dissolution of this mystification. But this is not so—neither at the social nor the individual level.

For instance, the recognition that the general practice of reification in legal thought yields legally unnecessary and politically conservative results does not imply that one can extirpate reification for one's thought processes. It is only if one assumes in conformity with the dominant ideology that legal thinkers are always already in control of their thinking processes, that such a conclusion would follow. Once one abandons this extreme philosophical idealism, the conclusion doesn't follow: reification is a cognitive process—and epistemological insights into the nature of reification can only do so much (depending on the context) to modify cognitive

ture. Thus, even as we try to advance subject-decentering knowledges (like deconstruction) within traditional legal discourse, the latter reasserts its own formal rhetorical structure and re-establishes both reader and author as privileged individual subjects.

By way of example, consider Jack Balkin's pioneering account of deconstruction in law, entitled *Deconstructive Practice and Legal Theory*.²⁶ Balkin's article quite rightly begins with the caveat that deconstruction is not a "philosophical position" or "a creed"—i.e., not the sort of thing that can be chosen or wielded by a privileged individual self.²⁷ Instead, Balkin properly insists on treating deconstruction as "a practice"—as even the title of his article indicates. But as the article proceeds, the metamorphosis begins. Slowly but surely deconstruction slips away from its role as a practice. Instead, Balkin begins to treat deconstruction in a more *instrumental* way, as a *technique* deployed by a self-conscious individual subject. For instance, midway through the article Balkin writes:

[T]he deconstructionist must engage in a process of *self-reflection* to determine when the insights provided by deconstruction *have produced sufficient enlightenment* with respect to a view of law, legal doctrine This decision is, of course, *a political and moral choice*, but it is one informed by insights gained through the activity of deconstruction itself. At the moment the choice is made, the critical theorist is, strictly speaking, no longer a deconstructionist. However, *the purposes of engaging in the deconstruction have been served*.²⁸

And by the end of Balkin's article, deconstruction is no longer a *practice* at all: rather, as Balkin puts it, "[d]econstruction by its very nature is an *analytic tool*"²⁹

Balkin's article thus illustrates the way in which (despite the best and most careful "substantive" intentions) deconstruction can come to be defined and confined by an already-in-place instrumentalist ideology—an ideology which at once depicts and constitutes morally charged individual subjects as competent choosers of normatively

frameworks. See Schlag, Missing Pieces: A Cognitive Approach to Law, 67 Tex. L. Rev. 1195 (1989) [hereinafter Missing Pieces].

At the same time, however, it would be a serious mistake to conclude that critical self-consciousness is of no political consequence for changing our practices. See Winter, Bull Durham, *supra* note 5 (arguing against Stanley Fish that critical self-consciousness is politically and socially necessary in modifying our practices).

²⁶ Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743 (1987).

²⁷ *Id.* at 745-46 (citing Jonathan Culler and Christopher Norris for the same sort of proposition).

²⁸ *Id.* at 766 (emphasis added).

²⁹ *Id.* at 786.

empty intellectual techniques. In the case of Balkin's description of deconstruction, this ideology puts the individual self in charge of choosing when to deploy deconstruction, when to end deconstruction, and what purposes to use deconstruction for. The net effect of this ideology, then, is to insulate the self, and the rhetoricity of the self from the subversive reach of deconstruction.

Balkin's account of deconstruction is an excellent and sophisticated account of the dominant paradigm of deconstruction practiced within critical legal studies. Indeed, the formalization of deconstruction into a set of operating procedures deployed by a radically free individual subject is typical (though not exhaustive) of *cls* deconstruction.³⁰ This tendency to formalize and thereby domesticate deconstruction into a set of stereotyped techniques or operating procedures is largely an outgrowth of a dominant *cls* paradigm that combines a thoroughly structuralist understanding of social and legal thought with a self-consciously contradictory affirmation of a radical individual subjectivism.³¹ In its very best moments, this *cls* paradigm demonstrates important and largely unanswered insights into the relatively underdeveloped condition and the outlandish epistemological pretensions of contemporary legal thought (i.e., the sort of thought we are all enmeshed in—one way or another).³² In one sense,

³⁰ See, e.g., Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *Yale L.J.* 997 (1985); Feinman, *A Case Study in Critical Contract Law*, 1988 *Ann. Survey Am. Law* 273, 275-76. For a counterexample, see Hutchinson, *From Cultural Construction to Historical Deconstruction* (Book Review), 94 *Yale L.J.* 209 (1984).

³¹ It is, of course, possible that I am misunderstanding what I take to be the dominant paradigm within *cls*—and that critical legal thought does not seek to canonize or elevate the radically free individual subject. Misunderstanding on this score is extremely easy. It is extremely easy because (particularly within the legal community) we lack strong, widely shared markers to designate stages of development of the subject.

In a recent article, I have described stages of development of the legal subject while simultaneously describing the difficulties attending such a task and also trying to develop some rhetorical strategies for overcoming these difficulties. See, *Missing Pieces*, *supra* note 25. My sense is that it does little good simply to describe stages of development of the subject. It does little good because those subjects that are not very far along, tend to (mis)understand later stages of development within the forms of earlier stages of development of the subject. As Heidegger put it:

We shall never learn what "is called" swimming, for example, or what it "calls for," by reading a treatise on swimming. Only the leap into the river tells what is called swimming. The question "What is called thinking?" can never be answered by proposing a definition of the concept *thinking*, and then diligently explaining what is contained in that definition.

M. Heidegger, *What Is Called Thinking* 21 (1968).

³² See Kennedy, *Comment on Rudolf Wietholter's "Materialization and Proceduralization in Modern Law" and "Proceduralization of the Category of Law"*, in *Critical Legal Thought: An American-German Debate* 511 (C. Joerges & D. Trubek eds. 1989).

this demonstration is consistent with the Derridean enterprise.³³ It is admirable *insofar* as it effectively resists and overcomes the hypostatizing and homeostatic effects of disciplinary knowledges including, most topically, law. In its very worst moments, however, this dominant cls paradigm does nothing of the sort. In its worst moments, it succeeds quasi-comically in dogmatically establishing the cls thinker as a radically free subject while reducing everyone else to the unenviable status of a mere vehicle for the reiteration of fairly crude structuralist patterns: radical individual subjectivism for me and objectified mindlessness for you . . . (I win—you lose).

Either way, best or worst, the irony remains. And the irony is that by putting the individualist self in charge of deconstruction, legal discourse (once again) re-establishes what Derrida derides as “the full presence, the reassuring foundation, the origin, the end of play.”³⁴ The self has been put outside the challenge of deconstruction and thus it remains a self-assured, coherent, integrated, rational, originary source of moral and political action. But to put the self outside the text in this way, turns deconstruction on its head.³⁵ More precisely, it sends deconstruction reeling back to the eighteenth-century metaphysics of the individual and his reason as the origin of truth, morals, etc.³⁶

And yet, of course, it is easy for the legal thinker to put his or her self outside the text. It has already been done. All the legal thinker

³³ See Edmundson, *supra* note 1, at 629:

The epistemological pride that comes with the notion that you can refine away more and more of what is contingent on the way to seeing things in their full presence and truth is the pride that Derrida most wants to dislodge. Derrida's target is epistemological hubris, in much the way Marx's target was the hubris of bourgeois prosperity and Freud's the hubris of “civilized sexual morality.”

³⁴ J. Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *Writing and Difference* 278, 292 (1978).

³⁵ Edmundson, *supra* note 1, at 628. (“The self, moreover, which has been conventionally conceived of as potentially stable and potentially unified, is here called into doubt. For if the activity of reading, or of being in the world, is constituted by the play of differences, then what is called the self is similarly in flux.”).

³⁶ Allan Hutchinson aptly describes this cooption of deconstruction in American literary scholarship:

Unfortunately, American literary scholarship has grossly misapplied this radical critique and blunted its critical edge Domesticated and neutralized, [deconstruction] has been reduced to a tamed dogma of textual nihilism. In its American mutant form, “unbounded free play” is premised on an unconstrained individual-at-large who designates meaning at will, an eternal signifier. It has been put to work within the very metaphysical process that it is intended to disrupt. In its text-centered, abstract, and ahistorical focus, Deconstruction shares much with the discredited New Criticism.

Hutchinson, *From Cultural Construction to Historical Destruction* (Book Review), 94 *Yale L.J.* 209, 230-31 (1984).

has to do—all *I* have to do—all *you* have to do—is do what Stanley Fish says comes naturally.³⁷ All each of us has to do is simply understand deconstruction as just another *technique*, just another *approach*, just another *argumentative resource* that each of us can deploy when or where each of us wishes. This is extremely easy for the legal thinker to do. As an already constituted privileged individual self, the legal thinker is always already prepared to objectify any intellectual activity into a *technique*, a *tool*. Indeed, insofar as he is an unconstrained originary subjectivity, all intellectual activity is always already at his willful disposal. Since he is constructed as the origin of choice and of meaning, all intellectual activities must perforce be subordinate to *his* choice and *his* meaning.

This rhetorical economy (of self and technique) is a reciprocal one, which means that it can be described the other way around as well. Since the action of the privileged individual self always already objectifies intellectual activity into techniques, tools, resources, etc., these are stripped of intrinsic normative value. The resulting emptiness of these texts creates a demand for a meaning-conferring subjectivity. Indeed, all these thoroughly objectified techniques, methods, approaches, create an economic demand for a morally charged subjectivity—one that is outside the text and can give such texts meaning, significance, life. And in our (legal) culture, this morally charged subjectivity happens to be rhetorically constructed as an individual one (you, me, etc.).

There is thus a powerful rhetorical economy here—one which links in a reciprocal manner the privileging of the individualist self and the reduction of intellectual activity to the objectified status of *techniques*, *methods*, *theories*, etc.³⁸ This is a simple symbiotic subject-object economy—one where the text is thoroughly objectified and subjectivity is purportedly located outside the text.

In the case of deconstruction, this already constituted rhetorical subject-object economy institutes a double misunderstanding of deconstruction.³⁹ First, it misapprehends deconstruction *tout court*. Second, it inscribes this misapprehension within the text of decon-

³⁷ All we have to do—to put the self outside the text—is to be like the academics Stanley Fish describes and routinely skewers. S. Fish, *Doing What Comes Naturally* (1989).

³⁸ This rhetorical economy constitutes part of the structure of the “rationalism” that I try to expose and displace. See *Missing Pieces*, *supra* note 25, at 1210-13, 1243-47.

³⁹ One might call this movement an ironic reversal of Derrida’s “double gesture.” Derrida, *supra* note 12, at 41-42, 46-47 (1981) (on the “double gesture”).

Derrida states that deconstruction must “avoid both simply *neutralizing* the binary oppositions of metaphysics and simply *residing* within the closed field of these oppositions, thereby confirming it.” *Id.* at 41. Accordingly, a “double gesture” is required. One phase of this

struction itself. The result is that deconstruction is re-presented as precisely what it is not: as *a technique*, as *a theory*, as *a tool*, etc. This result is at once ironic and perverse because, as Derrida makes clear, deconstruction is not just some *technique*, *theory*, *tool* to be deployed by self-directing *privileged individualist selves* whenever and wherever they choose. On the contrary, as Derrida says in *Positions*:

The *incision* of deconstruction which is *not a voluntary decision or an absolute beginning, does not take place just anywhere, or in an absolute elsewhere*. An incision, precisely, it can be made *only* according to lines of force and forces of rupture that are localizable *in the discourse* to be deconstructed.⁴⁰

But despite Derrida's caution, the risk is great that in the midst of, or even throughout a deconstruction, the legal thinker will nonetheless insist that "*Le hors de texte, c'est moi*." This risk is great precisely because our legal texts (quite paradoxically) constitute each of us as privileged individual selves. And the thing is: it is extremely difficult to give up this exceedingly flattering self-image. It is a very addictive self-image—and, from a certain point of view, one that is not without certain advantages. Indeed, this rhetorical self-image has the distinct advantages (for that self) of putting the self outside any already inscribed and delimiting

history
practice
form
writing. . .

while, simultaneously, bestowing upon this self the power to create its own ruling. . .

reason
theory
substance
speech.

Looking at these two columns, it seems clear that putting the self *hors de texte* in this way succeeds in reinscribing precisely the sort of hierarchical oppositions that Derridean deconstruction seeks to subvert (including speech/writing, substance/form, theory/practice, etc.). To put the self *hors de texte* in this way is to authorize the

double gesture entails overturning or reversing the hierarchical oppositions. Another phase entails *marking* or reinscribing the displacement, the interval that arises from the reversal.

Those two "phases" are not to be understood in a chronological relation. Nor are these phases to be understood in terms of a naive subject-object model whereby some privileged interpretive individual *subject* mechanically overturns the hierarchical dualities in a thoroughly *objectified* text.

⁴⁰ Derrida, *supra* note 12, at 82 (emphasis added).

cooption of deconstruction. It is to undo deconstruction in the very act of purportedly practicing deconstruction. It is to ensure that deconstruction will have no particular politics and no particular implications that traditional legal thought need worry about.

Indeed, ideas, theories, etc. are *not* dangerous—they are *not* consequential—*unless* they can change people's cognitive-social practices. And there is no reason to suppose that anyone's cognitive or social practices will *necessarily* or even *generally* be transformed *simply* because he or she comes to hold or mouth some new radical "substantive" idea, theory, method, technique.⁴¹ To believe that "substantive" ideas, theories, methods, etc. do have such power is to remain caught within the pervasive ideological overstatement that substance controls form and theory governs practice. It is to assume—in complete accord with the ruling ideology—that one's thoughts can control one's cognitive practices in an automatic unproblematic sort of way.⁴²

Thus, *as between* changing someone's theory, their ideas, etc. on the one hand or changing, their cognitive practices on the other—the more important intellectual and political endeavor would seem to be the latter. Theories come and go. Ideas are a dime a dozen. Prescriptive and normative ideas are even cheaper. People get them all the time—hence, the saying "There ought to be a law. . . ." But the problem with theories, and ideas, etc. is that they very often leave cogni-

⁴¹ I choose the underlined words carefully because I do not want to say *as much* as Stanley Fish seems at times to say: namely, that self-consciousness of one's thought processes is irrelevant to political change. I think that when Stanley Fish says that, he is wrong. It is an overstatement: it fails to consider the particular and context-specific relation between thought and practice. In some situations, self-consciousness is remarkably effective at changing cognitive practices. In other situations, it is not.

While I disagree with Stanley Fish, I also disagree with the sort of move sometimes seen in cls work that assumes that self-consciousness can somehow dissipate constraint and adversity. One can, for instance, be self-conscious that reification is an intellectually and generally politically objectionable practice and yet remain quite incapable of avoiding reification.

In the higher stages of development of the subject, the subject becomes aware that it is structured not just by language—but by *the language games* of language. As one achieves this sort of understanding, one becomes aware that changing the character of the subject—of one's self even—is not a matter of just thinking things through. It becomes a question of changing the language structures, the institutions that create the subject. In other words, self-consciousness may be a great rhetorical opening for the development of the subject, until the later stages when it appears to the subject that self-consciousness is simply no longer adequate. Further development depends upon the subject (and hence the associated category of self-consciousness) being put in question. What is required for further development is the displacement of the linguistic/institutional structures—i.e., precisely the sort of thing that deconstruction sometimes seems to do.

For a discussion of self-consciousness, as limited by conditions of sedimentation and adversity, see Winter, *supra* note 11.

⁴² I have previously attempted to *show* that this is not the case. See *Cannibal Moves*, *supra* note 14.

tive practices undisturbed. As a result, theories, ideas, etc. are often coopted, distorted, reified, and neutralized by being re-enveloped within the same old cognitive practices. The move from Marx to Lenin, from Coase to Posner, from Duncan Kennedy to [. . .]⁴³ is the same old rationalist move of enveloping dynamic accounts of subject-object relations within a much more stabilized Cartesian form.⁴⁴ Rationalism is very good at killing thought. And if one is to avoid producing intellectual creations that are already D.O.A., it becomes crucial to trouble the already inscribed spaces, the pathways, by which bureaucratic academic institutions channel (and kill) intellectual endeavor.

* * *

So what are the politics of deconstruction? Given that the rhetorical field in law is always already structured in a sedimented understanding of self and world, theory and practice, substance and form, serious and nonserious, the politics of deconstruction are to expose and exploit the fault lines in a manner that will subvert and displace our image of the political. This means that answering the question "what are the politics of deconstruction in law?" depends very much on the shape of the encounter between deconstruction and the politics of traditional legal discourse.

One possibility, of course, is that deconstruction will be coopted. To some extent, this seems to have happened already in the field of literary criticism where deconstruction seems to have taken its institutionally preformed pluralistic place among a variety of other approaches to literature (including new criticism, phenomenology, structuralism, psychoanalytic criticism, etc.)

But, it is also quite possible (contrary to many of the intimations thus far) that in law, deconstruction will not be coopted. It is quite possible that deconstruction will engage and resist the politics of traditional legal discourse and in so doing will displace that discourse. One of the reasons, that deconstruction could very well resist cooption in law is that, perhaps more than any other critical enterprise, deconstruction inscribes itself in opposition to the discursive mechanisms of cooption.

* * *

In what follows, I will sketch briefly the ways in which decon-

⁴³ Pick the reified account of cls of your choice and plug it in here.

⁴⁴ For an earlier discussion of the processes by which rationalism systematically envelops other forms of cognitive practice in legal thought. See, *Missing Pieces*, *supra* note 25, at 1222-27.

struction might engage and resist the categorial regimes in force in the law's traditional discourse—i.e., the ways in which deconstruction might avoid cooption. I will thus be showing the ways in which the deconstructive enterprise might be conducted. That very demonstration, however, also entails a deconstruction of the formal ways in which traditional legal discourse reproduces its own rhetorical images of the self, of politics, of theory, of intellectual endeavor. Ironically, this demonstration also charts the ways in which the rhetorical structure of the traditional legal discourse poses a very real risk of colonizing deconstruction. All of this is to say that deconstruction must start everywhere at once.⁴⁵

Starting everywhere at once, of course, is one of the mad and maddening aspects of Derridean deconstruction: In the very process of its unfolding, deconstruction places in question not just one or even a few, but a whole series of hierarchical oppositions that constrain, enable, and organize discursive practice (i.e., writing/speech, serious/nonserious, substance/form, theory/practice, etc.).⁴⁶ For deconstruction, there is no question (and no possibility) of focusing on *just one* of the logocentric hierarchies.⁴⁷ The various hierarchical oppositions

⁴⁵ Each concept, moreover, belongs to a systematic chain, and itself constitutes a system of predicates. There is no metaphysical concept in and of itself. There is a work—metaphysical or not—on conceptual systems. Deconstruction does not consist in passing from one concept to another, but in overturning and displacing a conceptual order, as well as the nonconceptual order with which the conceptual order is articulated.

J. Derrida, *Signature Event Context*, in *Margins of Philosophy*, supra note 24, at 307, 329.

⁴⁶ Very schematically: an opposition of metaphysical concepts (for example, speech/writing, presence/absence, etc.) is never the face-to-face of two terms, but a hierarchy and an order of subordination. Deconstruction cannot limit itself or proceed immediately to a neutralization: it must, by means of a double gesture, a double science, a double writing, practice an *overturning* of the classical opposition *and* a general *displacement* of the system. It is only on this condition that deconstruction will provide itself the means with which to *intervene* in the field of oppositions it criticizes, which is also a field of nondiscursive forces.

Id. at 329.

My invocation of the classic Derridean dualities here is not to be understood as according some privileged status to these dualities by virtue of some stabilized content that they might be thought to possess. On the contrary, my own description of the rhetorical economy of traditional legal discourse is a much more decentered one. For a short example, see *Cannibal Moves*, supra note 14, at 962-63 ("Appendix 1: A List of Splits"). The claim that the rhetorical economy of traditional legal discourse is a decentered one does not mean that this economy is without structure or organization. It is only the impoverished form of either/or thinking—which ironically *is* very much a part of the rhetorical economy of traditional legal thought—that would lead us to conclude erroneously that the decenteredness of any economy implies that it is without structure or organization.

⁴⁷ "Since these concepts are not elements or atoms, and since they are taken from a syntax and a system, every particular borrowing brings along with it the whole of metaphysics." Derrida, supra note 34, at 281.

that deconstruction seeks to engage and subvert are all mutually supportive. All these hierarchical dualities are accomplices in a great logocentric con.

One implication is that the subversive project of deconstruction *stands* to be defeated if it fails to address, engage, and challenge *the rhetorical economy* of these various logocentric dualities. As Derrida observes:

Once more we are not concerned with comparing the content of doctrines, the wealth of positive knowledge; we are concerned, rather, with discerning the repetition or the permanence at a profound level of discourse of certain fundamental schemes and of certain directive concepts.⁴⁸

This means that deconstruction cannot afford to transact in the accepted currency of discursive practice without simultaneously challenging the rates of exchange, the value of the currency, and the metaphor of currency itself. To speak for instance, about the hierarchical dualism of speech and writing *in terms* that leave the other hierarchical dualities in place (i.e., serious/nonserious, substance/form, theory/practice, etc.) is to reinscribe *at the very moment that logocentrism is being challenged* a logocentric understanding of the deconstruction of the writing/speech duality. It is to confirm as a matter of form, as a matter of practice—it is to confirm and reinscribe in all those ways that traditional legal discourse considers nonserious (but which are very serious indeed)—the logocentrism that deconstruction seeks to subvert and displace.⁴⁹

The cooptive or, more precisely, the recuperative, powers of logocentrism must not be underestimated. To underestimate these recuperative powers leads to the re-production of a bizarrely logocentric deconstructionism. It leads to a deconstructionism that appears deconstructionist in *substance*, but that is nonetheless encased in logocentric *form*—a deconstructionism that succeeds in a suicidal reinscription of precisely the sort of hierarchical dualities like substance/form that deconstruction seeks to subvert and displace. Most insidious is that this logocentric deconstructionism would reinscribe the hierarchical dualities in precisely those realms that are subordinated, trivialized, and repressed by traditional discursive prac-

⁴⁸ J. Derrida, *The Linguistic Circle of Geneva*, in *Margins of Philosophy*, supra note 24, at 153.

⁴⁹ [D]econstruction cannot simply represent a shift from one concept to another, since the infrastructures with which it aims to account for the specific aporias and differences between the concepts must also account for the inability of concepts to be purely metaphysical concepts, that is, to be concepts at all.
R. Gasché, *The Tain of the Mirror* 165 (1986).

tice—i.e., the realm of form, practice, writing—in short, the “nonserious” that deconstruction takes to be very serious indeed.

Deconstruction must thus (quite impossibly) start deconstructing everywhere at once—including (and very importantly) at the place that challenges the very concept of a beginning.⁵⁰ And deconstruction must do all this by re-valuating that which traditional discursive practice subordinates: what the discursive practice treats as *nonserious*, as *marginal*, as *mere form*, etc. This too is part of what makes deconstruction so mad and so maddening to the uninitiated. To the uninitiated, deconstruction apparently refuses to abide by even the most commonplace and seemingly uncontroversial *ground rules* of “normal” discourse.

This attempt by deconstruction for such extreme resistance to logocentrism is, of course, dangerous. It invites the facile logocentric dismissals that deconstruction is unintelligible, fanciful, or irrelevant. In addressing the works of philosophy, Derrida has sought to avoid such misunderstandings by an extraordinarily rigorous and meticulous reading of texts. In this sense (as well as others), Derridean deconstruction is a participation in the philosophical enterprise; Derrida writes in a manner cognizable by the discipline of philosophy while nonetheless placing that discipline, its presumptions, and its repressions into question.

Derrida engages the texts and the discursive practices he is discussing (and not just philosophical discourses) with particular attention for their specific and local character. This extremely attentive and solicitous practice of rigorous engagement with the peculiar and local character of a discursive practice is so pronounced in deconstruction that it might well be considered (in an ironic way) one of its key distinguishing aspects.⁵¹

If so, the question arises: can deconstruction be *applied* to law?

⁵⁰ In fact what has been said of *postmodern depth psychology* might well be said of deconstruction as well:

[Deconstruction] . . . loses nothing by admitting that it is impossible. Those analysts who precipitously content themselves with this view lose nothing from having to wait for the final analysis. For . . . [deconstruction], possibility would rather be the danger; a danger of becoming a veritable set of rule-governed procedures, methodic practices, formalized techniques, uniform standards, accessible approaches.

Kugler & Lacan, *Postmodern Depth Psychology and the Birth of the Self-Reflexive Subject*, in *The Book of the Self* 173, 183 (P. Young-Eisendrath & J. A. Hall eds. 1987).

⁵¹ I do not mean to say that other activities besides deconstruction are not attentive to the peculiar and local character of discursive practice. I mean to say that deconstruction has gone to extraordinary lengths—for some, clearly way too far—in problematizing and negotiating this question of the universal and the local. For this reason, it would be wrong to assume that

On what terms? And what is it that would be applied? *In the sense* in which legal thought usually understands "application"—for instance, in the sense of "applying the law to the facts" or in the sense of applying some foreign discipline to law—the answer will be that deconstruction cannot be "applied" to law. In other words, deconstruction cannot be applied to law on the model of contemporary interdisciplinary work.

To "apply" deconstruction on the model of contemporary interdisciplinary work would succeed in putting beyond reach much of what deconstruction would like to challenge and engage. It would be a surrender to the very system of hierarchical dualities that deconstruction seeks to engage and subvert.

That deconstruction cannot be "applied" to law on the model of "law and . . ." work becomes glaringly evident when one begins to consider the rhetorical structure of such contemporary interdisciplinary work. Indeed, the form and practice of "law and . . ." work, reveals that it often conceives its interdisciplinary mission largely as a matter of applying the conceptual vocabulary and grammar of a foreign discipline (say, microeconomics) to the field of law. Fairly often, this foreign import activity is fairly blunt business.

Typically, "law and . . ." work *appears* to automatically bestow upon the foreign discipline, the status of a constituting subjectivity. In law and economics, for instance, it is economics that purports to describe, organize, and explain law—not the other way around. Such a privileging of the foreign discipline *appears* to result in an automatic reduction of law to the status of an object-field subordinate to the organizing taxonomy and grammar of the foreign discipline. Thus, when microeconomics begins to describe, organize, and explain law, it is a curiously dead law—a law devoid of interpretive possibilities. It

deconstruction in law must take the same shape, the same form or the same preoccupations that it has taken in Derrida's treatment of philosophical texts.

On the contrary, Derrida insists that deconstruction must begin within the discursive terrain:

[Deconstruction is an] . . . incision, precisely [because] it can be made only according to lines of force and forces of rupture that are localizable in the discourse to be deconstructed. The *topical* and *technical* determination of the most necessary sites and operators—beginnings, holds, levers, etc.—in a given situation *depends upon an historical analysis*. This analysis is *made* in the general movement of the field, and is *never exhausted by the conscious calculation of a "subject"*.

Derrida, *supra* note 12, at 82 (emphasis added).

There is, of course, some irony (and some tension) in Derrida's attempt here to offer in the form of a general proposition the view that deconstruction must be appropriately attuned to the local character of a given discursive practice. Nevertheless, the point remains that we are not entitled to assume that deconstruction should or must take the same form, shape, or preoccupations in law, that it has taken in its encounters with philosophy.

is quite literally object-like: thing-like, self-contained, unambiguous, etc.⁵²

In interdisciplinary work, this apparent privileging of the foreign discipline and the corresponding subordination and objectification of law occurs automatically. In other words, it occurs without thinking. One result of this unthought and unexamined practice is that there is not a great deal of consideration given as to *how* the two or more previously distinct intellectual disciplines will merge or interface.⁵³ What is often missing from this interdisciplinary business is any significant consideration of how to negotiate the relation between the foreign discipline and the law.⁵⁴ On what terms, in what ways, on what conditions, with what modifications or reservations does economics, or normative philosophy or literature or social science contribute something to law? These are questions that are rarely asked in interdisciplinary work.⁵⁵

But, it is no surprise that these questions are rarely asked. It is no surprise because even before interdisciplinary work encounters the foreign discipline, even before it encounters *Billy Budd* or "price theory" or the Rawlsian difference principle, it is already launched in the *unreflective legal practice of applying* authoritative knowledges to the instrumental resolution of already given "normative" legal problems.

⁵² Duncan Kennedy, for instance, demonstrates how the integrity and determinacy of much of law and economics depends upon naive hypostatization of legal rules and entitlements. See Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 Stan. L. Rev. 387, 401-21 (1981).

⁵³ One consequence of this, of course, is that all these bold interdisciplinary efforts remain entrapped within the form and the agendas of traditional legal thought. Weisberg, The Law-Literature Enterprise, 1 Yale J. Law & Humanities 1, 47-62 (1988) (tracing the ways in which the law and literature works of both Richard Posner and James Boyd White remain confined within the narrow agendas of traditional legal thought).

⁵⁴ For instance, consider the following questions about law and economics. In case of a conflict between legal reasoning and economic reasoning which form of reasoning should prevail? Whose ultimate authorities, whose categorial structure should prevail? More broadly, how are the categorial structures of the two disciplines to be reconciled? To what extent should radical revision or restructuring of one discipline be permitted for the very good reasons articulated in others? According to what criteria?

For a recent discussion of the problematic character of the conjunction of law and economics, see Schlag, The Problem of Transaction Costs, 62 So. Cal. L. Rev. 1661 (1989) [hereinafter Transaction Costs].

⁵⁵ But, of course, sometimes they are. See Weisberg, *supra* note 53 (law and literature); Kennedy, *supra* note 52 (law and economics); Trubek & Esser, "Critical Empiricism" in American Legal Studies: Paradox, Program or Pandora's Box?, in Critical Legal Thought, *supra* note 32, at 105 (law and empirical social science).

These citations are not intended to indicate that only critical legal studies scholars ask such questions. But given that so much of the cls enterprise consists in exposing and displacing the anti-intellectual structuring character of academic disciplinary thinking, it is hardly surprising that these sorts of questions about the status of interdisciplinary work would comprise a significant part of cls work.

Typically (and not without some irony) these normative legal inquiries have already been framed and stabilized as "serious" intellectual problems prior to any encounter with the foreign disciplines. So in a curious way—in a curiously nonsubstantive sort of way—it now looks as if there has been a reversal. It now looks as if it is law, not the foreign discipline which is in the driver's seat. It looks as if it is law that is the constituting subjectivity in interdisciplinary work.⁵⁶

And yet, it remains true, as suggested a mere three paragraphs ago that "law and . . ." work often "*appears* to automatically bestow upon the foreign discipline, the status of a constituting subjectivity." And it is true, that law correspondingly *appears* to be reduced to some subordinate object field. And yet it is also true that, in this very privileging of the foreign field, the foreign field is privileged in a distinctly legal, logocentric manner: the foreign field is privileged as an instrument, a technique to resolve in an authoritative manner a legally defined set of problems. There is no contradiction here—only a nesting process. The foreign field *does* appear to be accorded the status of a constituting subjectivity, but the formal configuration of this constituting subjectivity remains defined by the law. The foreign field is accorded great authority—but it is virtually always the role, the identity, the function of a *legal authority*.⁵⁷

For instance, consider Judge Richard Posner's jurisprudence. Despite Posner's obvious distaste for the view that law is an autono-

⁵⁶ This is the structure of James White's argument against Richard Posner's recent exploration of law and literature. White argues that in a very real sense Richard Posner has not encountered the works of literature that he reports having read:

One way to put what is troubling is to think of what is missing from [Posner's] book. As I, at least, read through it I have no sense of the kind of life one associates with the reading of literary texts: no sense of a mind responding and learning, no sense of puzzle and illumination, no sense of joy or pleasure in the reading itself, no sense indeed of the presence of another mind with whom the author is engaged And there is something similar in the way his own text assumes that it will be read: it has the structure of an argument supported by examples, not that of a mind reaching out to another mind. It all seems a kind of display, a proof of something.

White, *What Can a Lawyer Learn from Literature?* (Book Review), 102 Harv. L. Rev. 2014, 2014-15 (1989) (reviewing R. Posner, *Law and Literature: A Misunderstood Relation* (1988)).

⁵⁷ As John Stick correctly observes:

I do think that some of the current use of philosophy in legal writing resembles an arms race: an attempt to acquire as quickly as possible complicated engines of destruction in order to annihilate the other side. The arms race mentality is naive in thinking that philosophy is so . . . conclusive. Philosophical arguments are not commodities that can be neatly packaged and easily transported into a foreign land such as law.

Stick, *Can Nihilism Be Pragmatic?* 100 Harv. L. Rev. 332, 397 n. 274 (1986).

mous discipline,⁵⁸ the uses that Posner makes of microeconomics in analyzing law is not distinctly different *in form and practice* from the uses an old-school lawyer-academic might make of Supreme Court opinions. More generally, the contemporary uses of the words "marginal cost," "John Rawls," "Ludwig Wittgenstein," "Immanuel Kant," in interdisciplinary work are often difficult to distinguish—at the level of form, practice, and rhetoric—from the ways in which the lawyer-academics of an older more doctrinally-oriented generation used the words "Chief Justice Warren," "the Court," or even "Mr. Justice Peckham." Even within critical legal studies, as Duncan Kennedy explains, the words "fundamental contradiction" have come to occupy the same old rhetorical space of *the legal authority*.⁵⁹ And, of course, this is precisely what happens with Posner's microeconomics: No sooner does his brand of economics displace law as an authoritative and autonomous discipline, than it enshrines itself in the same old authoritative autonomous place.⁶⁰ And while the words have changed, the story stays the same: It looks like economics, it sounds like economics, but in form and practice, it's good old-fashioned unreconstructed academic lawyering.

And, in a sense, this is really good news. It confirms once again that the disciplinary solipsism of traditional legal thought really does work. And what could be better than disciplinary solipsism? Disciplinary solipsism is self-confirming. It's self-validating. It is always already right.⁶¹ No wonder, Posner's work enjoys such a wide reputation among legal academics: he is telling legal academics that he has seen the world of economics (a good bit of it at any rate) and that much of it has already been crafted, mapped, organized in their own image.

Now, of course, not all foreign disciplines make such intellectually obliging colonies as microeconomics. For instance, despite Posner's best efforts to apply the same old legal categories, the same old legal grammar, to literature and literary criticism,⁶² it turns out that these intellectual colonies somehow seem unwilling to conform to the

⁵⁸ See Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761 (1987).

⁵⁹ Gabel & Kennedy, *supra* note 23, at 15-17.

⁶⁰ See Balkin, *The Domestication of Law and Literature* (Book Review), 14 Law & Soc. Inquiry 787, 797-98 (1989); Schlag, *Contradiction and Denial* (Book Review), 87 Mich. L. Rev. 1216, 1217-18 (1989) (reviewing M. Kelman, *A Critical Guide to Legal Studies* (1987)) [hereinafter *Contradiction and Denial*].

⁶¹ Now, I do not want to suggest that disciplinary solipsism is something that one can escape altogether. At the same time, I also do not want to suggest that the solipsistic tendencies of all disciplines are intellectually or socially equivalent.

⁶² See R. Posner, *Law and Literature: A Misunderstood Relation* (1988).

grammar of the rule of law. That, of course, as Posner points out, in a winningly solipsistic sort of way, is because they are bad colonies—virtually useless to the rule of law or to legal thought. They are barely worth colonizing at all—of virtually no value to the empire.

Regardless of whether we are talking about good intellectual colonies or bad ones, the important point—the one that matters—is that the empire is always right and always wins. Posner's reports always have the same rhetorical effect: they always confirm that there is no foreign discipline that cannot be tamed, neutralized, exploited, or if necessary, charted right off the maps.⁶³ Not only does disciplinary solipsism do work, but, within its own frame of reference, it is invariably successful.

Now far from claiming that Posner's kind of interdisciplinary applications are bizarre, I want to suggest rather that they are precisely what we ought to expect. Indeed, I want to make perfectly clear that my point here is not at all directed at Posner—nor at *the ideas* of any particular individual. My point, rather, is about the structure of a particular form of legal thought—a form of legal thought that manifests itself most visibly and acutely in Posner's interdisciplinary work.

Indeed, the sort of theoretical work that Posner does typically consists in applying the foreign discipline to the law. Obviously not all theoretical work, not even most of it, consists in application. But it turns out that, for legal scholars of Posner's generation, theoretical work is typically a question of "applying the theory to the law." This is no accident: the sort of *application* that Posner does is precisely the sort of *application* that good old-fashioned lawyer-academics of his generation have learned and internalized so well—and that used to go by the name of "applying the law to the facts." After years of being trained so well by their legal process fathers to "apply the law to the facts," is it really a surprise that when legal thinkers of Posner's generation turn to applying *the* foreign discipline to *the* law, it is through the mediation of the same old sort of (legalistic) *application*? Is it really so surprising that when they talk about theory, it is usually on the implicit model of applying *the* theory to *the* law? Hardly.

One of the reasons it is not surprising is that Posner's generation of lawyer-academics share with their intellectual legal process fathers

⁶³ Koffler, *Forged Alliance: Law and Literature* (Book Review), 89 Colum. L. Rev. 1374, 1377 (1989) (reviewing R. Posner, *Law and Literature: A Misunderstood Relation* (1988)) ("Posner's book represents the industrialized version of law and literature, in which the energies of art are harnessed to the market, literature is defined in crude Darwinistic terms and no political or labor unrest gums up the "smooth" workings of the law.") (citations omitted).

(not to mention, the grandfathers) a discursive system that systematically elides and effaces reflective inquiry into the form of their own thought.⁶⁴ The result of this deprivileging of inquiry into form is that when traditional legal thought goes traveling (in the footnotes) throughout the university, it never seems to encounter much of anything except itself. The interdisciplinary travels of traditional legal thought are like a bad European vacation: the substance is Europe, but the form is McDonald's, Holiday Inns, American Express. . . .

The irony, of course, is that the potential challenges and contributions from foreign disciplines are routinely neutralized because as soon as these foreign disciplines are "applied" to law, they are subordinated to and transformed into the same old legal form, the same old legal role. They are immediately, uncritically, and unreflectively pressed into instrumentalist service to address a pre-formed (usually normative) agenda of legal problems.⁶⁵

All of these flips—the substantive privileging of the foreign discipline and its simultaneous subordination to legal form—occur under the rhetorical rubric of "application." And it is in this naive sense of "application" then, that there can be no question of "applying" deconstruction to law. To be specific, there can be no question of "applying" Derridean deconstruction to law in the sense in which the discursive practice of "Law and . . ." work understands "application" of a foreign discipline to law. Indeed, to "*apply*" Derridean deconstruction in this naive sense would only be conceivable once deconstruction had been transformed into a *theory*, a *technique*, a *method*, or a *type of interpretation*. But to *transform* deconstruction into any of these things is to turn deconstruction into precisely what it seeks to resist and displace. To transform deconstruction into a *theory*, *etc.* is to relocate deconstruction and confine it to the already inscribed logocentric matrices of traditional legal thought.

⁶⁴ It may seem strange to charge legal process scholars with a failure to examine the form of their own thought. This is particularly true given that, for the legal process scholars, procedural and institutional form served as the foundational situs for the legitimacy of law. Peller, *Neutral Principles in the 1950's*, 21 U. Mich. J. L. Reform 561, 590-91 (1988). I am certainly not contesting this point. Rather, I am saying that the legal process scholars did not trouble the form within which their own thought was created and received.

This is the sort of intellectual shortcoming that might be cured by a reading of Hegel or Heidegger. See G. Hegel, *The Phenomenology of the Mind* (1967); M. Heidegger, *What Is Called Thinking* (1968). Though, of course, there is no guarantee and there are even reasons to think the therapy will not work. See *Missing Pieces*, *supra* note 25, at 1222-27.

⁶⁵ The (not quite) final irony, of course, is that the most recurrent objection to interdisciplinary work is that it represents an invasion of law by the foreign disciplines. For a recent articulation of this objection, see Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453-55 (1989).

Such a logocentric confinement of deconstruction is an ironic reversal of Derrida's double gesture—a reversal that misunderstands the project of deconstruction (at least) twice. First, it misunderstands deconstruction by making deconstruction complicitous in the reinscription of the very hierarchical arrangement of dualisms such as theory/practice and serious/nonserious that deconstruction seeks to displace. Second, by locating deconstruction in the space of *theory*, *technique*, *method*, etc., this logocentric confinement of deconstruction treats deconstruction as if it were *just* another theory or *just* another technique or *just* another *method*—at one (in an essentialist sort of way) with the other theories, techniques, and methods that might be deployed to understand law.⁶⁶ The error here is the homogenization and neutralization of the *different subversiveness* of deconstruction through its assimilation with approaches that have already been reduced to the status of mere *theories*, *techniques*, *methods*, etc.

Deconstruction cannot survive this logocentric confinement and must thus displace the rhetorical boundaries that would institute and enforce such a confinement. And in fact, deconstruction already has displaced this confinement—in Derrida's own deconstruction of the logocentric concepts of *method*, *application*, etc.⁶⁷

* * *

If deconstruction is not something that can be *applied* to law in the naive sense of "application," then one can begin to consider on what terms and in what conditions, deconstruction might be practiced in law. And as soon as one does, another question arises. Derridean deconstruction of the works of philosophy is a rigorous enterprise addressed to rigorous texts. Contemporary legal thought, by contrast, is not expressed in thoroughgoing *rigorous* texts.⁶⁸ This is actually quite an embarrassment for deconstruction in law. Just what is there to deconstruct here? What has been constructed? Where is a contemporary theoretical legal text that will stand up and say something? Indeed, the prominent accounts of contemporary legal thought—those

⁶⁶ In short, the logocentric confinement of deconstruction to the space of *technique* or the space of *theory* denies the specific and unique challenges posed by deconstruction.

⁶⁷ Deconstruction allows

for [no] method: no path leads around in a circle toward a first step, [so much for Hegel] nor proceeds from the simple to the complex, nor leads from a beginning to an end [So much for classic linear thought] We here note a point/lack of method: this does not rule out certain marching order.

J: Derrida, *Dissemination* 271 (1981).

⁶⁸ As David Kennedy notes, "The key . . . is to see each rotation, each repetition and tonal change within legal scholarship as a collapse of the scholarly voice which takes advantage of the previous strand's hidden awareness of the impossibility of its own project." Kennedy, *A Rotation in Legal Scholarship*, in *Critical Legal Thought*, *supra* note 32, at 353, 359.

that can credibly make some claim to account for and guide our legal practice—are virtually all already in a state of collapse.⁶⁹ They are all tripping over themselves and each other in the rush to defer to the reader, the judge, the lawyer, the legal academic, or their respective communities to supply the content that is missing from the theoretical text. Indeed, virtually all the dominant contemporary legal texts depend for their meaning and significance to an extraordinary degree on the unmentioned, unanalyzed, taken-for-granted understandings of the legal community. If one asks today, “How is it that contemporary law is possible and justified?” the answer given by our foremost legal theorists comes down to this: “We have a community of legal actors and legal interpreters whose task it is to make it so.” Yes, exactly right.

Now, to be clear: I’m not endorsing this answer. I’m simply noting that it has become the answer of choice among legal thinkers today. And I’m not the only one who has observed that it is the answer of choice. Not at all. Consider, for instance, Suzanna Sherry’s description of cutting-edge jurisprudence in American constitutional law:

In light of the failure of the “grand theories” to produce a useful and noncontroversial theory of constitutional constraints, many constitutional scholars have recently turned instead to anti-formalist, anti-theoretical approaches. In articles too numerous to mention individually, these scholars have begun to suggest that deciding constitutional cases requires what might be called judgment or practical reason, and to describe the exercise of that faculty. Because the literature is so extensive and impressive, I will describe it only very briefly

Judging—especially in difficult constitutional cases—is not a mechanical exercise, but a learned and lived craft. The tools of the trade are a thoughtful life lived in American social and legal culture. A pragmatist finds no formula by which to decide the difficult questions, but instead *internalizes* legal precedents, cultural traditions, moral values and social consequences, *creatively synthesizing* them into the new patterns that best suit the question at hand. No single source will adequately address the hardest questions; answers to societal dilemmas must be crafted from the web rather than constructed from the tower.

Above all, judging is an act of *controlled creativity*. Like writing at its best, it both draws on and evokes memories of what has gone before, but by innovation rather than mimicry. It simultaneously *acknowledges our debt to the past* and *denies that the past*

⁶⁹ See Schlag, Legal Nihilism (forthcoming 1991) [hereinafter Legal Nihilism].

should control the present. The task of the pragmatist decisionmaker is to reconcile a flawed tradition with an imperfect world so as to improve both and do damage to neither.⁷⁰

This is a remarkable, *and indeed all the more remarkable because entirely accurate*, picture of the current state of American legal thought. One of the striking things about this account is that at every difficult turn—when it is time to *internalize* norms and yet remain adept at *creatively synthesizing* new solutions; when it is time to *control* thought and yet be a *creative* thinker; when it is time to *acknowledge the past* without letting it *control the present*—in other words, at each difficult turn, this neopragmatist account refers the reader to some place outside the text,

to practical reason,
to the good judgment of the pragmatist,
to the lived craft of judging,
to a thoughtful life lived in American social culture.

What is striking about this account is that it collects a series of deeply problematic antinomies and then suggests that these antinomies should and can be reconciled *outside the text* in the person of the pragmatist. Thus, according to this text, a pragmatist “internalizes” all sorts of precedents, cultural traditions, etc., and by some process (that apparently occurs outside this text) this “internalization” leads to “creatively synthesizing” all sorts of things including precedents, cultural traditions, moral values, and other incommensurables. If this seems like a difficult task, remember that the pragmatist is no mere mortal, but is apparently an adept at “controlled creativity.” Again, the account of what is “controlled creativity” (other than something we are obviously supposed to like) is left outside the text.⁷¹

Now, I think Sherry is entirely correct in her description of the current renaissance of the pragmatic tradition in American legal thought. And I think this renaissance is no accident. Legal thinkers have learned that the text is a bad place to work out contradictions, aporias, and other intellectual difficulties. Texts create all sorts of problems. They are too equivocal, they are too iterable; they are too open, too public. Better, then, to find some place to deal with these difficulties that is impervious to texts—say, for instance some mystical place *outside* the text—say, the good judgment of the pragmatist. Yes, that’s it. So—how is it that we, in law, resolve difficult problems,

⁷⁰ Sherry, *The Ninth Amendment: Righting An Unwritten Constitution*, 64 Chi.-Kent L. Rev. 1001, 1013 (1989).

⁷¹ Interestingly, Steve Winter has begun to explore the implications of the recognition that legal thought is at once imaginative and situated. See Winter, *supra* note 11.

reconcile contradictions and overcome aporias, etc.? The answer of modern American legal thought is clear and unequivocal: "We refer them to the good judgment of the pragmatist." Yes, quite so.⁷²

Now, it would be extremely unfair to characterize current legal neopragmatism as the only American legal tradition rushing to refer difficult problems to some extratextual *theoretical unmentionable* like good sense or good judgment.⁷³ On the contrary, legal neopragmatism has much company. Consider one other instance. Consider, as another emblem of contemporary legal discourse, Dworkin's theory of law as integrity.⁷⁴ In order to make Dworkin's text mean something—in order to give it an interesting, relatively determinate aesthetic or political content—the reader has to project or transfer a terrific amount into the ruling concepts and the ruling architecture of the theory. The theory itself, while extraordinarily elegant and rhetorically refined, is, when it comes right down to it, nonetheless (virtually) empty.

In fact, the theory could easily have served (and served well) in the 1988 electoral campaign. Instead of having George Bush wishing for a kinder, gentler America, he could have taken a jurisprudentially sounder stance: for instance, he could have said "I want to make America the best it can be. I want an America whose moral values fit history—an America that is coherent—one that holds together with integrity for all."⁷⁵

Of course, just so you know that I am not reaching, this line was *in fact* used in the 1988 campaign. It was the Dukakis line.⁷⁶ As between Bush and Dukakis, it is, of course, clear whom Dworkin would favor. Indeed, this is one of the admirable things about Dworkin's theory: he does take his own politics seriously and his politics do influence his theoretical framework. But there is something that is not admirable about Dworkin's theory—and that is precisely that

⁷² For further criticisms of legal neopragmatism, see *Contradiction and Denial*, supra note 60, at 1221; *Cannibal Moves*, supra note 14, at 954-58; *Missing Pieces*, supra note 25, at 1223-25. For substantially similar criticisms, see Hutchinson, *The Three R's: Reading/Rorty/Radically* (Book Review), 103 Harv. L. Rev. 555 (1989) (reviewing R. Rorty, *Contingency, Irony and Solidarity* (1989)).

⁷³ *Contradiction and Denial*, supra note 60, at 1222 (Any theory or mode of thought has certain gaps, holes, and absences that, by virtue of the internal constitution of the theory or mode of thought, cannot be articulated in positive terms. Sometimes these gaps, holes, and absences bear names, and thus appear to have integrity and substance, even though by definition or by theory nothing positive can be said about them. These, then, are theoretical unmentionables.)

⁷⁴ R. Dworkin, *Law's Empire* (1986).

⁷⁵ Compare the text with Dworkin, supra note 74, at 225, 410-13.

⁷⁶ The Presidential Debate, N.Y. Times, Sept. 26, 1988, at A16, col. 1.

while his theory does authorize his politics, *in a sense*, it also authorizes virtually everybody else's politics. Indeed the deliberate irony of putting Dworkin in Bush's mouth, is to draw attention to how vacant Dworkin's theory really is: its content (and form) depend largely on the identity of the person who wields the theory.

Virtually any sort of judge might feel perfectly comfortable, unconstrained, and unreconstructed working with Dworkin's theory of adjudication. Indeed, there is nothing in Dworkin's theory that would call for Duncan Kennedy, Robert Bork, Richard Epstein, or Richard Posner to alter their jurisprudence in any significant way whatsoever. To be sure, they would all have to talk a bit more like Dworkin, and the metatheoretical status of their jurisprudential theories would change, but even so the main story lines (critical thought, intentionalism, libertarianism, efficiency analysis) could all remain the same.

There is nothing in Dworkin's theory to rule out any of these widely varying jurisprudential views—nothing that is, except for Dworkin himself who would no doubt interpose and object: "No Duncan, no Robert, no Richard, and not you either Richard—you guys all blew it again: your theories are simply not the most morally appealing they can be in light of the institutional history. Try harder, guys. Be the best you can be."⁷⁷

Now, of course, this sort of interpretive intervention is familiar rhetorical fare in legal thought. Indeed, people will generally be quite willing to explain the meaning or the significance of their own metatheories. This is especially true at critical junctures where it begins to look as though the metatheory could easily mean—just anything at all. This sort of interpretive intervention is also especially useful when there is a significant gap between the metatheory and the theory. So it is no surprise at all that Dworkin is more than happy to tell you what "making the law the best it can be" really means.⁷⁸ What it really means, of course, as a metatheory, is the adoption of Dworkin's own theories.⁷⁹ And correspondingly, what his metathe-

⁷⁷ This passage borrows liberally from Stanley Fish who has already made the point that Dworkin's theory is, qua theory, a kind of cheerleading. Fish, Dennis Martinez and the Uses of Theory, 96 Yale L.J. 1773, 1793 (1987). In Stanley Fish's view, Dworkin's account of adjudication scores much better in the judicial rhetoric competition. From Stanley Fish's perspective this is a compliment—but as this compliment is addressed to Dworkin (who is as a philosopher of law professionally obliged to reject it) the compliment cannibalizes itself. Id. at 1790-94.

⁷⁸ As Dworkin, says this sort of interpretive elaboration of his "law as integrity" conception is itself a part of the "law as integrity" conception. Dworkin, *supra* note 74, at 226. As Dworkin puts it, the "law as integrity" conception is "relentlessly interpretive." Id.

⁷⁹ Id. at 387-97. (Wherein we learn how Hercules would have decided *Brown* and *Bakke*:

ory does not mean—at least not according to Dworkin—is the jurisprudence of Duncan, Robert, Richard, or Richard.

In a sense, Dworkin's own intervention in the interpretation of his own metatheoretical enterprise is really quite unobjectionable.⁸⁰ Why shouldn't Dworkin be allowed to offer his own theories as candidates for his own metatheory? No reason at all. At the same time, however, it is not evident that Dworkin is entitled to special credibility when he declares that his own theories are the winners of the metatheoretical ("Make the law the best it can be") competition.

One reason one might entertain questions on precisely this point is that the very problem that plagues Dworkin's metatheory—a noticeable absence of jurisprudential content—seems to plague his more concrete theories as well. For instance, consider the following passage describing how Hercules would have decided *Lochner*:

[Hercules] would not have joined the *Lochner* majority, for example, because he would have rejected the principle of liberty the Supreme Court cited in the case as *plainly inconsistent with American practice* and *anyway wrong* and would have refused to re-examine the New York legislature's judgment on the issues of policy that then remained.⁸¹

Dworkin's supporting footnote is even more revealing:

The opinion in [*Lochner v. New York*] treats the issue as one of principle, about whether bakers and their employers have a right to contract for longer hours if they wish. Hercules would have replied that the particular interpretation of the principle of freedom of contract this assumes *cannot be justified in any sound interpretation of the Constitution*.⁸²

Well, there it is: stone cold devastating. See—it's not so hard to be Hercules. In fact, when you look at Hercules in action, it turns out to be pretty easy: It's pretty conclusory.

Of course, there is one important question still to answer: when you are Hercules, who will you be? It's important not to lose sight of this question because, if nothing else, it's the one Dworkin wants *you* to answer. That's right, his entire theoretical edifice was constructed so that *you* could answer the question. Indeed, Dworkin's metatheoretical efforts can be understood as an elaborate and elegant gesture whose single most important textual effect is to defer interpretation and meaning to a particular kind of reader—namely, the legal thinker

apparently with virtually no case analysis and lots of self-validating assumptions about the ethical beliefs of the American people).

⁸⁰ See *supra* note 78.

⁸¹ Dworkin, *supra* note 74, at 398 (emphasis added).

⁸² *Id.* at 452 (emphasis added).

personified as Hercules.⁸³ Once one understands this point, the reactions of various kinds of legal thinkers to Dworkin's enterprise become intelligible.

Some legal academics very much like Dworkin's text, because his text authorizes them to project into his text—the text of law, he tells us—their favorite hopes. For political liberals, Dworkin's theory and its moral inclination is seen to authorize and favor political liberalism. Political liberals generally think they have the most appealing normative theories going, and if only they can argue the law on *normative* grounds, they will surely win.⁸⁴ For political liberals, Dworkin's theory allows law to be awakened from its legal positivist slumber into the daylight of normativity.

That, of course, is precisely what political conservatives fear. For political conservatives, Dworkin's metatheory unnecessarily and undesirably expands the range of legal argument beyond what they see as the legitimate terrain of legal positivism and its attendant insistence on traditional forms of legal reasoning, legal process considerations, and canonical forms of interpretation. Political conservatives prefer this rhetorical terrain because, as they see things, it restricts the grounds of argument to the past—a past that they, of course, see as coinciding with an essentially conservative politics. For political conservatives, Dworkin's theory thus derails the straight course of the law into the swampland of political liberalism.

As for cls-ers, they view Dworkin's theory as providing (virtually) no constraint on decisionmaking; instead, it serves as a nice

⁸³ It is not immediately apparent what we are supposed to make of the fact Dworkin personifies his ideal judge as Hercules when in fact Hercules himself was not exactly the most intellectually gifted kind of guy. But see *infra* text accompanying note 81.

⁸⁴ Political liberals generally seem to think it is useful to depict the rhetorical field of law in normative terms. See Chemerinsky, *The Vanishing Constitution*, 103 Harv. L. Rev. 43 (1989); West, *The Authoritarian Impulse in Constitutional Law*, 42 U. Miami L. Rev. 531 (1988).

I suppose there is some validity to this supposition in the sense that constructing the rhetorical field in normative terms enables the liberal position to be articulated in the first place. On the other hand, the normative plane is extraordinarily weak and ephemeral by comparison to the cognitive one. As Heller puts it: "Law is essentially a cognitive and professional, rather than a normative discipline, referring to theory only in the liminal case where the content of settled practice comes into crisis. In other words, the practice of law primarily consists of the hermetic reproduction of that which already exists. . . ." Heller, *Structuralism and Critique*, 36 Stan. L. Rev. 127, 186-87 (1984).

I would add that not only is contemporary normative legal thought *characteristically* ineffectual in altering law and legal practice, but that indeed its dominance within the legal academy stems in part from the fact that it is guaranteed to produce virtually no significant change in the practice of law whatsoever. Normative legal thought is, in its present form, a symptom of homeostasis. For elaboration, see *Normative and Nowhere To Go*, *supra* note 20; Schlag, *Normativity and the Politics of Form* (forthcoming in 139 U. Pa. L. Rev.); Winter, *supra* note 11.

story line for whoever decides to use it.⁸⁵ From a critical perspective, Dworkin's theory provides an elegant and elaborate framework whose effect is ultimately to defer virtually all important jurisprudential decisions to those select readers *already in power* (i.e., judges, legal academics) without *requiring any critical examination* by anyone of the predispositions, value commitments, and cognitive orientations of these power holders. Indeed, from a cls perspective, Dworkin's theory is probably the most highly refined, most highly sophisticated trans-ideological legitimation package to come out of the legal academy in recent memory. As apologetics go, it's truly state of the art.⁸⁶

So what does Dworkin's theory mean? In one sense, I will leave you where he leaves you; it's up to you to do the work. Apparently, we have reached the point where the theoretical texts of traditional legal discourse signify something, but only on the condition that their reader project a tremendous amount into the text. We have apparently reached the point in American legal thought, where the reader has to do *virtually* all the work

But don't take my word for it. It's not just me who is telling you this. Not at all. Dworkin's text tells you this; neopragmatism tells you this.⁸⁷ Indeed, all these theoretical texts will tell you that *most* of the action is elsewhere—not in the theories, but in the reader, in the legal actor, or in the interpretive practices that constitute the reader or the legal actor. In fact, not only will these texts tell you so—but what's more, they will be proud to tell you so. These texts will tell you right up front—right on the very surface of their texts—that what really matters is located in the reader, or in the decision-maker, or in their customs, or in their practices, or in some analogous linguistic space located somewhere outside the text. And this thoroughly mystical somewhere—a somewhere that is nowhere in particular, save outside the text—will bear comforting names like “common sense,” “good judgment,” “good faith,” or some such theoretical unmentionable.⁸⁸

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⁸⁵ But see, Boyle, Legal Fiction (Book Review), 38 Hastings L. Q. 1013, 1022 (1987) (suggesting that Dworkin's *Law's Empire* is clearly not as vacuous as his prior book *Taking Rights Seriously*).

⁸⁶ See Boyle, *supra* note 85; Hutchinson, Indiana Dworkin and Law's Empire (Book Review), 96 Yale L.J. 637 (1987).

⁸⁷ Stanley Fish tells you this.

As I've argued, however, when Fish says that theory does not matter, he is saying too much. Schlag, Fish v. Zapp: The Case of the Relatively Autonomous Self, 76 Geo. L.J. 37, 55-58 (1987) [hereinafter *Autonomous Self*].

⁸⁸ Contradiction and Denial, *supra* note 60, at 1222; *Autonomous Self*, *supra* note 87, at 42.

Now, given such virtually empty texts, what is it that is to be deconstructed? This is more of a problem than it might seem: there is not a great deal to engage in these theoretical texts, precisely because their main move is to refer the reader elsewhere to some place outside the text. If all these texts of contemporary legal thought constantly refers all that is important to some place outside the text, what will deconstruction turn to?

The answer to this question has already been provided by the theoretical texts of contemporary legal thought. And the deconstruction has already begun. What must be deconstructed is precisely this recurrent and repetitive textual reference to the outside. The text of orthodox legal thought is always already exteriorizing. It is always already referring to the outside. What it doesn't want to discuss, of course, is its own interiority, its own organization, its own internal constitution.

And what is it that the grand texts of contemporary legal thought construct? Why, it is the very addressee of those legal texts who has been constructed. It is the self of this authorized addressee: the legal academic, the law student. And it is a very particular kind of self that has been constructed—a self that is authorized to give meaning and normative charge to law and legal thought. This is a self that is constructed by the text of law to systematically situate itself outside the text of law. It is a very imperial self that has been constructed—one that is at the very center of law's empire—a self very much like Dworkin's Hercules. For who is Hercules—if not the privileged individual self of the legal academic who stands outside the text of the law and makes it the very best it can be?

Hercules may or may not make a lousy judge. There is room for disagreement. But one thing is clear: as the depiction of the idealized self-image of the traditional legal academic displaced onto the character of the judge, Hercules is close to perfect. Hercules *is* the idealized self-image of the legal academic who by virtue of his intellectual prowess and his commitment to the rule of law applies his overarching legal knowledge to rewrite the case law in a way that is morally appealing. In short, Hercules is an empowerment fantasy—an empowerment fantasy for legal academics.

And as empowerment fantasies go, Hercules is really good. Not only does Hercules authorize the legal academic to act out the Herculean rule, but he demands that judges be more like himself as well. He demands, in other words, that judges be more like the idealized self-image of legal academics. In this way, Hercules places the idealized self of the legal academic—himself—at the center of it all. The rhe-

torical entailment is that judges (and reality) are but degraded versions of Hercules and *Law's Empire*, respectively.⁸⁹

Hercules is at once a reflection of the rhetorically constructed self of the legal academic and the construction-in-process of that very self. Admittedly, Hercules is a bit extreme in the degree of his atomism and in the grandeur of his imperial ambitions. But nonetheless, *Law's Empire* would not do as well as it does in the legal academy if Hercules did not graft easily onto the rhetorically constructed self of the legal thinker. Hercules is simply a more extreme, more idealized, more transparent version of the autonomous, coherent, integrated, rational, originary self of the legal thinker—the very self that is typically constructed by and reflected in our legal texts.

Indeed, regardless of its substance, the form of the legal text invariably seems to establish the self of the author and reader as autonomous, coherent, integrated, rational, and originary. Now, of course, as a conscious substantive proposition, the legal thinker does not for one minute accept this characterization of the self. We know very well that, as a description of the self (yours, mine, etc.), Hercules is utterly fantastic. As a conscious substantive proposition, we know very well that this representation of the self as a unitary, self-directing ego is not only ludicrous but unbelievable—an insufferable form of bragging. Indeed, we “know” that knowledges ranging from normal positivist social sciences to poststructuralism keep informing the self that is not autonomous, originary, or anything of the sort.⁹⁰ We know very well, for instance, that the self is situated in and constructed by various relations of culture, rhetoric, power.

And yet despite the fact that we know all this—as a conscious substantive proposition—the form of our legal texts seems to deny the very point in its construction of the self of the author and the reader. The very form of our legal texts denies that the construction of the self—its particular configurations—is an effect of rhetoric, culture, power. Sometimes, this denial is relatively transparent. For instance, how is it that the reader of *Law's Empire* (you, me) manages to get through the entire work without ever encountering any serious, self-conscious consideration of power—the power of the empire, the judge, the author?⁹¹ The answer is that questions of power cannot

⁸⁹ This is truly great stuff. Indeed, how many fantasies do you know of that manage within the fantasy itself to successfully disparage reality for failure to live up to the terms of the fantasy. Actually, I am exaggerating here. Contrary to the intimations in the text, it turns out that virtually every successful fantasy—that is, every fantasy that we do not recognize as fantasy—accomplishes this feat.

⁹⁰ See Autonomous Self, *supra* note 87, at 44.

⁹¹ I am not suggesting that Dworkin never mentions power nor that power does not play a

arise in a serious way. They cannot arise because the answers have already been assumed—already taken for granted. Indeed, how appropriate that in a work like *Law's Empire*, that systematically elides any serious encounter with power, the leading character, Hercules, should arrive on the legal scene already invested with tremendous physical force. How convenient. How true

How effective. It works! It works, because the form of our legal thought prepares us to accept the self, our own, as autonomous and originary—as outside the realm of culture, rhetoric, power. So, as readers, we accept without question Hercules and his power as an entirely plausible self-image. What is even more striking is that we accept this *easily* despite the transparent oddity and obvious dissonance—(now that I mention it)—of having a Greek hunk of limited intellectual faculties serve as a role model for judges and legal academics.

Now, of course, it looks like I have ruined the Herculean fantasy. But in fact—that is not true. I didn't do it. I didn't do it—because (among other things) we all already knew that Hercules is a fantasy. In fact, that seems to be our problem. We can't seem to make up our minds—much as we would (in our Herculean moments) like to think we can.

So the self of the legal thinker is really quite divided against itself. It is a paradoxical creation of the legal texts. As a conscious substantive propositional matter, it recognizes that it is not autonomous, originary, or anything of the sort, yet the form of the legal text systematically and subconsciously reproduces this self as the constituting originary subject of law.⁹² So on some level, this self knows that it is not autonomous or originary. Yet ironically, the texts that constitute this self lead it to act as if it were autonomous, originary,

role in his work. On the contrary, in one sense, it is precisely the concern with the awesome power of courts that provides much of the motivation for his work. See Dworkin, *supra* note 74, at 1-3.

What Dworkin does not do, however, is consider seriously the way in which power constitutes, enables, organizes the normative discourse that he is deploying to justify judicial power. More generally, he leaves power unexamined and unconceptualized.

⁹² And indeed, at the level of form this is undeniable: When we write to each other in professional situations, our form is very often that of radically free individual subjects who have chosen or who are constrained by (pick one) some exceedingly constraining substantive commitments otherwise called law and legal argument. We acknowledge, for instance, that we all "think like lawyers"—in the sense that we all make the same type of arguments and use the same sorts of analyses. Yet at the same time, of course, we like to think *we choose* to think as lawyers and that, we are, in a *meta* sort of way, in complete control of our lawyerly thinking processes.

etc. This then is the "relatively autonomous self."⁹³

This self is relatively autonomous in several senses of the term relative. First, this self is only *relatively* autonomous as opposed to say *fully* autonomous or *non-autonomous*. At the same time, however, this self is also *relatively* autonomous in the sense that it takes a "relative" stance concerning its own autonomy. The relatively autonomous self is *relatively* so in yet a third sense of relative—one which can help harmonize any conflict between the first two senses: *paradoxically*, this self is a creature whose structure is in part constituted by the legal texts, but who is in part constituted to act and understand itself to be autonomous.⁹⁴

And the thing that is really interesting is that, being constructed in this ludicrous and paradoxical manner, what this self does best, of course, is project its own ludicrous and paradoxical character right back into the very legal texts that created it. Hence, for instance, as Mark Kelman has argued, legal doctrine is organized around an unstable arrangement of breakpoints between choice and coercion, between intentionalist and determinist discourses that cannot be rationally reconciled.⁹⁵ This, of course, is a perfect reflection of the structure of the relatively autonomous self . . . which, in turn, is a perfect reflection of what Mark Kelman describes as the nonrational alternation between intentionalist and determinist modes in legal discourse.

Now, if you agree that the relatively autonomous self is ludicrous, you are absolutely right: it is ludicrous—a veritable scandal of consciousness. Unfortunately, it is also an entirely accurate description of the sort of legal self constructed by our legal texts. But the scandal does not stop here. Still more unfortunate is that recognizing just how ludicrous this picture of the self really is can only be of limited value in transforming that self. It is of limited value precisely because this self—the ludicrous one—is a rhetorical construction of our legal texts. And despite the best "substantive" ideas any of us

⁹³ For elaboration on the structure of the relatively autonomous self, see *Autonomous Self*, *supra* note 87, at 43-49.

⁹⁴ As Drucilla Cornell puts it:

There is irony here. The hallmark of modernity is its belief in the autonomous subject. Yet the objectifying tendency inherent in instrumental rationality threatens subjectivity. The irony is intensified when it is recalled that the proclaimed goal of instrumental rationality hailed by the Enlightenment as reason itself was the taming of the objective world on behalf of the subject.

Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. Pa. L. Rev. 291, 308 (1985).

⁹⁵ Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591 (1981).

may have, for what the self should do or become, not one of these ideas is likely to be good enough to enable the self to step automatically outside of the text. And the reason is simple: contrary to the systematic bias of our discourse, "substance" is not in direct communication with and certainly does not control "form".

If anything, the reverse is more likely to be the case. The texts of contemporary legal thought are remarkably successful in the rhetorical creation of legal thinkers as relatively autonomous selves.⁹⁶ In fact, these texts are so successful that, even when the individual legal subject encounters a subject-decentering discourse like deconstruction or postmodernism, this individual legal subject doesn't even recognize he has been targeted, much less that he has been hit. On the contrary, the individual legal subject is likely to transform deconstruction (or any other subject-decentering discourses) into—what else?—something he can use: a technique, a theory, a method—that is, precisely the sort of rationalist intellectual tool that can be deployed at will by the relatively autonomous self whenever it wishes. In the alternative, the individual legal subject will demand that the subject-decentering discourse answer for itself in the court of rationalist consciousness—as if rationalism had emerged from its struggles with modernism and postmodernism, unscathed, intellectually whole, and coherent as ever.⁹⁷

From the perspective of traditional legal discourse, what is particularly neat about all this is that, in constructing the relatively autonomous self, the traditional legal discourse constructs a "reader" who systematically misreads, neutralizes, and coopts even so subversive a discourse as deconstruction. In American law, deconstruction must thus displace and subvert this relatively autonomous self and its rhetorical supports. This rhetorical self must be displaced because it is implicated in the maintenance and reproduction of a rhetorical form of thought that is *at once aesthetically boring, intellectually stagnant, and politically conservative*.⁹⁸

The aesthetic boredom and intellectual stagnation that attends

⁹⁶ These texts of contemporary legal thought do, of course, get some help from the wider culture.

⁹⁷ For discussion of this point, see *Missing Pieces*, supra note 25, at 1243-47.

⁹⁸ For further elaboration, see *Normative and Nowhere To Go*, supra note 20; *Legal Nihilism*, supra note 69; *Normativity and the Politics of Form*, supra note 84.

Thomas Heller put it this way:

At the level of theory, global theory is to be replaced by a local set of theoretical practices. Theory must be analyzed as . . . one system of practices among others, with dynamics of reproduction and environmental interaction similar to those of non-symbolic practices. In displacing the hierarchical superiority over other levels of practice that is claimed by the pretense of theory to a determinate knowledge of

the production and consumption of contemporary legal thought are obviously related. In turn, both are related to the rhetorical privileging of the individual self of the legal thinker. It is this privileging of the individual self and the insulation of this individual self from the rhetorical, psychological, social, and political text that allows this self to repeatedly project its own internal structure onto whatever field it examines—including even such seemingly subversive terrain as deconstruction.⁹⁹

The naturalization of the self establishes the self as a rhetorical space where ideology establishes its relations and operations free from any critical inquiry. The self becomes in effect one of the rhetorical spaces where ideology does its work—unquestioned. And one of the ways in which ideology does its work is precisely by reproducing this autonomous, originary, integrated self as the fundamental *natural* human unit—bounded, whole, substantial, self-directive, and beyond question.

From my perspective, this is already politics—it is a politics of form. It is the political constitution of human beings as particular kinds of selves, with particular kinds of social relations to each other. From my perspective, this politics of form has already accomplished much of its political work. The realm of conceivable social relations,

self and others, there is at least a symbolic expression of the desire to decenter the political power that has in our era, been linked to that pretense.

Heller, *supra* note 84, at 196.

⁹⁹ Indeed, in this very symposium Jack Balkin writes:

The deconstructor of the self is still picking her targets, . . . And this choice (for we can find no other word to describe it) is still the grinding of a particular ax, *whether its real motivations are conscious or unconscious* . . .

Balkin, *Tradition, Betrayal and the Politics of Deconstruction*, 11 Cardozo L. Rev. 1613, 1629 (1990). Balkin is saying that even the deconstructionist of the self makes a *choice* about what to deconstruct—a choice “for we can find no other word to describe it.” *Id.* Now, on the first reading, Balkin’s statement seems self-evidently right, that is, until we read the rest of Balkin’s statement and recognize that it cannibalizes itself. It cannibalizes itself in reference to “*unconscious motivations*.”

For indeed, once Balkin brings up unconscious motivations and the idiom of psychoanalysis, the expressions “choice” and “pick her targets” are probably very far down the list of terms to account for how it is that the deconstructionist deconstructs this rather than that. On the contrary, far from there being no other word than “choice” to describe “it,” a number of other words come much more readily to mind: transference, counter-transference, projection, fixation, blockage, adjustment, etc.

Now, one might think that the reason Jack Balkin could find no other word than “choice” to describe the deconstructionist’s behavior is that “choice” describes the “picking” of targets. And there is some truth to that. But actually, the problem starts far earlier. It starts when “the deconstructionist” is located as the subject of Balkin’s sentence. Right away, that sentence construction is already begging a question—for that sentence structure already has Balkin (and maybe the reader) assuming that the deconstructionist is the subject—and that deconstruction must be explained by reference to the action of that particular subject.

the permissible channels of change, the identity of agents of social change, the character of the community have already been established by the politics of form. From this perspective, the ideational content of discussion about political or moral values—so-called “value choice talk”—is, as a political matter, virtually epiphenomenal.

In writing that the relatively autonomous self must be displaced and subverted, I am not suggesting the annihilation of the individual self (methodologically or otherwise). To many thinkers, of course, it will seem that I am. Indeed, true to the form of the relatively autonomous self, legal thinkers often believe that an interrogation of the self (such as I have attempted here) entails the elimination of the self and endorsement of some kind of determinism. This is then seen as perfectly horrible. But this classic reaction is itself a projection of the either/or—free will/determinist structure of the relatively autonomous self onto my argument.

And it is precisely this way of thinking, this sort of repetitive projection of the rhetorical structure of the relatively autonomous self that must be deconstructed. What is at stake here is a *displacement*, a *decentering*, not an annihilation, of the individual self. The claim is *not* that the self does not exist, *nor even* that the self is always fragmented, *nor even* that the individual self never exists.

The difficulty with discourse in the legal academy currently is that the self of the legal thinker is so vastly overinflated in importance—political and intellectual—that it has failed to recognize that it has been largely replaced as a decisional site by bureaucratic forms of organization, linguistic structures, mass communication, etc. In other words, this prototypically academic self has failed to recognize that it is largely a language game run by bureaucratic, institutional, and linguistic practices.

But why dwell on the negative? Certainly, the relatively autonomous self doesn't want to dwell on the negative. Of course not: the relatively autonomous self, after all, is nothing if not *self-indulgent*. What else could it be? And so, it doesn't want to hear such rude talk. It wants to hear a more ennobling discourse—a discourse, for instance that depicts law as the forum of principle, the realm of public value talk, of dialogue, of civic republicanism, etc. The relatively autonomous self wants to hear jurisprudential stories that will confirm that it is still in the driver's seat. In short, what the relatively autonomous self wants to hear is the intellectual equivalent of graduation speeches. And of course, that is what it gets—over and over and over again.

Indeed, the law reviews are filled with exceedingly normative articles which say very little, prescribe a great many things, and confirm

(over and over again) that the author is a deeply moral person who is deeply committed in a morally humanistic sort of way to arguing that the reader, who is apparently also a very moral person, should become ever more so. In the future, we will all be incredibly moral and we will all be doing graduation speeches all the time.¹⁰⁰

In fact, even deconstruction might become graduation speech material. And one can see how easily this might happen. If deconstruction does not succeed in displacing the relatively autonomous self, the latter will reduce deconstruction to a technique, a theory, a method, very much like all the other techniques, theories, methods, etc. And of course, given that deconstruction-as-technique will be morally empty, the relatively autonomous self will quickly jump to the conclusion that deconstruction requires some sort of moral supplement—some sort of moral justification to guide and constrain its use.

This, of course, is hardly surprising. On the contrary, it's boring. Indeed, having transformed deconstruction into a technique bereft of meaning and value, the rhetorical economy here requires that value be located and grounded elsewhere, somewhere outside deconstruction so as to guide and control the uses, the operation, and the deployment of deconstruction.

For the relatively autonomous self, deconstruction is morally lacking; some sort of moral supplement is thus absolutely necessary to sustain and defend deconstruction. The relatively autonomous self qua deconstructionist is thus ill at ease with his deconstruction. He is a deconstructionist, but he has morality envy. And so he seeks to shore up his admittedly inadequate deconstruction with moral supplements. The problem, of course, is that none of the available store of moral supplements fits easily with deconstruction. On the contrary, even in its most self-professedly antifoundationalist moments, normative legal thought cannot seem to get rid of the rhetorical habit of foundationalism. Normative legal thought always wants to stand in the rhetorical place that rules decisions on its own canonical terms. Indeed, normative legal thought seems to be one huge exercise in bad form. But what else can be expected when the addressees are always already located as privileged autonomous selves outside history, reason, the social text, and any other kind of writing?

All of this, of course, does not help the relatively autonomous self qua deconstructionist. He is still looking for a moral supplement for his deconstruction—one that will not create too many problems

¹⁰⁰ For elaboration, see *Normative and Nowhere To Go*, *supra* note 20.

for deconstruction. And so moral support, moral supplements, must be found in the weakest, least structured, least determinative, least foundational forms of moral theory—say . . . existentialism.

Existentialism is pretty good (not the best) stuff for the relatively autonomous self.¹⁰¹ It provides a moral foundation (hence rhetorical and intellectual security for the self), but the moral foundation is close to empty (so the relatively autonomous self retains virtually full autonomy to adjudicate its content). Existentialism is close to just right.

The irony, of course, is that deconstruction neither needs nor wants such a moral foundation. And the force of this point does not change merely because the proffered moral foundation (existentialism) and its transcendental signified (the individual self) are close to empty. Virtual vacancy is not a mitigating factor. Indeed, a transcendental signified does not become any less of a transcendental signified simply because it can claim to be virtually empty. On the contrary, any *self-respecting* transcendental signified is always already nearly empty.¹⁰²

CONCLUSION

What then are the politics of deconstruction? To answer, one would have to know who asks this question and from which discursive practice? In legal thought, the answer to this last question has already been written—over and over again. Who asks this question? It is the relatively autonomous self of the legal thinker.¹⁰³ It is he who wants to know what the politics of deconstruction are. And of course, he wants to know in his typically relatively autonomous sort of way. And he wants to know in his relatively autonomous sort of way for some very good reasons—or at least reasons that sound good to the relatively autonomous self. He wants to know so that he might decide whether he is in favor or against deconstruction. He wants to know so that he might decide whether to oppose or support deconstruction.

¹⁰¹ The best stuff for the relatively autonomous self is Stanley Fish. See, *Autonomous Self*, supra note 87, at 45.

¹⁰² Indeed, being empty (or nearly so) is an integral part of the way transcendental signifieds do their work. Consider the following transcendental signifieds: "Interpretive Communities," see Fish, *Fish v. Fiss*, 36 Stan. L. Rev. 1325 (1984) (fairly empty with increasing emptiness over time); "The best"—as in making law "*the best* it can be," see Dworkin, supra note 74, at 52, 62, 337 (variable emptiness); "Wealth Maximization," see Posner, *Economic Analysis of Law* (3d ed. 1986) (utterly empty, but given to sudden and repeated concretization at regular intervals).

¹⁰³ By asking the question "Who asks?" and by answering "the relatively autonomous self," I mean to imply that the question could very well have issued from elsewhere—and might thus have warranted a very different answer than the one I have given here.

But most of all he wants to know what the politics of deconstruction are so that he can defer reckoning with the politics of deconstruction: for the politics of deconstruction are to displace the relatively autonomous self and all the rhetorical baggage that supports his rhetorical well-being.